

aliens to work in the Washington County marijuana grow. The government says the evidence will establish that Berg assisted the workers who fled the grow by providing them transportation out of the area and subsequent shelter.

The cooperating witness, who is the subject of this motion and who the government intends to call at trial, is an illegal Mexican alien who was working in the Washington County grow during the summer of 2009. He was present in the marijuana grow when law enforcement aircraft flew over the area and discovered its existence. He and the other people who were working fled the area when the aircraft flew over. After fleeing the marijuana grow and being spirited out of Maine, the witness eventually made his way to the Indianapolis area. He was subsequently arrested for and convicted of child molestation.

In 2011 investigators learned that the CODIS DNA data base matched DNA recovered from physical evidence at the Washington County grow site with DNA of the witness obtained following his conviction for child molestation. Arrangements were made for the witness to be brought back to Maine to testify before the grand jury. He was appointed counsel and testified pursuant to a grant of immunity.

The cooperating witness has now completed his state sentence in Indiana. His release date was on or about March 3rd. The Assistant United States Attorney advises that the witness is currently in the custody of the United States Marshal¹ and is scheduled to be brought to Maine within the next week or ten days. The Department of Homeland Security advises that the witness was to be deported to Mexico upon completion of his sentence and apparently remains in

¹ There is a sealed ex parte order on the docket indicating that the defendant was arrested as a material witness following expiration of his state sentence. (ECF No. 87). This order is not available to the public or the defense attorneys but it explains the cooperating witness's current custodial status. I conducted an ex parte conversation with the AUSA handling this case following my telephone conversation with the parties and he indicated that he had no objection to my revealing the existence of the order although he requested the name of the cooperating witness remain sealed on the publicly available docket.

custody and in the United States pursuant to arrangements made by the Department of Justice. Immigration authorities have already issued a deportation order. Jury selection in this case is currently scheduled for September 2013.

Rule 15 Standard

Rule 15 of the Federal Rules of Criminal Procedure provides in relevant part that “[a] party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice.” Fed. R. Crim. P. 15(a). The decision whether to grant or deny a motion to take the deposition of a prospective witness for use at a criminal trial is a discretionary one, subject to certain considerations. United States v. Keithan, 751 F.2d 9, 12 (1st Cir. 1984). In United States v. Bunnell, 201 F. Supp. 2d 169 (D. Me. 2002), I applied a test fashioned by the Eleventh Circuit to evaluate whether exceptional circumstances exist to warrant a deposition. Under this test, the judicial officer considers whether: (1) the witness is likely to be unavailable at trial; (2) injustice will otherwise result without the material testimony that the deposition could provide; and (3) countervailing factors would make the deposition unjust to the nonmoving party. Bunnell, 201 F. Supp. 2d at 170 (citing United States v. Ramos, 45 F.3d 1519, 1522-23 (11th Cir. 1995)). I see no reason to deviate from that standard in this case.

Discussion

I note first that there appears to be a substantial likelihood that the cooperating witness could be unavailable for trial. The trial of this matter is scheduled now for fall 2013, a substantial time in the future. Although the cooperating witness is currently being held in custody as a material witness, there are substantial constitutional and procedural concerns with holding in custody for a prolonged period of time a material witness who is not charged with any

crime in connection with these events. See 18 U.S.C. § 3144 (pertaining to continued detention of material witness.) Once the witness is no longer held as a material witness and is released into the community, his continued presence in the United States would be unlawful. His conviction for an offense which could make him excludable from the United States underscores the danger to the community that could result from his release from custody into the community within the United States and is a compelling reason why the deportation order should be enforced upon his release.

