

Second Circuit Reverses Rabobank Libor Convictions Over Foreign Compelled Testimony

July 21, 2017

On July 19, 2017, the Second Circuit Court of Appeals held in *United States v. Allen*, No. 19-CR-898 (JAC), 2017 WL 3040201 (2d Cir. 2017) that the Fifth Amendment's prohibition on the use of compelled testimony in American criminal proceedings applies to the use of testimony compelled by a foreign sovereign. The court further held that when the government makes use of a witness who has been exposed to a defendant's compelled testimony, the government bears the "heavy burden" to prove that the witness's exposure to the compelled testimony did not "shape, alter, or affect the evidence used by the government." *Allen*, 2017 WL 3040201, at *13.

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This decision illustrates a key challenge to prosecutions in U.S. courts arising from cross-border investigations in which foreign governments are conducting parallel investigations following procedures that may differ from those used in U.S. criminal investigations. It also suggests that the Second Circuit (and likely other federal courts) are unlikely to relax the constitutional standards applicable to U.S. criminal prosecutions to accommodate the difficulties confronted by U.S. authorities in developing evidence from foreign investigations.



Background

Anthony Allen and Anthony Conti are citizens and residents of the United Kingdom who were tried and convicted of wire fraud¹ and conspiracy to commit wire fraud and bank fraud in the U.S. District Court for the Southern District of New York.² Their convictions arose out of the worldwide investigation into manipulation of LIBOR benchmark rates.³ Allen and Conti were both employees at the London office of Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (“Rabobank”), where they were responsible for the bank’s U.S. dollar LIBOR submissions. Following indictment and trial, a jury found that they had illegally adjusted their LIBOR submissions to benefit the trading positions of Rabobank derivatives traders during the period of roughly 2006 through 2008.

The focus of the Second Circuit’s opinion in *United States v. Allen* was on the government’s use at trial of testimony from a witness who had, prior to trial, reviewed transcripts of interviews that the U.K. Financial Conduct Authority (“FCA”) conducted of Allen and Conti in 2013 in connection with its LIBOR investigation. Those interviews were compelled by the FCA, which is authorized under Section 165 of the U.K. Financial Services and Markets Act 2000 to compel witness testimony under penalty of imprisonment, and as to which there is generally not a right to refuse such testimony on the grounds that it may prove self-incriminating.

Later in 2013, the FCA initiated an enforcement action against Paul Robson, another Rabobank LIBOR submitter who had worked with Allen and Conti. Following its normal procedure, the FCA allowed Robson to review the relevant evidence against him, which included transcripts of the FCA’s compelled interviews of Allen and Conti. In 2014, the FCA stayed its case against Robson, and the Fraud Section of the

United States Department of Justice (the “DOJ”)—which had been pursuing its own LIBOR investigation—brought charges against Robson.

Robson pleaded guilty to the charges in the United States and agreed to cooperate with the DOJ’s investigation. Based on information provided by Robson, the DOJ then sought and obtained an indictment of Allen and Conti. Some of the information that Robson provided to the FBI was introduced through the testimony of an FBI agent to the grand jury that returned indictments against Allen and Conti, and Robson himself later testified at Allen and Conti’s trial. Defendants objected to the introduction of evidence derived from Robson before the grand jury and at trial on the grounds that it was tainted by Robson’s prior review of their compelled FCA testimony.

Derivative Use Immunity and *Kastigar*

The Fifth Amendment to the U.S. Constitution prohibits the use of a defendant’s compelled testimony against him or her in American criminal proceedings. Under the Supreme Court’s decision in *Kastigar v. United States*, however, the government can compel testimony over a witness’s Fifth Amendment objection *only* by granting that witness full immunity against both direct and derivative use of that testimony.⁴

Direct use immunity prohibits the government from introducing the witness’s actual statements at trial. Derivative use immunity, however, provides a much more expansive protection against the use of either compelled testimony or any evidence derived from it at trial. Where derivative use immunity is granted, all information on which any subsequent prosecution of

¹ 18 U.S.C. § 1343.

