© jokerpro | AdobeStock

Challenges to Obtaining Foreign Evidence in Cross-Border Criminal Cases

I. Introduction

Given the ease and speed with which people, resources, and data now travel the world, it should come as no surprise that evidence in criminal cases is often located abroad. Congress has also taken an expansive view of the United States' interests in prosecuting crimes that occur abroad by passing a number of criminal statutes with extraterritorial reach. This has led to a growing number of prosecutions under these statutes as investigations become increasingly cross-border. As a result, defending clients in criminal cases today often will require defense counsel to be well-versed in constitutional, statutory, and foreign law issues relating to obtaining and defending against foreign evidence.

Foreign evidence includes witness testimony as well as documentary evidence that is beyond the jurisdiction of U.S. courts or not otherwise subject to compulsory process. While a theoretical obstacle to both the government and the defense, it is the criminal defendant who is at a disadvantage in a case involving foreign evidence. The government has often undertaken investigations and evidence-gathering over a lengthy period, engaged foreign nationals as informants, operated out of embassies abroad, and built its case on the anticipated testimony of cooperating witnesses who have already been brought to the United States. The government may also have ample access to evidence through mutual legal assistance treaties or other treaties or informal cooperation agreements, while the defendant has more limited access to evidence abroad. In addition, even when the government must rely on Rule 15 depositions or video conferenced testimony to present its case at trial, these mechanisms impair a defendant's Sixth Amendment right to confront witnesses.

This article will provide an overview of constitutional issues defendants face when seeking foreign evidence in cross-border cases. It will also discuss the methods defendants have to obtain foreign evidence and hurdles they may encounter when seeking it, particularly in light of numerous countries' new data privacy laws. Finally, it summarizes the relevant U.S. laws and rules that govern admissibility of foreign evidence.

II. Constitutional Issues

A. Extraterritoriality

The need to obtain or defend against foreign evidence typically arises in extraterritorial prosecutions, that is, cases involving conduct that occurs outside the territory of the United States.

While there is a presumption against the extraterritorial application of U.S. law, courts have held that the

BY LAUREN BRIGGERMAN, LINDA FRIEDMAN RAMIREZ, AND ADDY SCHMITT

presumption can be overcome when the statutory language makes congressional intent to grant extraterritorial application clear. For example, 18 U.S.C. § 1203 provides for the prosecution of anyone who kidnaps a U.S. citizen, even if it occurs outside the country. The court in *United States v. Noel* found that the defendant did not need to know that the victim was a U.S. citizen.[1] "The existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute."[2] Likewise, the Foreign Corrupt Practices Act ("FCPA") expressly prohibits certain individuals and companies from engaging in bribery of foreign officials anywhere in the world. But in a noteworthy case addressing FCPA jurisdiction, *United States v. Hoskins*, the Second Circuit declined to expand the extraterritorial reach of the FCPA beyond the statute's clear language. In that case, a nonresident foreign national who had never worked for a U.S. company or set foot in the United States during the relevant time period was charged with conspiring to violate the FCPA for his alleged involvement in a scheme to bribe Indonesian officials.[3] The Second Circuit dismissed these charges, ruling that the government cannot use theories of complicity and conspiracy to charge foreign nationals not otherwise covered by the FCPA's jurisdiction.[4]

The court will also look at the statutory scheme to determine its extraterritorial reach. In *United States v. Vasquez*, the defendant was convicted of multiple murders that took place entirely outside the United States, pursuant to 21 U.S.C. 848(e)(1)(A), a statute that punishes killing while engaged in certain major drug-trafficking crimes.[5] The court ruled that "Congress clearly and affirmatively indicated that it intended for § 848(e)(1) to apply extraterritorially — at least to the extent that the underlying predicate offenses do. Vasquez led a vast drug-trafficking and distribution conspiracy, and therefore the underlying predicate offenses would apply to his extraterritorial conduct."[6]

Challenges to extraterritoriality generally focus on the defendant's due process right to be free from prosecutions that are arbitrary or fundamentally unfair. In cases involving noncitizens acting entirely abroad, due process is often satisfied when the aim of that activity is to cause harm inside the United States or to U.S. citizens or interests. In *United States v. Al Kassar*, Drug Enforcement Administration agents posed as terrorists and negotiated with the defendant, a Spanish national, to purchase arms on behalf of the Revolutionary Armed Forces of Colombia-People's Army.[7] The Second Circuit found that the jurisdictional nexus was established because the agents claimed that the weapons were to be used against the U.S. military in Colombia. The court rejected the defendant's argument that the government had manufactured extraterritorial jurisdiction simply by suggesting that the weapons were to be used against Americans.[8]

Courts will also consider international law principles when assessing a statute's extraterritorial jurisdiction. For example, in *United States v. Ali*, the D.C. Circuit affirmed the dismissal of a conspiracy charge against a Somali national for allegedly helping to negotiate the ransom of a merchant vessel and its crew on the grounds that the offense was not within the definition of piracy contained in the U.N. Convention on the Law of the Sea ("UNCLOS").[9]

