

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE**

UNITED STATES OF AMERICA)	
)	
v.)	Docket No. 2:06-CR-105-P-S
)	
JO MILLER)	

ORDER ON MOTION FOR VIDEOTAPED DEPOSITION

Before the Court is the Government’s Motion for Videotaped Deposition (Docket # 28). Through this Motion and pursuant to Federal Rule of Criminal Procedure 15, the Government requests permission to take the videotaped deposition of Maine Department of Environmental Protection (“MDEP”) Investigator Andy Slusarski.

Federal Rule of Criminal Procedure 15(a) provides 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). In deciding such a motion, the Court should consider whether, under the particular circumstances of the case, there are “exceptional circumstances” and whether it is in “the interest of justice” to take the deposition. See United States v. Mann, 590 F.2d 361, 365 (1st Cir. 1978); Fed. R. Crim. P. 15 advisory committee’s note.

In this case, the Defendant is charged with one count of transporting hazardous waste without a manifest in violation of 42 U.S.C. § 6828(d)(5). Through its motion, the Government submits that Mr. Slusarski was the lead investigator for the MDEP in the Department’s investigation and remediation of hazardous waste issues at Miller Industries generally and Building 14 in particular. The Government asserts that his testimony is essential to the Government’s case. In further support of its motion, the

Government states that Mr. Slusarski and his wife are in the process of adopting a child from China. The Chinese adoption authorities initially informed Mr. Slusarski that he and his wife would need to travel to China in June of 2007. On that basis, the Government requested and the Court granted that the case would be set for trial on May 21, 2007 (Docket # 22). The Government further states that Mr. Slusarski subsequently has been informed that he and his wife will need to travel to China on or about May 17, 2007. Thus, the Government seeks his deposition in order to preserve his testimony for trial in the event that he is not available to testify in person.

Defendant Jo Miller has filed a limited objection to the Motion (Docket # 29). Miller does not object to taking the deposition so long as her counsel has all discovery, potential evidence, Brady, Giglio and Jencks Act material seven working days prior to the deposition. In addition, Miller requests that consideration be given to the potential need to recall the witness during trial, and that he should be available via videoconferencing or telephonic means should the need arise during trial.

In deciding the present Motion, the Court is mindful that the primary objective is “the preservation of evidence for use at trial,” Fed. R. Crim. P. 15 advisory committee’s note, and that the Court’s discretion “is not broad and should be exercised carefully.” Mann, 590 F.2d at 365. In this case, however, the witness’s situation with regard to adopting a child from China qualifies as “exceptional circumstances.” Further, given Mr. Slusarski’s role in the investigation, it is in the interest of justice to preserve his testimony for trial, should he be unable to attend. Notably, Miller has not claimed that this case lacks exceptional circumstances or that it would not be in the interest of justice to take the deposition.

With regard to the Defendant's request for all discovery, potential evidence, Brady, Giglio and Jencks Act materials, the Court notes that it has been informed by the Clerk's Office that the Government has provided all discovery and Brady materials to Defendant. In order to take the deposition, the Government must provide any Giglio and Jencks Act material related to this witness to the Defendant by 5:00 p.m. on April 25, 2007. After this material has been provided, the Government may take the deposition testimony of Mr. Slusarski on or after April 30, 2007.

Defendant additionally requests that the Government provide an assurance that the witness be available via videoconferencing or telephonic means should the need arise during trial. This request is virtually impossible to guarantee in advance and it is similarly impossible to weigh the Defendant's hypothetical need that may (or may not) arise during trial, especially prior to the taking of the deposition. Therefore, on the current record, the Court DENIES WITHOUT PREJUDICE this Defense request. Nonetheless, Defendant is certainly free to renew her request at any point prior to or during trial based on any actual need that arises.

Therefore, the Motion for Videotaped Deposition (Docket # 28) is GRANTED, so long as the Government provides any Giglio and Jencks Act material related to this witness to the Defendant by 5:00 p.m. on April 25, 2007. After this material has been provided, the Government may take the deposition testimony of Mr. Slusarski on or after April 30, 2007.

SO ORDERED.

/s/ George Z. Singal
Chief United States District Judge

Dated at Portland, Maine, this 23rd day of April, 2007.

Defendant

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Pending Counts

UNLAWFUL
TRANSPORTATION OF
HAZARDOUS WASTE
WITHOUT A MANIFEST;
42:6928(d)(5) and 18:2
(1)

Disposition

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

**Highest Offense Level
(Terminated)**

None

Complaints

Disposition

None

Plaintiff

USA

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