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Expert Analysis

Foreign Evidence Served On Silver Platter for U.S. Prosecutions

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In our last column, we described how certain policy developments and memoranda of understanding between U.S. federal agencies will likely lead to an increase in market manipulation investigations.[1] In this column, we describe how cooperation between domestic and foreign law enforcement agencies can provide U.S. prosecutors with evidence for use in prosecutions that is not subject to U.S. constitutional protections. This practice has been likened to foreign law enforcement agencies serving up evidence on an "international silver platter" for U.S. prosecutions.

Two recent opinions from the U.S. Court of Appeals for the Second Circuit describe the relevant issues and standards and reaffirm that even U.S. citizens have only limited means of excluding evidence obtained from foreign law enforcement agencies. Moreover, scores of mutual legal assistance treaties between the United States and other countries and memoranda of understanding between United States and foreign law enforcement agencies indicate that such cooperation will likely increase in the future.

'United States v. Lee'

On June 7, 2013, the Second Circuit issued its opinion in *United States v. Lee* affirming the conviction of American citizen Stephen Lee in the Eastern District of New York on charges of smuggling drugs from Jamaica into the United States.[2] Lee was the subject of simultaneous investigations by the U.S. Drug Enforcement Agency (DEA) and the Jamaican Constabulary Force Narcotics Division Vetted Unit (VU). The VU began an investigation of an international drug trafficking ring of which Lee was a member, and then triggered the DEA's investigation by notifying it that the VU had intercepted a shipment of marijuana bound for the United States.

The VU, in a subsequent investigation, received authorization from a Jamaican court to record certain phone lines. Recordings captured Lee, who was not a named target of the investigation, speaking about U.S.-bound drug shipments. Some of these recorded conversations were turned over to the DEA and presented to the grand jury that indicted Lee.[3]

Lee sought to suppress the recordings at trial on the grounds that the VU had acted as an agent of the DEA. Under Second Circuit precedent, evidence obtained in foreign jurisdictions may be subject to U.S. constitutional protections if the foreign agency that collects the evidence acts as an agent of the U.S. agency, or if the cooperation is designed to avoid U.S. constitutional protections.[4] Significantly, in 2004 the United States and Jamaica entered into a memorandum of understanding (MOU) under which Jamaican authorities intercept phone calls with approval from Jamaican courts for use in investigations in both countries. Nevertheless, the District Court held that the VU had acted independently and that the existence of an MOU and information sharing did not make the VU an agent of the DEA.

Lee also sought to compel the prosecution to turn over the documents the VU relied on in its wiretap application to the Jamaican court in an effort to prove an agency relationship between the VU and DEA. The government, however, did not possess the materials and was not able to acquire them from the VU despite good faith efforts. The District Court held that the government's good faith efforts satisfied its obligations and denied Lee's motion to compel.[5]

On appeal, the Second Circuit affirmed based on a lack of clear error by the District Court. The court noted that the federal wiretap statute "does not apply outside the United States."[6] The Second Circuit also held that the exclusionary rule under which evidence seized in violation of the Fourth Amendment is excluded, typically does not apply to evidence obtained from searches abroad by foreign law enforcement agencies.[7] The Second Circuit thus confirmed that the "international silver platter doctrine" is still applicable. Under this doctrine, foreign law enforcement agencies are not subject to Fourth

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Amendment restrictions and can serve up unconstitutionally-obtained evidence to U.S. prosecutors on a "silver platter."[8]

The circuit rejected the argument that the "close, ongoing and formalized collaboration" between the VU and DEA made the VU an agent of the DEA and thus subject to Fourth Amendment restrictions. The court noted that the VU investigation of the trafficking organization was commenced first and that the VU initiated the wiretaps on its own accord and not in consultation with the DEA.[9]

Somewhat worrisome was the Second Circuit's response to Lee's argument that the prosecution should be compelled to turn over the documents underlying the VU's wiretap application to a Jamaican court. The government represented that it was not in possession of the documents and that it requested but did not receive them from the VU. The Second Circuit held that Rule 16 of the Federal Rules of Criminal Procedure does not require the government to turn over materials that are not in its "possession, custody, or control" and that the government made the required good faith effort to obtain them.[10] Lee countered that without the underlying documents, he could not assess whether they were properly obtained. The circuit acknowledged that the Fourth Amendment exclusionary rule can bar overseas evidence in two circumstances—where the conduct of foreign officials was so egregious that it would "shock the judicial conscience," or where the nature of the cooperation between the United States and foreign agencies implicated Fourth Amendment restrictions.