Compare, however, *United States v. Yousef,* a case in which the defendant was charged with participating in a conspiracy to bomb U.S. commercial airliners in Southeast Asia.[10] The Second Circuit concluded that Yousef's prosecution was consistent with the protective principles of international law as well as U.S. due process.[11] The court stated: "Given the substantial intended effect of their attack on the United States and its citizens, it cannot be argued seriously that the defendants' conduct was so unrelated to American interests as to render their prosecution in the United States arbitrary or fundamentally unfair."[12]

What remains unclear is whether the growing number of criminal statutes with extraterritorial jurisdiction will prompt resistance from foreign governments — for example, reluctance to cooperate with U.S. prosecutors in case development, denial of access to witnesses or evidence, refusal to grant extradition requests, and even expulsion of U.S. investigators.

B. Right to Compulsory Process and Right to Present a Defense

One of the greatest challenges for defense counsel in cases involving foreign witnesses and documents is the absence of the court's subpoena power. The Sixth Amendment guarantees an accused the right to "have compulsory process for obtaining witnesses in his favor,"[13] and the Fifth and Fourteenth Amendments provide for a defendant's right to present a defense.[14] Courts, however, have yet to find that a defendant's inability to subpoena foreign witnesses results in a constitutional violation. Nor have courts generally upheld claims that an extraterritorial prosecution is unconstitutional because material evidence is beyond the reach of the court's subpoena power. Even when the government could likely obtain evidence on behalf of the defendant through a Mutual Legal Assistance Treaty ("MLAT"), courts overwhelmingly have declined to require the government to act on behalf of the defendant, including in cases in which the defendant argues that the evidence is exculpatory.[15]

One exception to courts' general unwillingness to find constitutional violations when evidence is located abroad is when a potential defense witness has been deported by the government. While the test for finding a constitutional violation varies by circuit, at the very least, a defendant will have to establish that the deportation prejudiced the defense by eliminating testimonial evidence that would have been material and favorable.[16] In many cases, if a foreign national witness is being detained for deportation, the government will offer the defendant an opportunity to depose the witness pursuant to Rule 15(a)(2) of the Federal Rules of Criminal Procedure. If the witness was already known to defense counsel who did not seek a deposition before the deportation, it will be much more difficult to argue a due process violation.[17]

Because of the various hurdles to presenting live testimony of witnesses abroad who might not want or be able to travel to the United States, a defendant can seek the court's approval of depositions pursuant to Rule 15 of the Federal Rules of Criminal Procedure. The rule provides that a defendant "may move that a prospective witness be deposed in order to preserve testimony for trial."[18] Defense counsel must be prepared to make a compelling showing as to the exceptional circumstances and materiality of the witness's testimony.[19]

In *United States v Hayat*, the defendant alleged that counsel was ineffective for failing to present an alibi defense related to witnesses located in Pakistan. As part of the habeas proceeding, the magistrate authorized Rule 15 depositions of these witness-

es. Ultimately, she considered the relevance of their deposition testimony and recommended vacating the defendant's conviction in part on the grounds that counsel failed to investigate and present alibi evidence.[20] The Honorable Judge Garland E. Burrell specifically adopted the finding that trial counsel's failure to adequately investigate the viability of an alibi defense was objectively unreasonable.[21] The court referenced that the trial lawyer admitted she was unaware of Rule 15 of the Federal Rules of Criminal Procedure.[22] The court granted the petitioner's habeas on this and other grounds, and vacated his convictions and sentences.[23]

In some cases, the government will argue against Rule 15 depositions on the basis that the safety of U.S. officials could be compromised by traveling to a specific foreign location.[24] Regardless, defense counsel has a constitutional obligation to pursue Rule 15 depositions when there is a need in order to effectively defend the client.

III. Methods to Obtain Foreign Evidence

A. Defendants' Limited Tools to Obtain Foreign Evidence

Defendants have limited tools to obtain evidence abroad compared to the prosecution. Pursuant to 28 U.S.C. § 1783, which governs the use of subpoenas abroad, a U.S. court may order the issuance of a subpoena for documents or testimony located abroad but only of a national or resident of the United States.[25] Defendants may not use a subpoena to reach foreign-located documents of non-United States citizens or residents. The justification is that these individuals do not owe an allegiance to the United States.

Because of these limitations, defendants generally must rely on the letters rogatory process to reach foreign evidence. Letters rogatory are requests from one court to a foreign court requesting judicial assistance, including in obtaining documents or securing testimony from a witness located abroad.[26] The process is only available to individuals once charged, not during the investigative stage of a criminal case.

