UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
El Paso Division

UNITED STATES OF AMERICA	)	
	)	Case N. EP-07-CR-87
v.	)	
	)	The Honorable Kathleen Cardone
LUIS POSADA CARRILES	)	

UNITED STATES' MOTION, UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 15, TO DEPOSE PROSPECTIVE FOREIGN WITNESSES

The United States of America, by and through Michael J. Mullaney, Acting U.S. Attorney, T. J. Reardon III, Jerome J. Teresinski, and Bridget Behling, Trial Attorneys, in order to preserve certain testimony for trial, respectfully moves the Court to enter an Order authorizing depositions, pursuant to Rule 15 of the Federal Rules of Criminal Procedure, of two prospective witnesses currently imprisoned in Cuba – Otto Rene Rodriguez-Llerena (Otto Rodriguez) and Francisco Chavez-Abarca (Francisco Chavez) – who are beyond the reach of the United States' subpoena power, and whose testimony would be of substantial importance to the case at bar.

I. Federal Rule of Criminal Procedure 15

Fed. R. Crim. P. 15 authorizes a district court to order pre-trial depositions whenever, due to "exceptional circumstances" of the case, it is "in the interest of justice" that the testimony of a prospective witness of a party be taken and preserved for use at trial. The "exceptional circumstances" and the "in the interest of justice" requirements of Rule 15 are met "[1] if th[e] witness' testimony is material to the case and [2] if the witness is unavailable to appear at trial." *United States* v. *Johnpoll*, 739 F.2d 702, 709 (2d Cir. 1984). The district court decides when

"exceptional circumstances" exist, subject to appellate review for abuse of discretion. *United States v. Allie*, 978 F.2d 1401, 1405 (5th Cir.1992).

A. Materiality

The threshold materiality requirement of Rule 15 is clearly satisfied here, because the testimony of the proposed deponents is directly related to significant issues in the case. Count 1 of the Superseding Indictment alleges that the defendant committed perjury, in violation of 18 U.S.C. § 1621, by falsely testifying during an August 30, 2005 removal proceeding that he was not involved in soliciting other persons to carry out the 1997 bombings of hotel and tourist sites in Havana, Cuba. Thus, it is material to the United States' burden of proof to demonstrate that, in fact, the defendant did engage in these violent activities.[1]

The purpose of the proposed depositions is to elicit testimony demonstrating the defendant's involvement in the 1997 Havana bombing campaign. In December 2006 and in January 2010, one of the proposed deponents, Otto Rodriguez, was interviewed by representatives of the United States in Havana, Cuba. During those interviews, Otto Rodriguez detailed meetings which he had with "Ignacio Medina," an individual whom Otto Rodriguez identified by voice as the defendant in this case. Otto Rodriguez provided information that he, along with the defendant, plotted to place an improvised explosive device in the lobby of the Melia Cohiba hotel in Havana, Cuba, which exploded on the morning of August 4, 1997. *See Exhibit A.*

In 2008, Francisco Chavez, who was in El Salvador at the time, provided information to representatives of the United States about his own involvement in the 1997 Havana bombing campaign.[2] Francisco Chavez stated that he worked directly for the defendant in planning some of

[1] Count 3 of the indictment, which alleges obstruction before agency proceedings, in violation of 18 U.S.C. 1505, incorporates by reference this false statement which is alleged in Count 1.

[2] On or about July 1, 2010, Francisco Chavez was arrested in Venezuela and extradited to Cuba. On September 27,

the 1997 hotel bombings in Havana, Cuba, and that he recruited Raul Cruz-Leon (Cruz-Leon) to participate in the bombing campaign. In 1999, Cruz-Leon was convicted in Cuba for his involvement in the bombing campaign, including being found responsible for planting the bomb that killed Italian tourist, Fabio DiCelmo, at the Copacabana Hotel. Thus, the testimony of both of these witnesses directly refutes the defendant's prior sworn testimony, demonstrates its falsity as alleged in Counts 1 and 2, and would assist the jury in determining the materiality of the lies that the defendant chose to tell when answering questions under oath.

B. Unavailability

The unavailability requirement of Rule 15 is also clearly satisfied in the instant case. When a witness is beyond the subpoena power of the United States, such witness is considered to be unavailable. *See* Fed.R.Evid. 804(a)(5) (declarant is unavailable if proponent of a statement "has been unable to procure the declarant's attendance . . . by process or other reasonable means"); 28 U.S.C. § 1783; *United States v. Farfan-Carreon*, 935 F.2d. 678, 680 (5th Cir. 1991). The United States need only demonstrate that it has made reasonable efforts to secure the attendance of a witness at trial. In *United States v. Aguilar-Tamayo*, 300 F.3d 562 (5th Cir. 2002), the Fifth Circuit addressed the implications under the Sixth Amendment Confrontation Clause of admitting a video deposition at trial when the witness had been deported from the United States. It observed that:

> [u]navailability must ordinarily also be established to satisfy the requirements of the Confrontation Clause, which generally does not allow admission of testimony where the defendant is unable to confront the witness at trial. *Ohio v. Roberts*, 448 U.S. 56, 100, S.Ct. 2531, 65 L.Ed.2d 597 (1980). This rule is not absolute. The lengths to which the government must go to produce a witness to establish the witness's unavailability is a question of reasonableness and the government need not make efforts that would be futile. *Id.* at 74.

