

Challenging Evidence Seized in Foreign Countries

By David Zapp

Challenges to foreign evidence seem hopeless. There is so much bad law. But then, along comes a case that gets one's hopes up. This is what occurred in a federal court recently:

Judge Rips Prosecutor For Withholding Information In Drug Case

A visibly frustrated judge called a federal prosecutor "disingenuous," in questioning her candor about when she knew "vetted units" of the Colombian national police were on the payroll of the Drug Enforcement Administration.

The issue arose in a federal courtroom after defense attorneys raised questions about the role Colombian police played in the investigation of a cocaine trafficking ring. Defense attorneys started asking

in April if Colombian police were paid for their assistance.

As soon as a contentious hearing revealed the truth of the DEA payments, more generous pleas were offered. In open court, the judge repeatedly lectured the prosecutor who is assigned almost exclusively to Colombian drug cases. The prosecutor was apologetic and blamed miscommunication and a language barrier with Colombian police. "This is why this does not make sense to me. This is all you do," the judge replied. "Answer me this: Why does the government get a pass?" The judge's anger and frustration were palpable. She said the prosecutor had breached her ethics as a prosecutor and apparently forgotten she represents the people of the United States.

Prosecutors had led the defense to believe the criminal charges were based on an independent Colombian police operation that the government knew would never be interfered with by U.S. courts. The defense attorneys said they inquired about the payments after receiving a tip that the U.S. government paid Colombian police officers \$200

each per month for their assistance in the three-year investigation. The tip was confirmed at the hearing during the cross-examination of the government's first witness, a Colombian national police officer. A DEA special agent also told the judge that the prosecutor had specifically inquired about the payments.

The judge said it was obvious prosecutors didn't want to cooperate with what appeared to be a routine defense request for discovery. "Such flagrant disregard for the rule of law and brazen dishonesty to the court and to opposing counsel should certainly shock the conscience of the court," a defense attorney wrote in his motion for dismissal.

The judge declined to dismiss the case or declare a mistrial (editor's note: Of course. If it is a choice between law and order, "order" always wins), but added, "the tug in that direction [toward dismissal] is quite strong." (Don't you believe it.) The judge also wondered aloud if an appellate court might overrule her. She then turned to the prosecutor and said she would reserve judgment on her behavior in the case. "To say that the level of professionalism is disappointing is an understatement," said the judge. One defense lawyer said he didn't think the defense would submit a motion for sanctions in light of the plea bargain. I guess,

sometimes you get an offer you can't refuse. (Excerpt from John Pacenti's article, published on the *Daily Business Review* on May 24, 2012.)

But this kind of revelation goes far in undermining the fiction that Colombian and probably other foreign law enforcement agents do not have an agency relationship with U.S. law enforcement, a suspicion we defense attorneys have long harbored. The U.S. government does not want that finding because it means that U.S. law must determine admissibility of foreign evidence. As of now:

1. Federal wiretap law with respect to foreign wiretapping, is not applicable outside the United States. See *U.S. v. Maturo*.

2. "Information furnished to American officials by foreign police need not be excluded simply because the procedures followed did not fully comply with our nation's (U.S.) constitutional requirements." *United States v. Cotroni*.

3. The Fourth Amendment's exclusionary rule suppressing evidence seized in violation of our Fourth Amendment (the right to be free from unreasonable searches), generally does not apply to evidence obtained outside the U.S. by foreign officials whether or not "the persons arrested and from whom the evidence

is seized are American citizens." *Stowe v. Devoy*.

There are two exceptions. One is where the conduct of the foreign officials in acquiring the evidence is so extreme that it "shocks the conscience" and two is where foreign law enforcement officials are "agents" or virtual agents for U.S. law enforcement. "*Within the first category, all I can say is that the 'shocking' conduct better have a cattle prod, a bull whip or a gun attached to it. Otherwise no one's conscience will be shocked. 'Circumstances that will shock the conscience are limited to conduct that not only violates U.S. notions of due process, but also violates fundamental international norms of decency.'*" See *United States v. Vilar*.

Illegal wiretapping hardly violates "international norms of decency."

Within the second category, it may well be that foreign policemen on U.S. payrolls may establish an agency relationship. After all, why are agents from one country being paid by another country? What are they being asked to do? And who among these agents is going to bite the hand that feeds them? However, formalized collaboration between an American law enforcement agency and a foreign counterpart does not, in isolation, give rise to an "agency" relationship.

Also the law does not require that documents in support of foreign wiretaps have to be supplied by U.S. prosecutors so getting them must come from the hard work of lawyers.

I do not want to close without making two observations: First, the kind of egregious conduct engaged in by the prosecutor in the above case rarely occurs. Prosecutors are overwhelmingly honorable. Second, a shout-out to the defense lawyers who proved that lawyering is not dead and that "the devil is in the details." Being a lawyer should not mean merely turning over the "Christians to the Romans." The lawyers here deserve our thanks. We have all benefited.

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