The letters rogatory process is time consuming and unpredictable because it is dependent upon the principles of comity. Defense counsel must prepare a letter to the relevant foreign court, translated into the official language of that foreign country, describing the particular evidence sought and how it is in the interest of justice to grant such a request.[27] The letter must be submitted to the appropriate U.S. court for signature and then forwarded to the Department of State to be transmitted through diplomatic channels to the foreign judicial authority.[28]

Foreign courts generally execute letters rogatory pursuant to their national laws and regulations.[29] Defense counsel should be aware that many foreign countries do not permit foreign attorneys to attend their court proceedings or provide verbatim transcripts.[30] Once the letters rogatory are executed, they are generally returned to the Department of State, and the requesting party is notified.[31]

Defense counsel should consider several options to potentially reduce the time and burden associated with the letters rogatory process, which typically can take more than a year.[32] Defense counsel should first determine whether the country from which the defendant seeks evidence is a party to any of the multilateral treaties on judicial assistance, such as the Hague Service or Evidence Conventions or the Inter-American Convention on Letters Rogatory and Additional Protocol.[33] These treaties have streamlined procedures for requesting judicial assistance that may greatly reduce the amount of time and effort it takes to obtain evidence through the letters rogatory process.[34] In addition, defense counsel should review the Department of State's country-specific pages on its website to determine whether alternative methods are available, such as hiring a local attorney to petition a foreign court directly for permission to obtain evidence.[35]

While the letters rogatory process remains the most reliable, albeit time-consuming, method by which a defendant can obtain foreign evidence, defense counsel should consider other methods to bolster their evidence collection efforts. Mutual legal assistance treaties among countries permit the exchange of evidence in criminal and related matters.[36] While criminal defendants may not directly avail themselves of MLATs, defense counsel may be able to argue that the U.S. government has an obligation to seek evidence located abroad under *Brady v. Maryland* and its progeny, to the extent that the evidence may be exculpatory.[37] If the government refuses to pursue the foreign evidence, defense counsel may petition a U.S. court to compel the government to do so. However, courts overwhelmingly have declined to find that the government has an obligation to secure foreign evidence not currently in its possession, particularly when defendants have not availed themselves of the letters rogatory process.[38]

Finally, in addition to seeking personal documents, defense counsel may be able to obtain official records in a foreign government's possession. Dozens of countries have enacted laws guaranteeing the right of access to government information, akin to the United States' Freedom of Information Act.[39] Defense counsel should enlist local counsel in the relevant foreign country to determine whether that country has such a freedom of information law, and to oversee or advise on the process for seeking official records.

B. Hurdles Defendants May Encounter When Seeking Evidence Abroad

Defense counsel should be aware of local laws that may present hurdles to obtaining evidence located abroad. In recent years, many countries have adopted laws strengthening data privacy protections for individuals. These laws put the onus on companies that have control of an individual's data to protect the individual's privacy. As a result of these privacy protections, individuals in the United States may face impediments in their efforts to access foreign evidence.

For example, Europe has adopted some of the most sweeping data privacy reforms in recent years. In May 2018, Europe's General Data Protection Regulation ("GDPR"), a comprehensive regulation seeking to harmonize data privacy laws across Europe, took effect.[40] GDPR requires all companies that process personal data of European Union residents to adopt infrastructure to protect that data, regardless of the company's location.[41] On the other hand, the regulation also gives new and expanded rights to individuals related to their own personal data during litigation, such as the right to obtain one's own data, change incorrect data, request that the processing of data be restricted, and have data removed.[42] In addition, GDPR includes certain rules and requirements regarding transfer of data to third countries or international organizations.[43] Other countries, such as Brazil, have adopted their own versions of GDPR that will soon take effect. As defense counsel seeks to obtain data abroad — whether about their own client or another individual — they should consult with local coun-

sel knowledgeable of these laws to ensure they obtain available information in a manner that does not run afoul of the data privacy laws.

In addition to data privacy laws, many civil law countries, such as France, have adopted so-called "blocking statutes" that may pose a barrier to U.S. litigants' abilities to secure evidence located abroad.[44] Blocking statutes prevent the transmission of documents and information to foreign countries for discovery purposes in connection with pending or prospective litigation, including criminal cases. These civil law-based countries often view discovery from a foreign country as invasive.

Notwithstanding these blocking statutes, U.S. courts have overwhelmingly sided in favor of providing access to documents. These courts have found that blocking statutes do not "deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute."[45] At a minimum, defense counsel should be prepared for a court battle over whether foreign blocking statutes shield a foreign company or individual from having to produce documents to the United States.

