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Second Circuit Rules Fifth Amendment Applicable to Statements Provided to Foreign Governments

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The Fifth Amendment right against self-incrimination applies to involuntary statements made by an individual to a foreign official who is not himself bound by the U.S. Constitution, the U.S. Court of Appeals for the Second Circuit ruled July 19 in a stunning defeat to the U.S. Department of Justice's first successful prosecution of individuals in connection with the LIBOR scandal. The court overturned convictions and dismissed indictments of two former Rabobank traders, finding that the prosecution was tainted by the government's reliance on a witness who had been exposed to defendants' compelled testimony before a government agency in the United Kingdom. Given the increasing coordination between the U.S. and foreign governments in cross-border criminal investigations, the precedent set by the Second Circuit is bound to have a meaningful effect ranging far beyond this case.

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Case Background

On November 5, 2015, a federal jury found the defendants, former Rabobank traders Anthony Allen and Anthony Conti, guilty of wire fraud and conspiracy for their role in manipulating LIBOR. Jury Verdict, *United States v. Allen*, No. 1:14-cr-272 (S.D.N.Y. Nov. 6, 2015), ECF No. 147. Allen and Conti were sentenced to two and one years in prison, respectively.

The defendants, both British nationals who worked at Rabobank in London and the Netherlands, were questioned in 2013 by the U.K. Financial Conduct Authority ("FCA") in connection with that agency's investigation into LIBOR manipulation. They faced criminal penalties under U.K. law if they refused to answer questions. The FCA also targeted another Rabobank trader Paul Robson and, later in 2013, informed Robson of its intention to take action against him. Consistent with its procedures, the FCA provided Robson with the relevant evidence against him, including transcripts of Conti's and Allen's compelled testimony, which Robson reviewed over the course of a few days, annotated, and about which he took pages of handwritten notes.

At the same time, the DOJ, in collaboration with various enforcement agencies around the world including the FCA, was also investigating manipulation of LIBOR. The DOJ indicted Robson and two other Rabobank traders in April 2014, but neither Allen nor Conti was named in the initial indictment. Robson decided to co-

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operate with the U.S. prosecutors, pleaded guilty, and submitted to several interviews with the DOJ. The DOJ stated at a court conference that it was considering a superseding indictment against other individuals in light of information provided in part by Robson. Two months later, Allen and Conti were indicted. Superseding Indictment, *Allen*, No. 1:14-cr-272 (Oct. 16, 2014), ECF No. 24.

The *Kastigar* Ruling

Throughout the district court proceedings, the defendants argued that the prosecution was tainted by the government's reliance on Robson who had previously been exposed to defendants' compelled FCA testimony. In advance of trial, the defense argued that the Fifth Amendment bars the use, however indirect, in a U.S. prosecution of a defendant's involuntary statements to a foreign official, emphasizing that a violation of the Fifth Amendment occurs when the involuntary statements are used in a U.S. prosecution, not when they are elicited. As a result, the defense contended that *Kastigar v. United States*, 406 U.S. 441 (1972), requires the government to prove that its evidence derived from legitimate sources wholly independent of the compelled testimony. Arguing that the government failed to satisfy this burden, the defendants moved to dismiss the indictment against them or to suppress the tainted evidence. Mem. in Supp. of Mot. to Dismiss, *Allen*, No. 1:14-cr-272 (July 17, 2015), ECF No. 76.

In response to Conti and Allen's *Kastigar* motion, the DOJ argued that the Fifth Amendment right against self-incrimination is inapplicable to statements compelled by foreign governments that are not themselves bound by the U.S. Constitution. It cited the so-called ''same-sovereign rule'' for the proposition that the Self-Incrimination Clause applies only when the ''compelling'' and ''using'' sovereigns are bound by the Clause. Alternatively, the government argued that it had made no use of the defendants' compelled statements, as Robson's testimony was not affected by his review of these statements and the government's decision to prosecute was based on independent evidence. Mem. in Opp'n, *Allen*, No. 1:14-cr-272 (Aug. 6, 2015), ECF No. 95.