I realize that the defendants view the problem as one over which the Department of Justice has complete control because the witness's potential unavailability is of the government's own making. The AUSA prosecuting the case has represented that even though the witness will be in Mexico beyond the subpoena power of the United States at the time of trial, the Government will attempt to secure the witness's voluntary attendance at trial. (Reply at 2, ECF No. 103.) The question of the witness's deportation is far more complicated than the defendants would suggest and it is not within the complete control or discretion of the United States Attorney's Office given the reason for the witness's deportation and the need to insure that those with such criminal records who are not citizens of the United States are not allowed to remain in the country, at large in the community. The government's request to preserve the testimony of the material witness meets the first hurdle, because it appears that the witness may be unavailable for trial.²

² In United States v. Mann, 590 F.2d 361, 366-67 & n.5 (1st Cir. 1978), the First Circuit had before it a dispute not only about whether to allow such a deposition, but also whether the deposition should have been admitted in evidence at trial pursuant to Federal Rule of Evidence 804(a)(5). Though the time for assessing the availability of the witness certainly arises only at the trial stage, it must at least be contemplated at the pre-trial Rule 15 juncture. In this case, as pointed out by the government, it is particularly important to preserve the testimony by deposition given the nature of the underlying charges. Here, three of the defendants are charged with alien harboring under 8 U.S.C. § 1324(a) (allowing for the taking and admissibility of video-taped deposition testimony of deported witnesses in cases where alien harboring violations are alleged pursuant to subsection (d)). See United States v. Aguilar-Tamayo, 300 F.3d 562, 565-66 (5th Cir. 2002) (discussing relationship among Rule 15, Rule 804(a), section

I am also satisfied based upon the information provided by the Government that this witness's testimony is material to the issues that will be raised at trial. The witness's materiality extends not only to the alien harboring charges, but also to the drug cultivation charges and the overall conspiracy. If the witness's testimony was not preserved for trial it could substantially hinder efforts to ferret out the truth behind these allegations.

Finally, I must consider whether any countervailing factors would make the deposition unjust to the nonmoving parties. The defendants seemed to concentrate on this factor in their response. However, it also appears they misunderstood the proposed circumstances of the deposition and erroneously inferred that they would be expected to travel to Indiana to conduct the deposition. The government has arranged for the witness to be brought to Maine and the defendants and their attorneys will attend a court hearing in Bangor, Maine, to conduct the deposition. I do not find there to be anything unjust or oppressive about that procedure. In fact, the defendants will have the opportunity to assess an extremely material government witness months before trial and will have the added benefit of obtaining his sworn testimony, subject to cross-examination, long before trial. While it is true that they will have to prepare to examine this particular witness sooner rather than later, this case should be familiar to all of the defendants by now since they all, save the last defendant who has not yet appeared, have known of the charges since September 2012. They are not being asked to prepare for the deposition "on the fly."

1324, and the Confrontation Clause); United States v. Santos-Pinon, 146 F.3d 734, 735-36 (9th Cir. 1998) (affirming conviction where court admitted material witness depositions over a Confrontation Clause objection, but where the defendant failed to contend that the prosecution did not exert a good faith effort to locate them); United States v. Allie, 978 F.2d 1401, 1404 (5th Cir. 1992) (involving §1324(d) case; aliens who were detained material witnesses slated to be deported were ordered deposed pursuant to 18 U.S.C. § 3144).

Accordingly, I find that exceptional circumstances exist and I will grant the motion to depose the cooperating witness, subject to the following conditions.³ In the interests of justice, the videotaped deposition must take place in the courtroom. The trial judge will preside at the deposition to immediately rule upon objections. Defendants shall attend the deposition in accordance with Rule 15(c)(1) or (2). The government will provide all of the discovery required by Rule 15(e)(3). The government shall also make all of the necessary arrangements for recording and transcription of the deposition at the courthouse and shall be responsible for the cost of providing the defendants with a copy of the deposition transcript. The deposition will be scheduled in consultation with the clerk's office based upon the availability of the parties and the district court judge.

CERTIFICATE

Any objections to this Order shall be filed in accordance with Federal Rule of Criminal Procedure 59.

So Ordered.

March 22, 2013

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Case title: USA v. FRENCH et al

Date Filed: 09/14/2012

Assigned to: JUDGE
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³ As requested by the Government, these conditions are modeled on the ones set forth by Judge Singal of the District of Maine in United States v. Peter Dirosa, 2:11-cr-00193-GZS (ECF No. 85).

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