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February 27, 1978

Honorable Tomas Amenabar
Minister Counselor
Embassy of Chile
1732 Massachusetts Ave., N.W.
Washington, D.C. 20036

Re: Letters Rogatory

Dear Mr. Minister:

The Chief Judge of the United States District Court for the District of Columbia has addressed a "Request for International Judicial Assistance" to the Supreme Court of Chile. This document, better known as a letter rogatory, has been transmitted by the U.S. Department of State to the Government of Chile, and released publicly in the United States with a "Non-Paper" of explanation of the action. The letter rogatory requests the Supreme Court of Chile to take testimony from two witnesses in Chile, using written questions proposed by the District Court.

Question Raised - You have asked our opinion as to the legality of the letter rogatory. After reviewing the document and the American law, I am satisfied that the letter rogatory is properly prepared and legal under American law.

Federal Courts may authorize depositions in foreign countries under Rule 28(b) of the Federal Rules of Civil Procedure. (Annex A) This rule of evidence applies to criminal proceedings as well as civil proceedings. United States v. Reagan, 453 F.2d 165 (1971) (Annex B) You will note that three procedures are prescribed for taking depositions abroad - one of them by letter rogatory.

The Department of State has the power to transmit such letter rogatory to the foreign tribunal. 28 U.S.C.A. §1781(a)(2) (Annex C) You will note that the statute does not prohibit direct transmittal of such letter rogatory from the American court to the foreign court, however, the American Government seems to have acceded to the suggestion of the embassy that diplomatic channels be used.

Case Law controlling the substance and form of letters rogatory is well set forth in United States v. Reagan, supra. This case is particularly appropriate to our situation. It was a criminal action before a U.S. District Court. A letter rogatory was issued to obtain evidence prior to the handing down of any indictment. Note the summary of facts on page 165. The opinion of the Court is an excellent presentation of American law regarding the inherent power of the American courts to issue letters rogatory. (Page 172)

The basic issue regarding the letter rogatory was whether such letter could be issued prior to the indictment of the defendant. (Our case also) The District Court allowed a letter rogatory to be issued prior to indictment, as well as after. (Page 173)

There was a difference in the facts of the Reagan case from ours - the evidence sought was documents already in existence, not testimony. The Court made it clear that the letter rogatory could be directed toward either. (footnote, page 173)

Form of Letter Rogatory - The District of Columbia Court has followed the basic style of the form of letter rogatory issued by the Ohio District Court in 1971. (footnote, page 168) I am satisfied that the style of the D.C. Court's letter rogatory is satisfactory. A degree of flexibility in the wording is permissible as the illustration in the Reagan opinion shows. The subject letter rogatory is properly addressed, states the charges in the pending investigation, identifies the proposed witnesses, sets forth their addresses, and justifies the relevence of the desired testimony to the case in hand. Paragraph 8 of the current letter rogatory meets the minimum requirement, though it is a bit ungracious when one

compares it to the Reagan letter which assures the German court that "...simular assistance to the tribunals of the Federal Republic of Germany has been and is being, rendered..."

Supplemental Questions - Oral questioning is not usual in the case of a letter rogatory. Such manner of deposing a witness abroad is more appropriate on "notice" (Annex A). It is clear, however, that the American Government wanted to obtain this testimony through the method most appropriate under Chilean law, presumably letters rogatory. Also, the letters rogatory approach makes it possible to compel the attendance of the witness. I would recommend that the trial court in Chile permit the submission of additional questions in writing through the judge, if the judge finds such procedure appropriate. In my opinion, if this were done it would not violate American law or procedure. The U.S. District Court would be free to decide whether to allow such testimony to be presented as evidence in the trial. An aggressive defense attorney might be able to convince the Court that since strict compliance with Rule 28 had not been followed, such testimony should be utilized for discovery purposes only.

Verbatim Recording - I would recommend that such a transcript of the questions and answers be authorized by the court in Chile. I understand that the judge instead might choose to prepare his own summary of the testimony produced in response to the questions of the American court. I fear that a summary would be subject to political attack by the critics of Chile who would question whether it truly reflected the testimony taken in the court.