2010, Cuban state television aired a program in which Francisco Chavez confessed to his role in the 1997 bombing campaign. Otto Rodriguez confessed to the role he played in the bombing campaign as well. *See Exhibit B.*

Aguilar-Tamayo, 300 F.3d at 565. The *Aguilar-Tamayo* court then observed that the government took no steps to procure the presence of the witness nor did it attempt to demonstrate that doing so would have been futile. In the absence of such a record, it was unlikely that a finding of futility – excusing the government of taking steps calculated to procure the presence of the witness – could be sustained. Id. at 566.

In contrast with *Aguilar-Tamayo*, the United States in this case can readily demonstrate the futility of attempting to obtain the presence of the witnesses at trial. Both are in the custody of the Government of Cuba (GOC). Otto Rodriguez was convicted for his involvement in the 1997 bombing campaign and is currently serving a thirty-year sentence in a Cuban prison. Francisco Chavez is currently in custody in Cuba and awaiting trial for his involvement in the 1997 bombing campaign. Further, the United States has no power to compel the presence of either witness at trial through subpoena or otherwise. Even if the United States were able to subpoena either witness, the GOC would not make them available to travel to the United States since both are incarcerated in connection with the 1997 Havana hotel bombings.

Since January 2010, the United States has been in discussions with the GOC to determine whether the GOC would consider allowing Otto Rodriguez and/or Francisco Chavez to travel to the United States and be witnesses at the defendant's trial. On November 23, 2010, in regard to both Otto Rodriguez and Francisco Chavez, a representative of the United States Department of State received notice from a representative of the GOC that it "would not be in a position to make them available to appear at trial in the United States," but that it would consider making Otto Rodriguez available for deposition to be taken in Havana, Cuba. On November 29, 2010, a representative of the United States Department of State formally notified the Department of Justice of the position of the GOC. *See Exhibit C.* The current position of the GOC is that, because of the pending trial of

Francisco Chavez, it cannot yet make him available for a deposition. The United States remains somewhat hopeful that an arrangement might ultimately be reached with the GOC to also allow a deposition of Francisco Chavez.

C. The Presence of the Defendant at the Site of the Deposition Is Not a Prerequisite to Taking or Using Rule 15 Depositions.

The United States anticipates that, in response to this motion, the defendant might object to the taking of either Otto Rodriguez' or Francisco Chavez' deposition in Cuba on the grounds that he cannot be physically present when they are taken. However, the defendant's actual physical presence in Cuba for the depositions is not mandated by the Confrontation Clause of the Sixth Amendment to the United States Constitution. Indeed, safeguards may be engaged to maximize the defendant's participation in these proceedings (i.e., during the depositions), which will ensure their reliability and protect the defendant's Confrontation Clause rights.

In *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), cert. denied, 129 S.Ct. 1312 (2009), the court was confronted with a set of circumstances similar to the instant case. The United States sought authorization to depose two critical witnesses who were located in the Kingdom of Saudi Arabia. Both were members of Saudi security forces who had interrogated the defendant. Their testimony was important to rebut the defendant's claim that his admissions while in Saudi custody, were the product of coerced interrogation techniques. The United States was unable to procure the in-court testimony of the interrogators because they were beyond its subpoena power and the Saudi government refused to allow them to travel to the United States to participate in the trial. The United States, of course, also lacked authority to control the defendant if he were to have traveled to Saudi Arabia and it feared consequently that the Saudi government would attempt to arrest and prosecute the defendant were he to enter the country. It was also not feasible to transport the defendant to that country to personally participate in the depositions. See *Ali*, 528 F.3d at 239.

Therefore, as a means of balancing the defendant's trial rights and the United States' need to present evidence material to the charges in that case, the district court fashioned a set of procedures to conduct the depositions in Saudi Arabia.

The safeguard procedures included the defendant's representation by two of his attorneys at the site of the deposition in Saudi Arabia. A third defense attorney sat with the defendant in an Alexandria, Virginia courtroom and participated in the proceedings via a live two-way video link. These safeguards enabled the defendant and his local attorney not only to see and hear the deposed witnesses' testimony contemporaneously, but also permitted the witnesses to see and hear the defendant as they testified. A court reporter transcribed the testimony in real time and both witnesses and the defendant were videotaped during the deposition so that the jury could observe their reactions. The trial court presided over the depositions from the Alexandria courtroom and ruled on objections as they arose. The defendant was able to communicate, via cell phone, to his attorneys at the deposition site during frequent breaks in the proceedings. The court in Alexandria, Virginia was also willing to suspend briefly the depositions if the defendant's attorneys in Saudi Arabia wanted to consult with the defendant. *Ali*, 528 F.3d at 239-240.