Finally, it is critical that defense counsel understand local privilege laws when attempting to reach evidence located abroad. These laws may impact whether a third party from whom a defendant seeks documents can withhold information on privilege grounds. They may also impact whether a defendant's decision to voluntarily produce documents in a foreign jurisdiction will be viewed by U.S. courts as a privilege waiver.[46]

Defense counsel should consult with local counsel in the relevant jurisdiction to navigate foreign privilege laws. The scope of attorney-client privilege varies widely by country and may not be co-extensive with that of the United States.[47] For example, many countries do not recognize the privilege for communications involving in-house counsel; provide for different exceptions to privilege; or may attach an expiration to the privilege.[48] The scope of work product protection varies as well, and some countries do not recognize it at all.[49]

C. The Governments' More Expansive Access to Foreign Evidence

By contrast, the government has numerous, more efficient methods to obtain evidence abroad to support its case. The prosecution's most powerful tool to obtain foreign evidence is the MLAT process. As explained above, MLATs are bilateral treaties that allow government authorities to seek assistance from foreign authorities in either a government investigation or proceeding.[50] The United States has executed MLATs with more than 50 countries.[51] The MLAT process is not available, however, to private parties, including criminal defendants.[52]

MLATs typically permit governments to provide mutual assistance in obtaining documents, taking testimony, locating persons or things, requesting searches or seizures, and freezing assets, among other things.[53] Because the process for seeking information is treaty-based, it is generally faster and more reliable than the letters rogatory process.[54] There is also a presumption in favor of granting a government's request for assistance under an MLAT.[55]

Defense counsel and their clients have little to no visibility in the MLAT process. Prosecutors must prepare a request conforming to the relevant MLAT's requirements and submit it to the Department of Justice's Office of International Affairs, which transmits the request directly to the foreign authority without the need for notice to third parties or court approval.[56] As a result, defense counsel and their clients may never learn that the government has availed itself of the MLAT process unless evidence has successfully been secured, or the government requests additional time from the court in the underlying criminal case while it waits for a response to an MLAT request.

In addition to the MLAT process, the government may pursue evidence abroad through numerous information-sharing agreements it has with foreign authorities. These agreements may be bilateral, multilateral, or in the form of a memorandum of understanding or ad hoc arrangement. Agencies such as the Departments of Justice, State, and Treasury have entered into memoranda of understanding with their foreign counterpart agencies.[57] In addition, the Securities and Exchange Commission is a party to the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, a global multilateral information-sharing framework among more than 100 securities and derivatives regulators.[58] These information-sharing agreements can expedite the process by which government authorities access foreign evidence in enforcement proceedings.

Defense counsel should also be aware of recent changes in the law that codifies the government's ability to access overseas electronic data. In 2018, Congress passed, and the president signed into law, the Clarifying Lawful Overseas Use of Data Act (or the CLOUD Act).[59] The CLOUD Act provides that U.S. search warrants and subpoenas issued under the Stored Communications Act ("SCA") apply abroad.[60] The SCA governs voluntary and compelled disclosure of stored communications held by third-party internet service providers.[61] Congress passed the CLOUD Act to address a circuit split over whether the SCA had extraterritorial reach, which culminated in the Supreme Court granting certiorari in *United States v. Microsoft.* In *Microsoft*, the Second Circuit overturned a lower court decision upholding a search warrant issued under the statute that compelled Microsoft to hand over email data stored on a server in Ireland.[62] Congress passed the CLOUD Act before the Supreme Court could rule on the extraterritoriality of the SCA, therefore solidifying the government's access to electronic data stored on servers abroad.

In addition to codifying the extraterritorial reach of the SCA, the CLOUD Act authorizes the attorney general to

Hiring Local Counsel to Navigate Foreign Laws

1. Seek advice from local counsel regarding foreign laws to avoid potential criminal consequences and/or steep fines.
2. Verify what privileges apply to attorney-client relationships under the laws of the foreign country and who is covered.
3. Engage a qualified interpreter when meeting with non-English speaking counsel and for any deposition, video conference, etc.
4. Verify the meaning of foreign law terms and avoid mechanical translations of legal terms.
5. Consult with the client regarding choice of foreign counsel, particularly in high-profile cases.

enter into bilateral executive agreements governing data-sharing with foreign governments.[63] The purpose is to give U.S. and foreign law enforcement agencies reciprocal access to data stored in each other's countries and to expedite the information-sharing process. The Act includes a formal process through which U.S. service providers can challenge a search warrant if disclosure would violate the laws of the country in which the data is located.[64]

The law also contains limits to address privacy and civil liberties concerns. For example, it allows the United States to enter into an executive agreement only if the attorney general and secretary of state certify to Congress that the foreign government provides "robust substantive and procedural protections for privacy and civil liberties" and that it has adopted procedures to "minimize the acquisition, retention, and dissemination of information concerning United States persons."[65] However, the CLOUD Act does not require the government to provide notice to individuals at the time their electronic data is being sought.