Conclusion - In my opinion the letter rogatory of the U.S. District Court of the District of Columbia is legal. I would recommend full cooperation by the Government and the courts of Chile, even though there are technicalities upon which reliance could be made to reject the letter.

Cordially yours,

E Pendleton

EDMUND PENDLETON

EP/jdm

quence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

[*See main volume for text of (f)*]

As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 30, 1970, eff. July 1, 1970.

Rule 27. Depositions Before Action or Pending Appeal

(a) Before Action.

[*See main volume for text of (1) to (3)*]

(4) Use of Deposition.—If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 32(a).

[*See main volume for text of (b) and (c)*]

As amended Mar. 1, 1971, eff. July 1, 1971.

Rule 28. Persons Before Whom Depositions May be Taken

[*See main volume for text of (a)*]

(b) In Foreign Countries. In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath

or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

As amended Jan. 21, 1963, eff. July 1, 1963.

Rule 29. Stipulations Regarding Discovery Procedure

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court.

As amended Mar. 30, 1970, eff. July 1, 1970.

Rule 30. Depositions Upon Oral Examination

(a) When Depositions may be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b) (2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Notice of Examination: General Requirements; Special Notice; Non-Stenographic Recording; Production of Documents and Things; Deposition of Organization.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

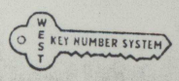
If a party shows that when he was served with notice under this subdivision (b) (2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

ANNEX B

The judgment below is reversed. The court below is directed upon remand to make findings of fact and conclusions of law based upon the state record before it, or, if necessary, a record supplemented by evidentiary hearings before that court.

Reversed and remanded.



UNITED STATES of America, Plaintiff-Appellee,

v.

Howard D. REAGAN, Defendant-Appellant.

No. 71-1262.

United States Court of Appeals, Sixth Circuit.

Dec. 9, 1971.

Defendant was convicted in the United States District Court for the Northern District of Ohio, Eastern Division, Thomas D. Lambros, J., of voluntary manslaughter, and he appealed. The Court of Appeals, William E. Miller, Circuit Judge, held that where a seaman was killed aboard an American vessel in a German harbor, German authorities were called, defendant was taken into custody, defendant was judicially committed to a state mental institution in Germany, defendant remained in German institution until after his ship returned to German harbor, a judge of appropriate German county court refused to issue a warrant of arrest for crime of murder sought by German prosecutor, and defendant was released, and returned to the United States, such preliminary proceeding did not constitute an "assertion of jurisdiction" by local sovereign which would operate to oust jurisdiction of flag sovereign, and thus the United States District Court had proper subject matter jurisdiction over prosecution for federal murder with death penalty, in which a verdict of guilty of lesser included offense of manslaughter was returned.

Affirmed.

1. Criminal Law ⇐97(3)

In absence of any controlling treaty provision, and any assertion of jurisdiction by territorial sovereign, it is duty of courts of the United States to apply to offenses committed by its citizens on vessels flying its flag, its own statutes, interpreted in light of recognized principles of international law.

2. Criminal Law ⇐100(1)

Where a seaman was killed aboard an American vessel in a German harbor, German authorities were called, defendant was taken into custody, defendant was judicially committed to a state mental institution in Germany, defendant remained in German institution until after his ship returned to German harbor, a judge of appropriate German county court refused to issue a warrant of arrest for crime of murder sought by German prosecutor, and defendant was released, and returned to the United States, such preliminary proceeding did not constitute an "assertion of jurisdiction" by local sovereign which would operate to oust jurisdiction of flag sovereign, and thus the United States district court had proper subject matter jurisdiction over prosecution for federal murder with death penalty, in which a verdict of guilty of lesser included offense of manslaughter was returned. 18 U.S.C.A. §§ 7, 1111, 1112.

this defendant, those issues already disposed of are res judicata in a collateral proceeding such as habeas corpus *or under Criminal Procedure Rule 1.850.*" (citations omitted) (Emphasis added)

erhaven about April 1, 1967. On April 5, 1967 a Judge of the appropriate German County Court refused to issue a Warrant of Arrest for the crime of murder sought by the German Prosecutor, finding no probable cause for an arrest.

