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MEMORANDUM
TO: Bernard Kleinman
FROM: Jennifer Van Bergen
RE: The Exceptions to the Doctrine of US Nonresponsibility for Foreign Police Acts
DATE: March 3, 1999

Bernie - Here is a summary of cases on the 4 theories of law relating to US involvement in foreign searches, seizures, torture, etc. I tried to give you enough details on each so that you can see where things fall. I want to get this to you today, even though you probably don't have time to look at it right away. I've been working on it all day. Later, or tomorrow, I will look it over and give you my observations. Right now I can't think anymore about it. I am also sending you, along with this, the portion of my "Miranda" argument that precedes this information.

Please note that these cases below seem to follow the 4 theories whether they are dealing with 4th, 5th, or 6th A. rts., and I have not here separated those issues out.

DISCUSSION

Neither the 4th A. excl. rule nor the Miranda/5th A exl. rule apply to interrogations conducted by foreign officials (arising out of Ker-Frisbie Doctrine), unless there is a certain amt. of US involvement. The exact amt. has never been determined.
But, where a defendant moves to exclude evidence under the 4th A exclusionary rule, or to exclude a confession under the 5th A on the basis of US gov't participation in foreign torture, the law is slightly different with regards to whether an evidentiary hearing will be required (or, alternatively, the court will divest itself of jurisdiction -- which never happens) depending upon exactly what sort of US participation he alleges.

Unfortunately, it seems that the rulings turn on specific facts (and the facts are rarely, if ever, adequate to establish US involvement). Of course, generally, the more little facts there are that show US involvement, the better case we have.

There are four different theories:

1) SHOCK THE CONSCIENCE STANDARD: This is where foreign official conduct "shocks the conscience" such that US gov't officials shouldn't use the information obtained. The doctrine comes from Rochin v. California, 342 US 165 (1952), which dealt with US police misconduct. Most cases I've read state this principle as applying to foreign official conduct (see Maturo, infra, at 60, and Stowe, infra, at 341) and frame it as that which underlies the particular theories I discuss below.

But in US v. Toscanino, the 2d Cir. applied this standard to the conduct of agents of US gov't in Uruguay, where US gov't officials were aware of the torture of the defendant, and even participated in it. 500 F.2d 267, 270 (2d Cir. 1974). (The Dist. Ct. decided, on remand, based solely on defedndant's affidavit, that the allegations were legally insufficient to require an evidentiary hearing. US v. Toscanino, 398 F.Supp. 916, 917 (E.D.N.Y. 1975).)

2) JOINT INVESTIGATION OR VENTURE: US v. Maturo, 982 F2d 57, 61-2 (2d Cir. 1992) says (w/o cite) that the 2d Cir. has not adopted this theory (4th A. context). However, the court adds that "[e]ven were we to adopt this doctrine... the level of cooperation between the DEA and the TNP [here] falls far short of the level needed to find the existence of a joint venture," implying that they might, under certain circumstances. Id. at 62. In that case, the TNP (Turkish National Police) did not tap the defendant's phone until after the DEA provided them w/information about the DEA's investigation. Then, the DEA obtained a subpoena for credit card records, based on the TNP's wiretaps. This was not considered a joint investigation.

An earlier Dist. Ct. case, US v. Molina-Chacon, 627 F.Supp. 1253 (E.D.N.Y. 1986), says that the 2d Cir. expressly reserved decision on "the precise test" to be applied under this theory (citing US v. Bagaric, 706 F.2d 42, 69 (2d Cir.), cert. denied, 464 US 840, 104 S.Ct. 133, 78 L.Ed.2d 128 (1983) on 5th A context, and US v. Paternina-Vergara, 749 F.2d 993, 998 (2d Cir. 1984), cert. denied, 469 US 1217, 105 S.Ct. 1197, 84 L.Ed.2d 342 (1985) and US v. Busic, 592 F.2d 13, 23 n. 7 (2d Cir. 1978) on 4th A. context). [Molina-Chacon has a very good exposition on all these doctrines.]

The Ninth Cir. test was that: "the 4th A could apply to raids by foreign officials only if Federal agents so substantially participated int he raids so as to convert them into joint ventures between the US & foreign officials." Stonehill v. US, 405 F.2d 738, 743 (9th Cir. 1968), cert. denied, 395 US 960, 89 S.Ct. 2102, 23 L.Ed.2d 747 (1969). (Real clear, huh?) There was no joint venture where a DEA agent was present and armed while defendant was interrogated in a foreign country. Pfeifer v. USBOP, 615 F.2d 873, 877 (9th Cir.), cert. denied, 447 US 908, 100 S.Ct. 2993, 64 L.Ed.2d 858 (1980).