In addition to the CLOUD Act, defense counsel should be aware that in December 2016 an amendment to Rule 41 of the Federal Rules of Criminal Procedure took effect, which expanded the global reach of search warrants. The amendment allows judges to issue search warrants for electronic data stored anywhere in the world in two situations: if the computer is using technology to shield its location, or if it may be part of a botnet, which is a network of computers infected by malware unbeknownst to its users.[66]

Finally, prosecutors may pursue evidence through the letters rogatory process described above. Because it is time consuming and unpredictable, it is often used as a last resort.

IV. Admission of Foreign Evidence

If a defendant successfully obtains evidence located abroad, defense counsel will need to know the relevant U.S. laws and rules governing admissibility of such evidence in U.S. courts. These rules often require authentication and/or certifications that the records are genuine, which may require obtaining statements from foreign officials or document custodians. Admission of evidence also poses constitutional concerns, which are addressed in Section II.

A. Authentication Requirements for Foreign Records

Any document located outside the United States must be authenticated pursuant to federal statute and the Federal Rules of Evidence.[67] The process by which documents may be authenticated through written or oral interrogatories is set out in 18 U.S.C. § 3492 and 18 U.S.C. § 3493. Parties seeking to authenticate foreign documents must apply to the U.S. court in which the criminal matter is pending, and that court must issue a commission to a consular officer in the United States to authenticate the documents by sworn deposition or written interrogatory.[68] Defendants are entitled to have foreign counsel represent them in the taking of any oral testimony.[69] Pursuant to 18 U.S.C. § 3494, a consular official can certify the genuineness of the record.

B. Foreign Public Records

Foreign public records are self-authenticating but still require a certification that the record is genuine pursuant to Rule 902 of the Federal Rules of Criminal Procedure.[70] Failing to comply with the rules may prevent the party from introducing the foreign record at trial. In *United States v. Yousef*, a district court judge issued a preliminary ruling that a foreign public record should be excluded due to the government's failure to include the required certification or an explanation as to why the certification was not provided.[71] While courts may give parties the opportunity to cure the defect, defense counsel should comply with the certification requirement early on to avoid any doubt about admissibility.

The Hague Convention Abolishing the Requirement of Legislation for Foreign Public Documents ("Hague Convention") simplifies the certification process for parties to the Convention.[72] The requirement of a final certification of U.S. diplomatic officers is abolished and replaced with a model apostille, which is to be issued by officials of the country where the records are located. The Convention therefore eliminates the need to obtain certification from both the country from which the document originates and the receiving country. Defense counsel should consult the Hague Convention to determine whether the relevant foreign jurisdiction is a party before commencing the certification process.

C. Foreign Business Records

Admissibility of foreign business records — as opposed to government records — is governed by 18 U.S.C. § 3505. The statute provides for the admission of a foreign business record in a criminal proceeding if it is accompanied by a "foreign certification" attesting that the record was made at the time of the occurrence of the relevant event and was kept in the course of regularly conducted business activity, among other requirements.[73] The statute includes an exception where the source of the information or method of preparation lacks trustworthiness.[74] The certification must be a written declaration made and signed in a foreign country by a qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country.[75]

A party intending to seek admission of a foreign business record must provide notice at the time of arraignment or as soon after as is practicable, allowing the other party to file a motion in opposition.[76] As discussed more fully above, courts have generally denied motions seeking to block admission of foreign business records on the grounds that a defendant's Sixth Amendment Confrontation Clause rights have been violated.[77] When the government seeks to introduce foreign business records, defense counsel should therefore anticipate that the prosecution will deny that a confrontation problem exists because the defendant can request a Rule 15 deposition for the author of the certification. Such a request, however, puts the onus on the defendant to show that the author or sponsoring witness is unavailable to testify in the United States. Therefore, the defense may object, arguing that (a) the records are not self-authenticating, and (b) any testimony in a written declaration regarding the reliability of the records would violate the Confrontation Clause.

By contrast, a defendant who seeks to offer foreign documentary evidence will not face Confrontation Clause-based objections because the government has no right to confrontation. However, the defendant will still need to fulfill the Federal Rule of Evidence and the statute's notice and technical requirements.

D. Witness Testimony at a Foreign Proceeding

As discussed above, Federal Rule of Criminal Procedure 15 permits a party in "exceptional circumstances" to depose its own witness in order to preserve the witness's testimony, particularly if that wit-

ness is likely to be unavailable to testify at trial.[78] Under Federal Rule of Evidence 804(b)(1), an unavailable declarant's former testimony is admissible as an exception to the hearsay rule as long as the witness's former testimony was given "in a deposition taken in compliance with law in the course of the same … proceeding, if the party against whom the testimony is now offered … had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."[79]