After his release in Bremen, Reagan returned to the Kennedy Airport where, though no charges were pending against him, he was met by agents of the Coast Guard and F.B.I. and told to return to his home in Cleveland and not to sail on foreign voyages. Thereafter, the U.S. Coast Guard in Bremen, acting for the F.B.I., requested the appropriate German authorities to release to them the records pertaining to the Reagan matter. This request was denied on the ground that under German law such records may not be released without the consent of the accused, a consent which Reagan refused to give. On November 3, 1967 Judge James C. Connell of the United States District Court for the Northern District of Ohio, Eastern Division, requested from the "appropriate judicial authorities in Land Bremen, Federal Republic of Germany" the records sought by the F.B.I. and the Coast Guard. The request in the form but not in the words of a "letter rogatory" is set forth below.[1] Pursuant to this request, the German file was sent to the district court and made available to the office of the U. S. Attorney in early 1968.

On September 12, 1969 a grand jury indictment was returned. On September 15, 1969 it was opened, docketed and a warrant for the appellant's arrest was issued. He was then taken into custody. The trial and appellant's conviction followed. From this conviction appellant perfected his appeal.

Appellant makes numerous contentions. He asserts: the district court was without subject matter jurisdiction; the indictment was deficient in that it failed to allege an essential element of jurisdiction; the delay in prosecuting him constituted a denial of his due process rights under Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970); the request for international judicial assistance was without the jurisdiction of the

1. IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION
REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE

To the appropriate judicial authorities in the Land Bremen, Federal Republic of Germany:

There is currently pending within the jurisdiction of this Court an investigation into an alleged homicide committed on December 16, 1966, by Howard Reagan, an American National, on Joseph J. Speidell, at Bremerhaven, Germany. It is this Court's understanding that the Prosecutor in Bremerhaven, Federal Republic of Germany conducted an investigation of the alleged offense beginning in the month of December, 1966.

The United States authorities in this district are currently conducting an investigation of the same incident. It would be most helpful, and in the furtherance of justice, if the investigative files of the German authorities in Bremerhaven, including, but not limited to, oral or written statements of all witnesses, reports of investigative officers, reports of any autopsy or post-mortem medical examination of the deceased, medical or psychiatric reports from any examination of the suspect (Reagan), any photographs, and any oral or written statements of the suspect (Reagan), could be made available to the United States investigative authorities. To that end, a request is hereby made that the pertinent files and exhibits, currently in the possession or in the custody of the German authorities in Bremerhaven, be made available to this Court.

The Courts of the United States are authorized by statute, 28 U.S.C. 1781, et seq., to extend similar assistance to the tribunals of the Federal Republic of Germany. Such assistance has been, and is being, rendered; thus, reciprocity is assured.

The Court assures the judicial authorities in the Land Bremen that any records or exhibits which may be made available, pursuant to this request, will be promptly returned, after they have served their purpose.

The Court takes this opportunity to extend to the Judicial authorities of the Land Bremen the assurance of its highest consideration.

Nov. 3, 1967

s/ James C. Connell
JUDGE, UNITED STATES
DISTRICT COURT

Since there is no "controlling treaty provision" the resolution of the question before us turns upon whether there has been "any assertion of jurisdiction by the territorial sovereign." It is our view that there was no "assertion of jurisdiction" by Germany and, therefore, that the district court was not without jurisdiction.

The record shows that Reagan was taken into custody by German authorities on December 16, 1966, and judicially committed to a German mental institution on December 17, 1966, when his ship went to sea. He was subsequently released (after the return of the *SS Thunderbird* to port) and on April 5, 1967 the appropriate local court refused to issue a warrant for Reagan's arrest requested by the local prosecutor, finding that there was no probable cause for the issuance of such a warrant. The German court had before it the results of a rather extensive police investigation.

[2] We do not believe that this preliminary proceeding constituted an "assertion of jurisdiction" by the local sovereign which would operate to oust the jurisdiction of the flag sovereign. It would appear that for whatever its reasons, the German court declined to "assert jurisdiction" within the meaning of *Flores, supra*. The application of the doctrine of "concurrent jurisdiction" is based on principles of comity. Assertion by the court below of its own jurisdiction in no way infringed upon the jurisdiction of the German court. The appropriate German authorities carefully scrutinized the matter and no formal charges were ever brought. There was no determination of Reagan's guilt or innocence. A different case would be presented if Reagan had been brought to trial in Germany or perhaps even if he had been indicted in Germany. We hold that the district court did have proper subject matter jurisdiction.