Following the guilty verdicts, Judge Jed S. Rakoff directed a hearing to consider the issue and, on February 11, 2016, denied the defendants' motion in full. *United States v. Allen*, 160 F. Supp. 3d 684 (S.D.N.Y. 2016). The district court concluded that the government had satisfied its burden under *Kastigar* of proving that its evidence derived from legitimate sources wholly independent of the compelled testimony. First, Judge Rakoff found ''patently obvious'' that Robson was motivated to cooperate with the U.S. prosecutors in order to seek potential sentencing benefits – not as a result of his review of the defendants' compelled statements. The district court further found that Robson's cooperation and the allegedly tainted statements he made to prosecutors did not play an important part in the government's decision to prosecute the defendants, because the government had already possessed significant evidence incriminating the defendants. In any case, Judge Rakoff found that the prosecutors were not exposed to defendants' compelled testimony and that the evidence used against the defendants derived entirely from sources untainted by their compelled testimony.

In reaching this decision, Judge Rakoff sidestepped the seemingly threshold question – indeed the very question ultimately answered by the Second Circuit – of whether the Fifth Amendment right against self-incrimination and *Kastigar* apply to involuntary statements made by a defendant to a foreign official who is not himself bound by the U.S. Constitution. Relegating this issue to a footnote, Judge Rakoff concluded: ''Deeply interesting though this question is, the Court has no occasion to resolve it here, because, even assuming *Kastigar* applies to testimony compelled by a foreign sovereign, the government has met its *Kastigar* burden on the facts here determined.'' *Id*. at 690, n.8.

Second Circuit Decision

The defendants appealed a host of Judge Rakoff's rulings, including the denial of the defendants' motion to suppress Robson's testimony under *Kastigar*. Notice of Criminal Appeal, *United States v. Allen*, No. 16-898 (2d Cir. Mar. 23, 2016), ECF No. 1. The defense argued that Judge Rakoff applied an incorrect legal standard by not considering whether the testimony of Robson, who reviewed the defendants' compelled statements prior to cooperating with the government, had been ''shaped, altered or affected'' by his review. Instead, the defense argued that the district court erroneously focused on a narrower question of whether Robson's testimony was based on his personal experience and corroborated by other, untainted sources. Joint Brief, *Allen*, 16-898 (July 6, 2016), ECF No. 33; Joint Reply Brief, *Allen*, No. 16-898 (Nov. 2, 2016), ECF No. 69. The government countered that it met its burden under *Kastigar*, because it proved to the district court's satisfaction that Robson did not actually rely on the defendants' compelled statements or use them in his testimony and that Robson's ''personal experience and observations'' were an ''independent source'' of the information. Appellee Br., *Allen*, No. 16-898 (Oct. 5, 2016), ECF No. 53. And of course the issue underpinning arguments from both sides was whether the Fifth Amendment right against self-incrimination even applies under these circumstances.

On July 19, 2017, a three-judge Second Circuit panel unequivocally answered that question in the affirmative. First, the court held that the Fifth Amendment's prohibition on the use of compelled testimony in criminal proceedings in the United States applies *even when a foreign official compelled the testimony*. *Allen*, No. 16-898, slip op. (July 19, 2017). Describing the right against self-incrimination as ''fundamental'' and ''absolute,'' the court found that it is ''a personal trial right'' of the accused that is violated only at the time of its ''use'' in an American criminal proceeding rather than at the time of the ''compulsion.'' *Id*. at 35, 46. The court distinguished the freedom from self-incrimination from exclusionary rules intended to deter unconstitutional actions by American officials, such as rules relating to unreasonable searches and seizures or confessions given without *Miranda* warnings. *Id*. at 36.

Second, the Second Circuit held that the district court ''impermissibly lowered the bar'' when it determined that the government satisfied its *Kastigar* burden based on Robson's denial of taint and corroborating evidence of Robson's testimony. *Id*. at 60-61. As Judge Gerard Lynch remarked during oral argument, the court's finding that a witness has an ''honest face'' does not satisfy the government's burden of establishing that a witness's testimony was not influenced. Embracing the le-

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gal standard set forth by the D.C. Circuit Court in *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), the court held that, at a minimum, the government was required to prove that Robson's exposure to the compelled testimony ''did not shape, alter, or affect the information that he provided and that the government used.'' (The court did not foreclose an even more rigorous standard that would require the government to demonstrate that a witness's exposure to compelled testimony did not ''in any manner subtly refresh his memory, focus or organize his thoughts, or in some other traceless way influence his state of mind.'' *Allen*, No. 16-989, slip op. at 61.)