To be admissible in U.S. criminal proceedings, foreign deposition testimony must comply with both rules for the admission of former testimony as well as the Sixth Amendment right to confrontation.[80] In *United States v. McKeeve*, a defendant challenged the admission of foreign deposition testimony of a government witness on the grounds that the testimony violated his rights under the Confrontation Clause.[81] In that case, a district court judge had ordered the deposition of the government's witness in England after finding him unavailable for trial.[82] The judge required the government to transport the defendant's attorney to the deposition and install a phone line on which the defendant located in the United States could monitor the deposition from prison.[83] A British solicitor prepared a contemporaneous transcript of the deposition and certified its accuracy at the conclusion of the proceeding.[84] On appeal the First Circuit followed Second Circuit precedent and held that "unless the manner of examination required by the law of the host nation is so incompatible with our fundamental principles of fairness or so prone to inaccuracy or bias as to render the testimony inherently unreliable, … a deposition taken … in accordance with the law of the host nation is taken 'in compliance with law' for purposes of Rule 804(b)(1)."[85] The appeals court concluded that the British proceeding "substantially jibes with our practice and thus satisfies the rule."

E. Suppression of Evidence Seized Abroad

Beyond seeking to admit evidence, defendants may have grounds to suppress evidence the government improperly obtains abroad based on constitutional or statutory arguments.

In 2017, the Second Circuit issued a landmark ruling in *United States v. Allen* that a defendant's prior testimony, when compelled abroad, cannot be used against him in a criminal trial in the United States pursuant to the Fifth Amendment.[86] The court overturned the convictions of two former Rabobank currency traders in a case in which DOJ alleged that the two had manipulated LIBOR, a benchmark rate that leading banks charge each other for short-term loans.[87] At trial, prosecutors offered the testimony of a witness who had reviewed transcripts of the two defendants' compelled "interviews" conducted by the U.K.'s Financial Conduct Authority in the course of the United Kingdom's parallel LIBOR investigation. The Second Circuit held that, pursuant to the Fifth Amendment, a defendant's prior testimony, when compelled abroad, cannot be used against him or her in a criminal trial in a U.S. court.[88] The court further held that, when the government calls a witness who had substantial exposure to a defendant's compelled testimony, it is required under *Kastigar v. United States*[89] to prove that a witness's exposure to the defendant's compelled testimony did not influence the government's evidence.[90] In *Allen*, the court concluded that the witness provided tainted testimony warranting reversal of the two defendants' convictions.[91]

United States v. Allen has broad implications for the government's ability to introduce foreign-obtained evidence at trial, particularly in investigations that are increasingly cross-border in nature.

V. Conclusion

As criminal cases become increasingly cross-border in nature, the need for defendants to obtain evidence located abroad has become more common. Defense counsel have constitutional and ethical obligations to help clients obtain evidence no matter where it resides. However, defendants have limited methods by which to seek evidence abroad, and foreign laws can present challenges to a defendant's ability to reach evidence abroad. It is therefore critical for defense counsel to consult with experienced and knowledgeable local counsel so that clients can avail themselves of all possible methods to obtain foreign evidence without running afoul of foreign laws.

Notes

1. *United States v. Noel*, 893 F.3d 1294, 1297-98 (11th Cir. 2018).
2. *Id.* at 1298.
3. *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).
4. *Id.* at 97.
5. *United States v. Vasquez,* 899 F3d 363 (5th Cir. 2018).
6. *Id.* at 377-378.
7. *United States v. Al Kassar*, 660 F.3d 108, 120 (2d Cir. 2011).
8. *Id.*
9. *United States v. Ali*, 718 F.3d 929, 942 (D.C. Cir. 2013).
10. *United States v. Yousef*, 327 F.3d 56, 79-80 (2d Cir. 2003).
11. *Id.* at 91-92, 112.
12. *Id.* at 112.
13. U.S. Const. amend. VI.
14. U.S. Const. amend. V, XIV.
15. *United States v. Rosen*, 240 F.R.D. 204, 214 (E.D. Va. 2007).
16. *United States v. Hernandez*, 347 F. Supp. 2d 375, 384 (S.D. Tex. 2004).
17. *United States v. Vasquez-Hernandez*, 314 F. Supp. 3d 744, 760 (W.D. Tex. 2018).
18. Fed. R. Crim. P. 15.
19. "The principal consideration guiding whether the absence of a particular witness's testimony would produce injustice is the materiality of that testimony to the case." *United States v. Drogoul*, 1 F.3d 1546, 1552 (11th Cir. 1993). And the witness's availability to testify is another "critical consideration" in resolving a request to take a deposition. *United States v. Jefferson,* 594 F.Supp.2d 655, 665 (E.D. Va. 2009).
20. *United States v. Hayat*, No. 2:05 -cr-0240 GEB DB, 2019 WL 176342, at *16 (E.D. Cal. Jan. 11, 2019).
21. *United States v. Hayat*, No. 2:05 -cr-0240-GEB, 2019 WL 3423538, at *9-10 (E.D. Cal. July 30, 2019).
22. *Id.* at *9-10.
23. *Id.* at *18.
24. *United States v. Omene*, 143 F.3d 1167, 1169-70 (9th Cir.1998).
25. *See* Fed. R. Crim. P. 17(e) (citing 28 U.S.C. § 1783(a)).
26. *See* U.S. Dep't of State, *Preparation of Letters Rogatory*, Travel.State.Gov, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/obtaining-evidence/Preparation-Letters-Rogatory.html (last visited June 18, 2019).
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*; 28 U.S.C. § 1781(b) permits parties to bypass the Department of State and transmit the request directly to the foreign authority.
36. *See Treaties and Agreements*, U.S. Dep't of St. (Mar. 7, 2012), https://www.state.gov/j/inl/rls/nrcrpt/2012/vol2/184110.htm.
37. *Brady v. Maryland*, 373 U.S. 83 (1963).
38. *See, e.g., United States v. Mejia*, 448 F.3d 436, 444 (D.C. Cir. 2006) (ruling that the government had no obligation to seek recordings of a trial in Costa Rica that were not in its custody or control); *see also United States v. Jefferson*, 594 F. Supp. 2d 655, 674 (E.D. Va. 2009) (holding that the Sixth Amendment did not require the government to use the MLAT process to obtain depositions for the defendant).
39. *Constitutional Provisions, Laws and Regulations*, RIGHT2INFO.ORG (last modified Oct. 24, 2011, 4:30 PM), https://www.right2info.org/laws/constitutional-provisions-laws-and-regulations.
40. *See* EU Gen. Data Protection Reg., https://eugdpr.org (last visited June 18, 2019).
41. *See GDPR Key* Changes, EU Gen. Data Protection Reg., https://eugdpr.org/the

