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Second Circuit Limits Government's Ability to Seize Assets Without a Warrant

In the recent decision *United States v. Cosme*, 14-1625-cr, a panel of the Second Circuit held that the government cannot seize and then hold a defendant's property pending the resolution of criminal charges without a judicial finding that probable cause supports the forfeitability of the seized assets.

In December 2012, Cosme was arrested on charges of wire fraud. At the time of his arrest, the government seized several sports cars from his house. In one of the cars, investigators found a bag containing \$634,894 in cash, which they also seized. The same day, the government sent letters to several banks asking them to freeze Cosme's accounts on the ground that they contained the proceeds of criminal activity. The letters cited the civil forfeiture statutes as authority and stated that while the government was in the process of obtaining a seizure warrant, exigent circumstances required freezing the accounts immediately. However, the government never sought or obtained a warrant for the seized property.

In January 2013, Cosme was indicted in the Southern District of New York. The indictment listed a series of purchases made by Cosme with the proceeds of his alleged fraud. In a section titled "Forfeiture Allegations," the indictment stated that Cosme "shall forfeit" various automobiles, the funds held in the frozen bank accounts, and the \$634,894 in cash. However, as the government clarified on appeal, these

forfeiture allegations were merely notice provisions; they were not subject to a grand jury vote.

In July 2013, the government sought a pretrial restraining order applicable to the seized assets. After some discussion, the district court signed the order, permitting the government to "maintain custody" of the seized assets until the conclusion of the criminal case. The order stated that the property in question was "already in the lawful custody of the government," and cited 21 USC § 853, as the government was now pursuing criminal forfeiture of the assets. Subsequently, the parties entered two stipulations, in which the government agreed that it would release to Cosme the \$634,894 in seized cash, and he agreed not to seek a Monsanto hearing concerning his access to funds to fund his defense under the Sixth Amendment.

In February 2014, Cosme, now on his eighth lawyer, moved to vacate or modify the pretrial restraining order. He argued, among other things, that the seizure of his assets violated the Fourth Amendment because the government had never obtained a warrant and exigent circumstances did not justify the seizure. The district court denied his motion, stating that the government had made a sufficient showing of probable cause by virtue of the indictment, which contained the forfeiture allegations. Cosme appealed.

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The Second Circuit first rejected the government's contention that Cosme had waived any challenge to the seizures by means of his two stipulations. Those stipulations barred him from arguing that the seizure violated his Sixth Amendment right to counsel, but they did not preclude his argument that the government's warrantless seizure of his assets violated the Fourth Amendment.

On the merits, the Court agreed that the government's conduct in this case violated the Fourth Amendment. When the government first seized the assets, it did so based on the civil forfeiture statutes, which permit the government to seize property if there is probable cause to believe that it is subject to forfeiture and if an exception to the Fourth Amendment's warrant requirement applies. By the time of the pretrial restraining order, the government was pursuing forfeiture under the criminal forfeiture statutes, which allow the government to obtain a protective order to maintain control of forfeitable property in its possession. While the Court was careful to state that it saw "no inherent problem" with the government switching between the civil and criminal forfeiture statutes in this manner, it stressed that "this tactic cannot serve as a tool for the government to seize assets without ever showing probable cause."

Importantly, the Second Circuit noted that the district court had apparently only issued the restraining order because it erroneously

believed the grand jury had found probable cause for the seizure given the forfeiture allegations in the indictment. But as the government had clarified on appeal, these allegations were notice provisions only and had never been voted on by the grand jury.

With all that out of the way, the civil forfeiture statutes under which Cosme's bank accounts were originally seized only permit seizure without a warrant if an exception to the Fourth Amendment's warrant requirement applies. The Court agreed with the government that the exigent circumstances exception permitted the initial freezing of the accounts, but this exception lasts only as long as reasonably necessary for the government to obtain a warrant. Since the government had never done so—and plainly could have in the intervening years—exigent circumstances could not support the government's continued possession of the bank accounts. Cosme was entitled to a judicial determination of whether probable cause supported the seizure of his bank accounts, and the Court remanded to the district court to make that determination.

While the government has a number of tools to seize the assets of persons accused of wrongdoing, the *Cosme* decision underscores that the government's powers are not boundless. For further questions about forfeiture or related matters, please contact Joe Martini or any member of our group.

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