Applying this standard, the court concluded that it had no choice but to overturn the convictions and dismiss the indictments because ''the Government did not, and cannot, meet its burden under *Kastigar*.'' *Id*. at 71. The court explained that the most effective way for the government to meet its burden is to present ''canned'' testimony, demonstrating that the testimony at issue was unchanged from comparable pre-exposure testimony. Here, however, Robson's ''canned'' testimony before the FCA actually showed taint through material differences with his trial testimony. *Id*. at 61-62. The court further determined that the use of Robson's tainted testimony was not harmless, because Robson was the unique source of certain material information supplied to both the grand and petit juries. *Id*. at 71-79.

Finally, the court addressed at length the government's argument that prohibition on its use in U.S. courts of foreign-compelled testimony would hamper cross-border prosecutions of criminal conduct. *Id*. at 49-54. For example, the DOJ argued that a foreign government could either inadvertently or purposely compel testimony and then make it publicly available thus sabotaging any prospect of a U.S. prosecution. The Second Circuit rejected these arguments, noting that its holding in this case would not necessarily prevent prosecutions in the U.S. where a hostile foreign government publicized compelled testimony. The court concluded by highlighting the DOJ's silence on the ''troubling consequences of accepting its argument,'' including removal of any bar to compelled testimony in U.S. courts that could permit U.S. prosecutors to freely rely on evidence compelled by a foreign partner. *Id*. at 51.

Implications of the Second Circuit's Ruling

As the Second Circuit explicitly recognized, cross-border criminal investigations have become more prevalent in recent years. The court itself cited not only the LIBOR cases, but also the Swiss bank tax evasion prosecutions as well as rising FCPA enforcement to make its point. Indeed the DOJ has recently taken steps that stretch beyond mere cross-border collaboration by embedding U.S prosecutors in foreign law enforcement, namely Eurojust in The Hague and INTERPOL in France. And while global investigations and international cooperation for those investigations are on the rise, there is simultaneously an increased emphasis in the United States on individual culpability as a component to, or even in place of, corporate resolutions. In light of this trajectory, the court concluded:

> We do not presume to know exactly what this brave new world of international criminal enforcement will entail. Yet we are certain that these developments abroad need not affect the fairness of our trials at home. If as a consequence of joint investigations with foreign nations we are to hale foreign men and women into the courts of the United States to fend for their liberty we should not do so while denying them the full protection of a ''trial right'' we regard as ''fundamental'' and ''absolute.''

Id. at 54-55 (internal citations omitted).

A practical consequence of this ruling is that the DOJ will need to be in closer coordination with its foreign counterparts. And, notwithstanding the DOJ's desire to preserve the secrecy of its own investigation, it may feel the need to advise foreign counterparts of an investigation at even earlier stages than it might have otherwise chosen to do. Once outreach has been made, the DOJ will need to be even more vigilant in gathering evidence to ensure that its own prosecutors, or the witnesses with whom they wish to speak, do not become tainted in any way by compelled testimony. The burden to remain taint-free is exclusively its own, as the Second Circuit noted, ''the risk of error in coordination [with a foreign authority] falls on the US Government . . . , rather than on the subjects and targets of cross-border investigations.'' *Id*. at 49.

Steps that the DOJ will need to take to shield itself from exposure to compelled testimony will likely include: implementing a ''taint team'' to protect prosecutors from exposure; requesting that a foreign regulator not share compelled information with U.S. prosecutors or other witnesses in the case or the public at large; and requesting to conduct its own interviews ahead of and separate from the foreign regulators. And the government will now take increased steps to educate foreign regulators about the Fifth Amendment and the consequences of the *Allen* ruling.

Further, application of Fifth Amendment protections to foreign-compelled testimony, and the resulting evidentiary hurdles that need to be overcome to remain taint-free, could encourage the government to reconsider at the outset whether to undertake certain prosecutions that have a stronger center of gravity in the foreign country. In *Allen*, for example, both the district court and the Second Circuit expressed puzzlement that the DOJ would prosecute U.K. nationals for conduct that took place entirely in the U.K., particularly where the U.K.'s Serious Fraud Office prosecuted other British nationals for LIBOR-related misconduct and where prosecution in the United States made a critical witness unavailable.

Finally, defense counsel in cross-border investigations need to think strategically about how the teachings of *Allen* may affect their clients, both in the U.S. and abroad. At a minimum, prior to any interview being conducted or testimony being taken in a foreign jurisdiction, counsel should carefully consider any Fifth Amendment implications. And, depending on the jurisdictions involved in an investigation, there may even be certain advantages to individuals subjected to overseas compelled testimony in defending their cases here in the United States.