In approving the procedures adopted by the district court in *Ali*, and the subsequent admission of the Saudi witnesses' deposition testimony, the Court of Appeals relied upon the Supreme Court's decision in *Maryland v. Craig*, 497 U.S. 836 (1990), which established a two-prong test for admitting testimony taken outside the presence of the defendant. Under that test, there must first be an important public policy that is advanced by a failure to provide a physical face-to-face confrontation. *Id.* at 850. In this respect, the *Ali* court observed that the case involved a matter of national security, in particular the protection of Americans against unprovoked attack. *Id*. at 241. Second, the district court must craft procedures to make certain that, absent a physical face-to-face

confrontation, "'the reliability of the testimony is otherwise assured'" (*Id.*, quoting *Craig*, 497 U.S. at 851) and "'subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.'" *Ibid.* The *Ali* court held that the trial judge had satisfied that component because: (1) the Saudi witnesses testified under oath; (2) defense counsel were able to cross-examine the witnesses extensively; (3) the defendant, judge, and jury could observe the demeanor of the witnesses; and (4) the judge and jury, as well as the witnesses, could observe the defendant's reactions to the deposition testimony. *Id*. at 241-242.

As to the first prong of the *Maryland v. Craig* criteria, the instant case similarly involves weighty matters of national security – ensuring the integrity of our country's borders and the immigration process. This important responsibility requires the identification, apprehension, and prosecution of those individuals who would seek to enter the United States after having engaged in acts of terrorism and thereafter concealing them from immigration authorities, in order to try and gain a benefit to which they are not legally entitled. These fundamental interests need not be compromised – by mandating literal adherence to the right to confront a witness physically – when it is impossible to conduct such a proceeding and virtual confrontation via telephone and video link will secure essentially the same benefits for the defendant. In this respect (and pertinent to *Maryland v. Craig's* second prong), the United States submits that, just as in *Ali*, it can implement similar procedures which ensure the reliability of the witnesses' testimony during the depositions, and which will result in a Constitutionally sound, functional equivalent to a physical in-court confrontation.

D. Proposed Procedures

Rule 15 mandates that the procedures for a deposition in a criminal case must generally follow the manner of depositions taken in a civil action, with the additional requirement that "the

scope and manner of the deposition examination and cross-examination [] be the same as would be allowed during trial" and the grounds for any objection be stated "during the deposition." Fed.R.Crim.P. 15(e) and (g). The United States respectfully submits that the following procedures not only satisfy this requirement but also fulfill the requirements of *Maryland v. Craig*:

1. That the depositions be conducted in the presence of the district court and governed by the Federal Rules of Evidence and Criminal Procedure.
2. That, during each deposition, a telephone and live two-way video link be made from the site of the deposition to the Court, where the defendant would be present with counsel;
3. That the defendant also be represented by counsel at the site of the deposition;
4. That the defendant be afforded the opportunity to confer by telephone with his counsel at the site of the deposition.
5. That the court control the conduct of each deposition in as close a manner to trial testimony as possible, including ruling upon objections by either party;
6. That the depositions be video-taped, and that a verbatim, stenographic recording be made of the proceedings;
7. That the questioning of the witnesses be conducted by the attorneys for the parties, including direct examination by a prosecutor and cross-examination by the defense attorney at the deposition site;
8. That each witness testify under oath;
9. That the United States assume the expenses for the defendant's counsel to travel to Cuba and any other deposition-related travel expenses for members of the defense team.

E. CONCLUSION

In sum, the deposition testimony of the two unavailable witnesses, Otto Rodriguez and Francisco Chavez, is material to its proof of Counts 1-3 of the indictment. The Court can protect the defendant's Sixth Amendment Confrontation Clause rights by implementing the procedures which are consistent with those outlined by the 4th Circuit, supra.

WHEREFORE, the United States respectfully requests that the Court enter an Order authorizing pre-trial depositions of Otto Rodriguez and Francisco Chavez.

Respectfully submitted,

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ACTING UNITED STATES ATTORNEY

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Certificate of Service

I hereby certify that on the 3rd day of December, 2010, I caused the foregoing to be filed with the Clerk of Court, and have sent a copy of the following via e-mail to:

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ORDER

On this day, the Court considered the Government's Motion Authorizing the Taking of Depositions of Otto Rene Rodriguez-Llerena and Francisco Chavez-Abarca. Upon due consideration, it is the opinion of this Court that the Motion should be **GRANTED**.

SO ORDERED.
Signed this ___ day of _____, 2010.

_____
KATHLEEN CARDONE