² 18 U.S.C. § 1349.

³ LIBOR, the London Interbank Offered Rate is, “a ‘benchmark’ and ‘reference’ interest rate meant to reflect the available borrowing rates on any given day in the

‘interbank market’—in which banks borrow money from other banks.” *Allen*, 2017 WL 3040201, at *2.

⁴ See *Kastigar v. United States*, 406 U.S. 441, 442 (1972) (explaining that 18 U.S.C. §§ 6002–05 requires the government to confer both immunities on a witness from whom they wish to compel testimony).

that witness is based must be derived from a source wholly independent of any compelled statements.⁵

In this case, prior to their trial in the United States, Allen and Conti moved under *Kastigar* to dismiss the indictment or to suppress Robson’s testimony, on grounds that Robson’s testimony was derived in part from Robson’s review of Allen’s and Conti’s compelled testimony to the FCA. The district court chose to address the *Kastigar* issue post-trial, permitting Robson to testify during the trial. After Allen and Conti were convicted, the court held a two-day so-called “*Kastigar* hearing,”⁶ during which it was revealed that Robson had not only read Allen’s and Conti’s compelled testimony, but had also made annotations on hard copies of the testimony and had taken several pages of handwritten notes.⁷ Robson’s review of the transcripts occurred not only before trial, but also prior to giving the statement to the FBI on which the FBI agent relied when testifying before the grand jury. The district court nonetheless ruled that there was no *Kastigar* violation because the government had shown an independent source for Robson’s testimony, that is, Robson’s “personal experience and observations.”⁸ This was despite the fact that—as the Second Circuit later found—Robson’s testimony at trial included descriptions of events not included in his testimony to the FCA.⁹

The Second Circuit’s Decision

In overturning Allen’s and Conti’s convictions and dismissing their indictments, the Second Circuit made two key rulings.

First, the Second Circuit held that the Fifth Amendment’s prohibition on the use of compelled testimony in an American criminal proceeding against the defendant who provided that testimony applies even if that testimony was compelled by a *foreign* sovereign

that was under no obligation at the time of the testimony to afford the defendant Fifth Amendment protection, and even if that testimony was taken in full accordance with foreign law.¹⁰ In so holding, the court rejected the government’s suggestion that statements compelled by foreign officials should be excluded only if they were obtained by conduct that “shocks the judicial conscience,” the typical test for excluding evidence obtained by foreign governments on Due Process Clause grounds.¹¹ The Circuit also rejected the government’s argument that testimony compelled by a foreign government was akin to testimony compelled by a private entity or employer (under threat of termination), which typically does not raise Fifth Amendment concerns, on the basis that “[o]nly sovereign power exposes ‘those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt.’”¹²

Second, the court held that if the government calls a witness who has been substantially exposed to a defendant’s compelled testimony, *Kastigar* requires the government to prove that the witness’s review of the compelled testimony “did not shape, alter, or affect the evidence used by the government.”¹³ While the court accepted that this could be done by introducing consistent statements given by the witness prior to being exposed to the compelled testimony (so-called “canned testimony”), the court found that the government’s burden was not satisfied through mere self-serving statements by the witness that his testimony was not influenced by review of the compelled testimony. Where, as here, there is evidence that a witness’s account of the relevant events was significantly different and less incriminating before review of the compelled testimony, the government must make a

⁵ See *United States v. Plummer*, 941 F.2d 799, 803 (9th Cir. 1991).

⁶ *Allen*, 2017 WL 3040201, at *7.

⁷ *Id.* at *6.

⁸ *Id.* at *7.

⁹ *Id.* at *13.

¹⁰ *Id.* at *9.

¹¹ *Id.*

¹² *Id.* (quoting *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 55 (1964)).