LETTERS ROGATORY

The appellant argues that the district court exceeded its jurisdiction in requesting international judicial assistance through the medium of a "letter rogatory" since there was no "case or controversy" before it, and that it therefore erred in not suppressing the fruits of this request. We must disagree al-

> to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion. This is the doctrine of the law of nations, clearly laid down by writers of received authority, and entirely conformable, as it is supposed, with the practice of modern nations. If a murder be committed on board of an American vessel by one of the crew upon another or upon a passenger, or by a passenger on one of the crew or another passenger, while such vessel is lying in a port within the jurisdiction of a foreign State or sovereignty, the offense is cognizable and punishable by the proper court of the United States in the same manner as if such offense had been committed on board the vessel on the high seas. The law of England is supposed to be the same. It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must, doubtless, be answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself. 6 Webster's Works, 306, 307.

though concededly the contention is not without some support.[3]

28 U.S.C. § 1781 recognizes, impliedly at least, the power of federal courts to transmit letters rogatory to foreign tribunals.

> (a) The Department of State has power, directly, or through suitable channels—
>
> (1) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution; and
>
> (2) to receive a letter rogatory issued, or request made, by a tribunal in the United States, to transmit it to the foreign or international tribunal officer, or agency to whom it is addressed, and to receive and return it after execution.
>
> (b) This section does not preclude—
>
> (1) the transmittal of a letter rogatory or request directly from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner; or
>
> (2) the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner.

In United States v. Staples, 256 F.2d 290 (1958), the Ninth Circuit pointed correctly to the source of a court's power to issue letters rogatory:

> This Court, like all courts of the United States, has *inherent* power to issue Letters Rogatory. The manner of taking proof is left to our discretion. 256 F.2d at 292. (Emphasis added.)

We find no definitive authority, however, as to precisely when this power attaches in a given case.

The opinion of the Court of Appeals in In re Pacific Ry. Comm'n, 32 F. 241 (Cir. Ct. N.D.Cal., 1887), is suggestive though not squarely in point. There the Court held that the Pacific Railway Commission created by Act of Congress did not have the power to issue letters rogatory. Speaking of this instrument, the Court stated:

> There are certain powers inherent in all courts. The power to preserve order in their proceedings, and to punish for contempt of their authority, are instances of this kind. And by jurists and text writers the power of the courts of record of one country, as a matter of comity, to furnish assistance, so far as is consistent with their own jurisdiction, to the courts of another country, by taking the testimony of witnesses to be used in the foreign country, or by ordering it to be taken before a magistrate or commissioner, has also been classed among their inherent powers. "For by the law of nations," says Greenleaf, "courts of justice of different countries are bound mutually to aid and assist each other, for the furtherance of justice; and hence, when the testimony of a foreign witness is necessary, the court before which the action is pending may send to the court within whose jurisdiction the witness resides a writ, either patent or close, usually termed a letter rogatory, or a commission *sub mutuae vicissitudinis obtentu ac in juris subsidium*, from those words contained in it. By this instrument the court abroad is informed of the pendency of the cause, and the names of the foreign witnesses, and is requested to cause their depositions to be taken in due course of law, for the furtherance of justice, *with an offer on the part of the tribunal making the request to do the like for the other in a similar case.*" Treatise on Evidence, vol. 1, § 320. The comity in behalf of which this power is exercised cannot, of course, be invoked by any mere inves-

3. See e. g., 3 Benedict on Admiralty, § 400, p. 93.

tigating commission, 32 F. at 256, 257. (Emphasis added.)

And in the preceding paragraphs the Court quoted Chief Justice Marshall in Osborn v. United States Bank, 9 Wheat. 738, 819, 6 L.Ed. 204:

> This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States. 32 F. at 256.