(Continued on page 42)

About the Authors


NACDL MEMBER

Lauren Briggerman focuses her practice on white collar defense, including criminal antitrust, bank fraud, and government contracts fraud. She writes and speaks frequently on global cartel investigations.

Lauren E. Briggerman
Miller & Chevalier
Washington, D.C.
202-626-5966
Email lbriggerman@milchev.com
Website www.millerchevalier.com
Twitter @millerchevalier


NACDL LIFE MEMBER

Linda Friedman Ramirez practices federal and international criminal law. She is the author of *Federal Law Issues in Obtaining Evidence Abroad Pt. 1 & Pt. 2* (The Champion, June and July 2007), and the former editor of *Cultural Issues in Criminal Defense* (Juris Publishing).

Linda Friedman Ramirez
Linda Friedman Ramirez P.A.
St. Petersburg, Florida
727-877-6973
Email lindafriedmanramirez@gmail.com
Website https://lindafriedmanramirezlaw.com


NACDL MEMBER

Addy R. Schmitt, a member of NACDL's Board of Directors, represents individuals and corporations in white collar matters, including internal and grand jury investigations, trial, and post-trial proceedings. In addition, she is often called upon to conduct sensitive internal investigations. Ms. Schmitt writes and speaks frequently on criminal justice issues.

Addy R. Schmitt
Miller & Chevalier
Washington, D.C.
202-626-5837
Email aschmitt@milchev.com
Website www.millerchevalier.com
Twitter @millerchevalier

breath test, his license would be automatically suspended regardless of the outcome of the trial. When the prosecutor says this, defense counsel should object by saying, "Burden shifting." By mentioning that the client did not take the breath test, thereby requiring him to provide evidence, the state shifts the burden of proof to the client to have to prove his innocence. The defense lawyer will have already laid the groundwork in voir dire. The jury will understand exactly where the defense lawyer is coming from. The judge will, in all likelihood, deny the defense objection, but it is a valid and ethical one to make.

Some states permit the judge, during jury instructions, to comment on a presumption that the jury can make by the defendant's refusal to take the breath test. If this is applicable, defense counsel should file a motion in limine to preserve an objection for a later appeal, should the defense lose the trial. The objection must be renewed *before* the judge gives the actual instruction to the jury at the end of the case. The reasoning behind the objection is that it allows the judge to make a comment on the evidence, which invades the providence of the jury.

The Supreme Court of Florida ruled in *Gutierrez v. State*[1] that it is improper for the court to comment on how the jury can consider a refusal (even though a prosecutor can). The U.S. Supreme Court in *South Dakota v. Neville*[2] ruled that it does not violate a defendant's Fifth Amendment right against self-incrimination to allow a refusal to take a breath test into evidence at trial. (But that is not to say that a judge may comment on the fact.)

(Continued on page 52)

About the Author

Denis deVlaming has lectured throughout the United States on matters pertaining to DUI. He is board certified in criminal trial law and teaches Advanced Criminal Trial Advocacy as an adjunct professor at Stetson College of Law in St. Petersburg, Florida.

NACDL MEMBER

Denis deVlaming
deVlaming & Rivellini, P.A.
Clearwater, Florida
727-461-0525
EMAIL denis@deVlaming.com
WEBSITE deVlaming.com

Obtaining Foreign Evidence

(Continued from page 36)

-regulation/ (last visited June 18, 2019).