¹³ *Id.* at *13.

greater showing than the witness’s “bare, generalized denial of a taint.”¹⁴

Applying those holdings, the court found that the government had not met its *Kastigar* burden with respect to the use of Robson’s testimony at both trial and before the grand jury, and so Allen’s and Conti’s convictions must be reversed, and their indictments dismissed.

The Second Circuit’s holding in this case follows and is in accord with prior rulings from the D.C. Circuit, and with similar holdings from the Fourth, Fifth, Ninth, and Tenth Circuits.¹⁵

Takeaways

This case is significant not only for its specific holdings, but also because it illustrates the sorts of the challenges that U.S. authorities will continue to face in their increasingly aggressive pursuit of overseas prosecutions. The Second Circuit was careful to emphasize that its decision should not be read as calling into question the propriety of the FCA’s investigative procedures, and the court acknowledged that the DOJ had made efforts to coordinate with the FCA so as to inoculate its investigation from any taint caused by differences in U.K. and U.S. investigatory and evidentiary requirements. Indeed, given the procedural requirement under U.K. law that Robson be given access to the case file in proceedings against him, it is difficult to imagine how the DOJ might have avoided his exposure to the relevant testimony. The Second Circuit, however, was unsympathetic. In its words: “The practical outcome of our holding today is that the risk of error in coordination falls on the U.S. government (should it seek to prosecute foreign individuals), rather than on the subjects and targets of cross-border

investigations.”¹⁶ The Circuit’s decision thus gives greater comfort to those compelled to testify before foreign authorities that their compelled testimony will not be used against them—directly or indirectly—before a U.S. court.

There is also a political undertone to the court’s decision, that was reflected in a significant colloquy at oral argument about why the U.S. government was prosecuting in New York two British subjects for conduct that occurred entirely overseas, particularly where the British government was itself conducting a parallel investigation. Indeed, the circumstances that led to the overturning of Allen’s and Conti’s convictions arose precisely because there were parallel proceedings occurring in the U.K., which resulted in Robson’s obtaining access to the case file of the FCA’s proceedings. As the U.S. government becomes increasingly active in seeking to prosecute foreign conduct in circumstances where foreign authorities are conducting their own separate investigations, this decision re-emphasizes the importance of coordinating activities with those foreign authorities to avoid contamination of evidence.

While the Second Circuit’s decision is important, it is also limited in scope to the Fifth Amendment and its application in proceedings in U.S. courts. Importantly, the decision does not address the array of investigatory tactics that might be undertaken by foreign governments abroad to develop evidence *other* than the compelled testimony of the defendant. For example, the court went to lengths to distinguish the circumstances presented from those involving an unreasonable search conducted by a foreign government, recognizing that while the fruits of an unreasonable search by U.S. authorities would likely be excluded under the Fourth

¹⁴ *Id.* at *15. The court noted that Robson’s testimony at trial differed markedly from the testimony Robson had given to the FCA prior to his review of Allen’s and Conti’s compelled testimony. In particular, Robson testified at trial to certain events and communications in which he was not personally involved and that he did not discuss with the FCA, which called into question whether he had only learned of them through his review of the compelled testimony. *Id.* at *21-22.

¹⁵ See *United States v. North*, 910 F.2d 843, 861 (D.C. Cir. 1990); *United States v. Poindexter*, 951 F.2d 369, 373 (D.C. Cir. 1991); *United States v. Abu Ali*, 528 F.3d 210, 232 (4th Cir. 2008); *Brulay v. United States*, 383 F.2d 345, 349 n.5 (9th Cir. 1967); *United States v. Mundt*, 508 F.2d 904, 906 (10th Cir. 1974); *Kilday v. United States*, 481 F.2d 655, 656 (5th Cir. 1973).

¹⁶ *Allen*, 2017 WL 3040201, at *16.

Amendment, the policy justifications for that rule did not apply to searches conducted by foreign authorities. Accordingly, while the Second Circuit's decision applies a strict rule to compelled testimony, it does not appear to set down a standard for evaluating the admissibility of other types of evidence developed by foreign authorities.

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