In a footnote the Court stated:

> The judicial power of the courts of the United States extending to the cases and controversies enumerated in the constitution, their jurisdiction necessarily covers all proceedings taken from the formal commencement of such cases and controversies to the execution of the judgments rendered therein. *A certain class of offenders can only be prosecuted in the federal courts through the indictment or presentment of a grand jury.* Article 5 of Amendments. *Over, therefore, the proceedings of such bodies those courts can exercise jurisdiction, and in aid of their deliberations can issue process, and compel the attendance of witnesses, and require them to answer any proper questions propounded to them, and in case of refusal may punish them as for a contempt.*
>
> Proceedings to perpetuate testimony, where litigation is expected or apprehended, are within the ordinary jurisdiction of courts of equity, and come under the designation of "cases in equity" in the constitution. 32 F. at 257 n. 1. (Emphasis added.)

Similarly, it would seem that preliminary steps taken by a federal court to obtain evidence from a foreign power, in aid of its jurisdiction in criminal cases, would be within its Article III power over cases and controversies.

[3] Absent substantial and controlling authority, we are unwilling to hold here that a court may only issue a letter rogatory after an indictment is returned in a criminal case. We are not persuaded that the issuance of such an ex parte instrument is incompatible with the fair operation of our system of justice.[4]

It should be pointed out that the German record was used not as the principal part of the prosecution's case, but for purposes which appear to have been limited in nature. For example, it may be assumed that by use of the record the government obtained the name of the police official Volkmann (although it may have obtained this name from other sources). His testimony, however, was given at the trial below and no statement or testimony on his part was read from the record which had been procured pursuant to the letter rogatory. Further, as possible fruits of the request, appellant points to certain fingerprints and photographs of the victim's room which were

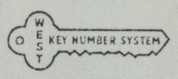
4. The invocation of judicial power prior to formal charges being made or before filing suit is indeed a common practice in our jurisprudence, examples being orders for the taking of testimony de bene esse; and the issuance of search warrants to aid possible criminal prosecutions. Other examples are plentiful. The supervisory power of courts over grand jury proceedings, as pointed out by the court in In re Pacific Ry. Comm'n, *supra*, is illustrative of the same concept. In the present case while the instrument issued by the district judge to obtain the foreign record is not formally characterized as a "letter rogatory," we think that such was its real meaning and intent. That its function was to obtain documents instead of the testimony of witnesses is of no significance in our view. If it be assumed that German law required the appellant's consent before the record could be released, appellant would have no right to complain because Germany saw fit, in the interest of comity, to waive the requirement of its own law.

used at the trial. While it must, therefore, be assumed that the foreign record was of some value to the government, an examination of the entire record of the trial below indicates to us that if error was committed on the part of the court in requesting the foreign record and allowing its limited use at trial, such error must be regarded as "harmless." Ample testimony was presented to the jury, apart from the foreign record, concerning Reagan's appearance and actions immediately following the stabbing and his own incriminating statements made in the presence of shipmates. Such evidence appears to us to have been decisive in linking the appellant with the murder on shipboard.

Appellant's further contentions enumerated above have been carefully considered and we find them to be without merit.

The judgment of the district court is therefore

Affirmed.



UNITED STATES of America, Plaintiff-Appellee,

v.

Thomas ANDERSON (aka Workman), Defendant-Appellant.

UNITED STATES of America, Plaintiff-Appellee,

v.

Samuel LOVING, Defendant-Appellant.

Nos. 71-1616, 71-1647.

United States Court of Appeals, Ninth Circuit.

Dec. 20, 1971.

Defendants were convicted in the United States District Court for the District of Arizona, C. A. Muecke, J., of theft of United States mail, and they appealed. The Court of Appeals, Choy, Circuit Judge, held that all data necessary to show probable cause for issuance of a federal search warrant must be contained within four corners of a written affidavit given under oath.

Reversed.

1. Searches and Seizures ⇐3.6(2)

All data necessary to show probable cause for issuance of a federal search warrant must be contained within four corners of a written affidavit given under oath. Fed.Rules Crim.Proc. rule 41(c), 18 U.S.C.A.

2. Searches and Seizures ⇐3.6(2)

All facts establishing probable cause must be presented to federal warrant-issuing official so that he may adequately perform his impartial function of determining probable cause upon a consideration of all facts. U.S.C.A.Const. Amend. 4; Fed.Rules Crim.Proc. rule 41(c), 18 U.S.C.A.