42. *General Data Protection Regulation: Chapter 3*, Intersoft Consulting, https://gdpr-info.eu/art-20-gdpr/ (last visited June 18, 2019).

43. *General Data Protection Regulation: Chapter 5*, Intersoft Consulting, https://gdpr-info.eu/chapter-5/ (last visited June 18, 2019).

44. *E.g.*, Loi 80-538 du 16 juillet 1980 relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères [Law 80-538 of July 16, 1980, relating to the Communication of Economic, Commercial, Industrial, Financial or Technical Documents and Information to Foreign Individuals or Legal Entities], Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 17, 1980 at 1799.

45. *See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. Iowa*, 482 U.S. 522, 544 n.29 (1987) ("declin[ing] to hold as a blanket matter that comity requires resort to Hague Evidence Convention procedures"); *see also Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397, 402-05 (S.D.N.Y. 2014) (ordering compliance with subpoenas directed at documents located in France notwithstanding France's blocking statute but quashing a subpoena for documents located in Switzerland).

46. *See, e.g., In re Vitamins Antitrust Litigation*, Misc. No. 99-197, MDL No. 1285, 2002 U.S. Dist. LEXIS 26490 (D.D.C. Jan. 23, 2002).

47. Gov't Investigations & Civil Litg. Inst., General Counsel's Guide to Government Investigations 537-38 (Patrick L. Oot et al. eds., 2d ed. 2018).

48. *Id.*

49. *Id.*

50. *See* https://2009-2017.state.gov/j/inl/rls/nrcrpt/2012/vol2/184110.htm; Dep't of Justice, *276. Treaty Requests*, justice.gov, https://www.justice.gov/jm/criminal-resource-manual-276-treaty-requests (last visited June 21, 2019).

51. *See* https://2009-2017.state.gov/j/inl/rls/nrcrpt/2012/vol2/184110.htm.

52. *See* Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges [hereinafter Guide for Judges], Federal Judicial Center International Litigation Guide at 5 (2014).

53. *Id.*

54. *See* Dep't of Justice, *276. Treaty Requests*, justice.gov, https://www.justice.gov/jm/criminal-resource-manual-276-treaty-requests (last visited June 21, 2019).

55. Guide for Judges, *supra* note 52, at 10.

56. *See* https://www.justice.gov/jm/criminal-resource-manual-276-treaty-requests.

57. Guide for Judges, *supra* note 52, at 23.

58. *See* U.S. Sec. and Exch. Comm'n, *International Enforcement Assistance*, sec.gov, https://www.sec.gov/about/offices/oia/oia_crossborder.shtml (last visited June 21, 2019).

59. Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348.

60. *Id.* § 104, 132 Stat. at 1216-17.

61. 18 U.S.C. §§ 2702-03.

62. *In re Warrant to Search a Certain Email Account Controlled and Maintained by Microsoft Corp.*, 829 F.3d 197 (2d Cir. 2016).

63. Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 105, 132 Stat. 348, 1217-25.

64. *Id.*

65. *Id.* § 105, 132 Stat. at 1218.

66. Fed. R. Crim. P. 41.

67. *See* 18 U.S.C. § 3492.

68. *Id.*

69. *Id.*

70. *See* Fed. R. Crim. P. 902.

71. *United States v. Yousef*, 175 F.R.D. 192, 194 (S.D.N.Y. 1997).

72. *12. Convention Abolishing the Requirements of Legalisation for Foreign Public Documents*, HCCH (Oct. 5, 1961), https://assets.hcch.net/docs/b12ad529-5f75-411b-b523-8eebe86613c0.pdf.

73. 18 U.S.C. § 3505(a).

74. *Id.*

75. *Id. at* § 3505(c).

76. *Id. at* § 3505(b).

77. *See* Section II of this article.

78. Fed. R. Crim. P. 15.

79. *See United States v. Salim*, 855 F.2d 944, 952 (2d Cir. 1988).

80. *See United States v. McKeeve*, 131 F.3d 1, 8 (1st Cir. 1997) ("[C]ompliance with Rule 15 is a necessary, but not sufficient, condition to the use of a deposition at trial. The admissibility of the testimony is quite another matter."); *see also United States v. Moalin*, No. 10CR4246-JM, 2012 WL 3637370 (S.D. Cal. Aug. 22, 2012).

81. *McKeeve*, 131 F.3d at 7-10.

82. *Id.* at 7.

83. *Id.*

84. *Id.*

85. *Id.* at 10.

86. *United States v. Allen*, No. 16-898 (2d Cir. July 19, 2017), ECF No. 98-1.

87. *Id.* at 8-9.

88. *Id.*

89 *Kastigar v. United States*, 406 U.S. 441 (1972).

90. *Allen*, *supra* note 86, at 8-9.

91. *Id.*