The court, however, then held that "even if [the VU] somehow operated improperly under Jamaican law in obtaining the electronic surveillance of Lee—and the record belies any such suggestion—nothing in this record shows that they operated in a manner that would implicate either of the limited exceptions."

The Second Circuit's holding seems to present a classic Catch-22. Case law makes clear that egregious conduct by foreign law enforcement agencies or close coordination with domestic law enforcement agencies subjects overseas evidence to Fourth Amendment restrictions, but in *Lee* the court rejected such arguments without documents sufficient to fully assess the conduct of the foreign law enforcement agencies. This presents a gaping hole in Fourth Amendment restrictions regarding evidence obtained overseas. Not only can foreign law enforcement agencies serve up evidence on a silver platter for domestic prosecutions, but they can also prevent any real exclusionary challenge to the evidence by withholding materials underlying their actions. No matter how improper the actions of foreign agencies might be in obtaining evidence overseas, defendants may be unable to base a Fourth Amendment challenge simply because the same agencies withhold certain materials. The troubling potential of this holding becomes more apparent in another Second Circuit opinion involving overseas evidence decided only months after *Lee*.

Two opinions from the Second Circuit reaffirm that even U.S. citizens have only limited means of excluding evidence obtained from foreign law enforcement agencies.

'United States v. Getto'

On Sept. 9, 2013, the Second Circuit issued its opinion in *United States v. Getto*.[11] Matthew Getto—an American citizen—was convicted for mail and wire fraud based on his role in a conspiracy to defraud Americans through a lottery telemarketing scheme. The scheme operated out of boiler rooms located in Israel. In 2008 the FBI began an investigation into the conspiracy based on a tip, and ultimately made a request pursuant to the United States' Mutual Legal Assistance Treaty with Israel (MLAT) for the Israeli National Police (INP) to investigate the conspiracy.

The MLAT request included phone numbers associated with the conspiracy, which the INP used to locate a boiler room in Israel. The INP then obtained authorization from an Israeli court to search the boiler room and install a surveillance device in it. Some of the evidence obtained was used to support an arrest warrant for Getto in the United States. In the United States, Getto argued for suppression based on the joint efforts of the FBI and INP and egregious conduct by the INP. The District Court denied the application, and Getto was convicted.[12]

On appeal, the Second Circuit began by noting that in *Lee* it had recently reaffirmed the "international silver platter doctrine" and recognized the two circumstances—egregious conduct by foreign law enforcement agencies in obtaining evidence, or close cooperation between U.S. and foreign law enforcement agencies—that might impose Fourth Amendment restrictions on evidence obtained overseas. Getto argued that both circumstances were present.

As for egregious conduct, Getto argued that the INP searched the boiler room before it had court authorization. Getto offered only suspicions to support this contention, but the Second Circuit, accepting them for argument's sake, held that such conduct was merely illegal but not so egregious that it could "shock the judicial conscience." The Second Circuit wrote, "We have accordingly held that conduct did not shock the judicial conscience when, for example, there was no act of torture, terror, or custodial interrogation of any kind, or when there was no claim of rubbing pepper in the eyes."[13] The court added that this standard comes not from the Fourth Amendment, but from "a federal court's authority to exercise its supervisory powers over the administration of federal justice."[14]

As for the Fourth Amendment argument, the court reiterated that such restrictions attach only where the foreign agency acted as an agent of the U.S. agency or the cooperation was designed to evade constitutional protections. The court held that an MLAT is not enough to render a foreign law enforcement agency an agent of a U.S. law enforcement agency. Instead, "American officials must play some role in controlling or directing the conduct of the foreign parallel investigation."

The court explained that the exclusionary rule under the Fourth Amendment exists to "inculcate a respect for the

Constitution in the police of our own nation." The court held that there was no evidence that the FBI had controlled the INP's actions. Moreover, there was no evidence that the FBI made the MLAT request with the intent to evade U.S. constitutional protections.[15] The Second Circuit thus held that the District Court did not err in declining to suppress the evidence obtained overseas.