3. Searches and Seizures ⇐3.6(2)

Information known to affiant which is not presented to federal warrant-issuing official is irrelevant to a determination of probable cause. U.S.C.A.Const. Amend. 4; Fed.Rules Crim.Proc. rule 41(c), 18 U.S.C.A.

4. Criminal Law ⇐394.5(2)

Defendant who had rented and was staying in motel room that was searched and codefendant who was legitimately present there each had standing as a "person aggrieved" to move for suppression of illegally seized evidence. Fed. Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

5. Post Office ⇐49(12)

Evidence was insufficient to sustain conviction for theft of United States mail. 18 U.S.C.A. § 1708.

Noel K. Dessaint (argued), of Harrison, Myers & Singer, Phoenix, Ariz., for Thomas Anderson.

ANNEX C

miralty subject to Federal Rules of Civil Procedure, with certain exceptions, deposition of a witness may be taken in admiralty for purposes of discovery even though it may not be usable on trial. Id.

5. Witness quashing subpoena

Although a witness, not a party, may not be personally represented by a proctor during the taking of his deposition, he cannot be denied right to move to quash an invalid or oppressive subpoena. Application of A. Pellegrino & Son, D.C. N.Y.1950, 11 F.R.D. 209.

6. Expenses and fees

Where, in admiralty action in district of Delaware, libellant and cross-respondent gave notice to take depositions of various witnesses de bene esse in Honolulu, government, as respondent and cross-libellant, was not entitled to protective order providing that libellant and cross-respondent pay travel expenses to enable government counsel to attend the depositions in Honolulu. Standard S. S. Co. v. U. S., D.C.Del.1954, 126 F.Supp. 586.

When depositions are taken de bene esse in admiralty, opponent attends at his own expense, and admiralty court does not have power to condition an order for depositions at a distant place on payment of counsel fees and traveling expenses to adverse party. Id.

§ 1781. Transmittal of letter rogatory or request

(a) The Department of State has power, directly, or through suitable channels—

(1) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution; and

(2) to receive a letter rogatory issued, or request made, by a tribunal in the United States, to transmit it to the foreign or international tribunal, officer, or agency to whom it is addressed, and to receive and return it after execution.

(b) This section does not preclude—

(1) the transmittal of a letter rogatory or request directly from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner; or

(2) the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner.

June 25, 1948, c. 646, 62 Stat. 949; Oct. 3, 1964, Pub.L. 88-619, § 8(a), 78 Stat. 996.

Historical and Revision Notes

Reviser's Note. Based on Title 28 U.S.C., 1940 ed., § 653 (R.S. § 875; Feb. 27, 1877, c. 69, § 1, 19 Stat. 241; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167).

Word "officer" was substituted for "commissioner" to obviate uncertainty as to the person to whom the letters or commission may be issued.

The third sentence of section 653 of Title 28, U.S.C., 1940 ed., providing for admission of testimony "so taken and returned" without objection as to the method of return, was omitted as unnecessary. Obviously, if the method designated by Congress is followed, it cannot be objected to.

The last sentence of ... 28, U.S.C., 1940 ed., rela... atory from courts of ... incorporated in section ...

The revised section ... sions of section 653 of ... ed., which applied only ... the United States was a ... terested, so as to insure ... of taking foreign deposi...

Words "courts of the ... were inserted to make ... section is addressed to the ... than the State courts as ... ed by Congress.

Changes were made ... 80th Congress House Rep...

1961 Amendment. Pub... tuted provisions author... ment of State to transmit ... ry or request by a foreign ... al tribunal, or by a tribu... States, to the tribunal, ... in the United States or ...

Fe...

Persons before whom ...

Certificate 4
Definition of letters rogat...
Letters rogatory
Definition of 2
Power and grounds fo...
Order directing service o...
foreign tribunal 5
Power and grounds for ...
rogatory 3
Prior law 1

Library references
Federal Civil Procedure ...
C.J.S. Federal Civil Pro...

1. Prior law

Former section 653 of t... restrict the inherent pow... court to issue letters roga... mentioned therein when t... nesses was desired to be ... tries that refused to com... ance of witnesses und... and where the witnesses ... unwilling the examinati... been oral and not on wri... ries. De Villeneuve v. ... Ass'n, D.C.N.Y.1913, 206 F...

The statutes of the Uni... no general power upon th...