Whether adopted or not, this theory has also not been successful in this jurisdiction. In Stowe v. Devoy, 588 F.2d 336, 341 (2d Cir. 1978), cert. denied, 442 US 931, 99 S.Ct. 2862, 61 L.Ed.2d 299 (1979), the 2d Cir. wrote that "There exists no case, so far as we are aware, which suppresses evidence obtained in a foreign country under such conditions, regardless of whether the foreign officers failed to follow American constitutional procedures or of the extent to which American agents may have been involved in their activities."

All this doesn't mean we couldn't use it. The reason for the 2d Cir.'s failure to adopt this theory may be that it is too close to the "agency theory," below. (In Molina-Chacon, the Dist. Ct. deals w/joint investigation under the section on agency. Molina-Chacon, supra, at 1259.)

3) US PARTICIPATION OR AGENCY - where US officials were involved to such an extent that the foreign officials could be considered agents of US. This originated with Toscanino, 500 F.2d 267, 280 n. 9 (2d Cir. 1974).

Maturo, supra, at 61, declines to allow an agency argument (on the abovementioned facts). US v. Orsini, 402 F.Supp. 1218, 1219 (E.D.N.Y. 1975) (hearing ordered where defendant alleged gross mistreatment "at or by direction of United States officials"). US v. Lira, 515 F.2d 68, 70 (2d Cir. 1975)(no participation or agency where "the Chilean officials appear to have been most cooperative in honoring the DEA's requests, even going so far as to provide a sizeable Chilean escort on the plane to the United States" and where the defendant heard English spoken during his torture, and saw the Special Agents at the Naval Prosecutor's office.)

Where American officers actively participate in the arrest and interrogation of a defendant by foreign officials, Miranda warnings apply. US v. Nagelberg, 434 F.2d 585, 587 n. 1 (2d Cir.), cert. denied, 401 US 939, 91 S.Ct. 935, 28 L.Ed. 219 (1971). See also Pfeifer, supra,

at 977; US v. Hensel, 509 F.Supp. 1364 (D.C. D.Me. 1981).

This doctrine has been litigated extensively in military courts applying constitutional law (adjudicated and later codified in military law). US const'l law applies to foreign state action only if US personnel had "conducted, instigated, or participated in foreign action." US v. Coleman, 25 MJ 679 (USCMR, 1987). This court's test was to "closely analyze any cooperative activity to distinguish the actions of US officials from those of foreign officials, and apply our norms and law to any and all US action." Id. at 686 (citing to US v. Covington, 783 F.2d 1052 (9th Cir.), cert. denied, 479 US 831, 107 S.Ct. 117, 93 L.Ed.2d 64 (1986)). This military case involved the interrogation of an american soldier at a German police station, re. 6th A R/C.

In US v. French, 38 MJ 420 (USCMA, 1993), minimal involvement of Air Force personnel in British investigative effort did not trigger Miranda, and neither the accused's first sergeant nor Air Force Office of Special Investigations (OSI) agent "participated" in the interrogation of the accused, so as to trigger 4th A. protections. This court states that "mere presence" of US officials at foreign interrogation is insufficient to constitute participation. Id. at 426.

In US v. Trenary, 473 F.2d 680 (9th Cir. 1973) (note a 9th Cir. case), a US customs officer acting as an interpreter was not acting as a US agent.

In US v. Caro-Quintero, 745 F.Supp. 599, 602-604, 609 (CD Ca. 1990), the Dist. Ct. concluded that DEA agents, who hired bounty hunters, were responsible for Mexican defendant's abduction, but not personally involved in it. The S.Ct. held that the Dist. Ct. nonetheless had jurisdiction to try the defendant. US v. Alvarez-Machain, 504 US 655, 657 (1992).

4) US OFFICIAL CONDUCT DESIGNED TO EVADE CONSTITUTIONAL PROTECTIONS

"Foreign action cannot be used as a subterfuge to circumvent the constitutional protections otherwise afforded an accused." US v. Coleman, supra, 25 MJ at 686 (no evidence of subterfuge where US and German officials mutually assisted in investigations). There are few cases on this. Byars v. US, 273 US 28, 32, 47 S.Ct. 248, 71 L.Ed. 520 (1927) proscribed "circuitous and indirect methods" of US agents to undermine 4th A rts. See also US v. Rose, 570 F.2d 1358, 1362 (9th Cir. 1978)(the court, under its discussion of joint venture, decides that US customs officials search of defendant at border was not circumvention), and US v. Molina-Chacon, supra, at 1260 (where the request by US officials to apprehend a criminal and transport him to US, is not circumvention of constitutional safeguards). In US v. Bagaric, 706 F.2d 42, 69 (2d Cir.), cert. denied, 464 US 840, 104 S.Ct. 133, 134, 78 L.Ed.2d 128 (1983), the court did not decide "the circumstances under which the relationship between American and foreign authorities might amount to a joint, willful attempt to evade the strictures of Miranda or Massiah." In Maturo, supra, at 62, the Dist. Ct. decided that "the TNP's wiretapping of phones in Turkey was prompted not by a desire to circumvent constitutional constraints, but by the logistical problem caused by [defendant's] random selection of pay phones."