Troubling Implications

The Second Circuit's opinions in *Lee* and *Getto* make clear that the grounds upon which to challenge evidence obtained overseas by foreign law enforcement agencies in U.S. prosecutions are limited and narrow. Moreover, *Lee* and *Getto* reveal that defendants can essentially be denied the means to mount such challenges, and that even if they are able to mount such challenges federal courts will overlook conduct by foreign agencies that would be plainly illegal if done by a U.S. agency.

Moreover, the legal standards described, reaffirmed and applied in both *Lee* and *Getto* can seem almost glib. To paraphrase, foreign law enforcement agents can essentially serve up on a platter evidence for U.S. prosecutions (that would otherwise be excluded if obtained by a domestic agency) unless the foreign agents obtained the evidence by rubbing pepper in someone's eyes. Given that in many countries a government agent rubbing pepper in someone's eyes is a real possibility, these standards may warrant more sober scrutiny by federal courts. This is particularly so when the "shocks the conscience" standard is—by the Second Circuit's own description—apparently a purely discretionary power vested in federal courts.

For example, although the Fourth Amendment and the Federal Rules of Criminal Procedure may require only that U.S. prosecutors make a "good faith" effort to obtain foreign evidence sought by a defendant, perhaps the fact that the defendant cannot obtain it and thus cannot even mount a Fourth Amendment challenge warrants closer scrutiny by a federal court. Indeed, if another basis for an exclusionary challenge is an intent by the domestic and foreign agencies to evade Fourth Amendment restrictions, the mere fact that the foreign agency declines to provide information necessary to assess the agencies' true intent might support an inference that the intent was improper.

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If federal courts can exclude evidence based on a subjective interpretation of what constitutes "egregious" conduct, federal courts in certain circumstances can and should demand more information about how foreign agencies obtained evidence they supply to U.S. prosecutors and perhaps examine in camera or even order disclosure of communications between the involved law enforcement agencies.

The issues involved in the use of foreign evidence in our courts require greater attention because cooperation among domestic and foreign law enforcement agencies will only increase in the future. The United States currently has mutual legal assistance treaties with 56 countries. Also in force are a number of EU instruments and protocols that supplement or create mutual legal assistance relationships between the United States and every EU member. The United States has signed and ratified UN conventions relating to crime prevention, and the United States has a mutual legal assistance agreement with China. The United States also has "asset sharing agreements"—such as the one with Jamaica referenced in *Lee*—with seven countries. The U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) also has memoranda of understanding or letter understandings with the financial intelligence units from 47 countries.[16]

In short, U.S. prosecutors have scores of avenues from which to obtain overseas evidence from foreign agencies. The United States also continues to negotiate with other countries for additional mutual legal assistance treaties, memoranda of understanding, and other methods of information sharing for law enforcement purposes. Thus, U.S. prosecutors will increasingly rely on evidence obtained overseas by foreign law enforcement agencies. The ease with which information obtained overseas can circumvent the Fourth Amendment in U.S. prosecutions warrants heightened scrutiny of the close cooperation between foreign and domestic law enforcement agencies. Defense attorneys must be wary of evidence obtained overseas and creative in devising effective means to challenge it.

1. Nicholas M. De Feis and Philip C. Patterson, "Foreign Price-Fixing Probes Spur U.S. Inquiries," N.Y.L.J., July 31, 2013, available at http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202613158051&Foreign_PriceFixing_Probes_Spur_US_Inquiries&slreturn=20130825155305.
2. 723 F.3d 134 (2d Cir 2013).
3. Id. at 137-38.
4. *United States v. Maturo*, 982 F.2d 57, 60 (2d Cir. 1992).
5. *Lee*, 723 F.3d 137-38.
6. Id. at 139 (citing *Maturo*, 982 F.2d at 60; 18 U.S.C. §§2510-2520).
7. Id. at 139 (citing *United States v. Janis*, 428 U.S. 433, 455 n.31 (1976).
8. Id. at 139 n.3 (recounting history of the "international silver platter doctrine).
9. Id. at 141.
10. Id. at 141.
11. No. 11 CR 1237, 2013 U.S. App. Lexis 18739 (2d Cir. Sept. 9, 2013).
12. 2013 U.S. App. Lexis 18739 at *6-9.
13. 2013 U.S. App. Lexis 18739, at *15-16 (internal quotations and citations omitted).
14. Id. at *17.
15. Id. at *21-28.
16. A summary of these agreements is available at http://www.state.gov/j/inl/rls/nrcrpt/2012/vol2/184110.htm.