April 2019

Federal Rule of Criminal Procedure 15 and Terrorism Cases

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I. BACKGROUND

During the Obama administration, there has been a strong shift toward indicting and trying terrorism-related crimes in Article III Courts.[1] While this development raises many evidentiary issues for both the prosecution and defense, this article will focus on the use of Federal Rule of Criminal Procedure 15 ("Rule 15") as amended in 2012 in terrorism cases.

In order to fully understand the current case law, one needs to first look at the Sixth Amendment's Confrontation Clause, which states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[2] In 2004, the Supreme Court in *Crawford v. Washington* held that the Confrontation Clause is a procedural guarantee that applies to testimonial evidence and is meant to

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1 *See* Jessica K. Weigel, *Hearsay and Confrontation Issues Post-Crawford: The Changing Course of Terrorism Trials,* 89 N.Y.U. L. Rev. 1488, 1489 (2014).

2 U.S. Const. amend. VI.

ensure the reliability of evidence through the requirement of witness cross-examination.[3] While Justice Scalia limited the standard under *Crawford* to testimonial evidence, the Court declined to clearly define what "testimonial" meant. Justice Scalia made it clear however, that unless a witness was unavailable and there had been a prior opportunity for cross-examination, there was a bar to admitting testimonial statements.[4]

Rule 15 addresses the use of depositions in criminal cases. In 2012, it was amended to add subsection (c)(3) to provide for pre-trial depositions abroad, outside the presence of a defendant. Since 2012, Rule 15 has been used by both the Government and defendants in terrorism related trials to attempt to obtain pre-trial depositions of witnesses outside the United States. Although Rule 15 is specific to depositions, Rule 15's requirements also have been applied in determining whether to allow witnesses to testify at a U.S. trial via live closed circuit video feed from a foreign location.

This article examines how Article III courts are currently applying the Rule 15 analysis in different witness testimony situations. It first addresses the Rule 15 requirements and then delves into the Rule 15 methodology by reviewing recent case law to identify the approach and direction courts are taking with regard to its use.

II. RULE 15 REQUIREMENTS AND GENERAL PRACTICALITIES

Depositions are generally disfavored in criminal cases and are only to be utilized to preserve evidence for trial; they are not for discovery purposes.[5] Further, the burden for establishing the exceptional circumstances to take a deposition as required under Rule 15 is on the moving party.[6] Rule 15(a) states 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."[7] Courts have consistently held that in order to meet the burden of "exceptional circumstances," the moving party must show that the testimony is material and the witness is

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3 *See* Crawford v. Washington, 541 U.S. 36 (2004).

4 *Id.* at 68. For the development of case law defining "testimonial," *see* Davis v. Washington, 547 U.S. 813 (2006); Michigan v. Bryant, 562 U.S. 344 (2011); Williams. V. Illinois, 132 S. Ct. 2221 (2012).

5 *See* U.S. v. Drogoul, 1 F.3d 1546, 1551 (11th Cir. 1993); *see also* U.S. v. Little, No. 12 Cr. 647, 2014 WL 1744824, at*2 (S.D.N.Y, Apr. 23, 2014).

6 *See Drogoul,* 1 F.3d at 1553.

7 FED. R. CRIM. P. 15.

unavailable to testify at trial.[8] For evidence to be material, the testimony would either have to exculpate the defendant, if offered by the defendant, or inculpate the defendant if offered by the Government.[9] Additionally, while such testimony need not be definitive proof of guilt or innocence, it must be more than just relevant, it cannot be cumulative of other evidence, and it must be admissible.[10] Under Rule 15, for a witness to be "unavailable" the moving party is required to show that the witness is unable or unwilling to attend trial and that the moving party has made a good faith effort to obtain the witness's presence.[11] Generally speaking, foreign witnesses outside of a party's subpoena power who refuse to travel or cannot travel to the United States are considered "unavailable" as long as the moving party provides more than vague assertions that the witness will not travel to the United States and the moving party has made a good faith attempt to get the witness to come to the United States.[12]

But, since the Confrontation Clause ensures that an accused has the right to confront witnesses against him, Rule 15(c)(3) requires case-specific findings in order to prevent ex-parte evidence from being used against a defendant.[13] The five requirements are as follows:

(1) the witness's testimony could provide substantial proof of a material fact; (2) there is a substantial likelihood that the witness's attendance at trial cannot be obtained; (3) a deposition of the witness in the U.S. cannot be obtained; (4) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; and (5) the defendant can meaningfully participate in the deposition through reasonable means.[14]

In determining whether to permit depositions, various courts utilize a checklist analysis for the "totality of circumstances" which includes (a) whether the Rule 15 motion is timely made, (b) whether the deponents are available for trial, (c) whether the purpose of the deposition is for discovery or for use at trial; (d) whether the anticipated testimony is material; (e) whether the safety of U.S. officials who would be traveling to the foreign deposition location might be compromised, which

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8 *See* U.S. v. Al Fawwaz, No. S7 98 Crim. 1023, 2014 WL 627083, at *1 (S.D.N.Y. Feb. 18, 2014); s*ee also* U.S. v. Moalin, No. 10CR4246-JM, 2012 WL 3637370, at *2 (S.D. Cal. Aug. 22, 2012) *and* U.S. v. Abu Ghayth, No. S14 98 CRIM. 1023, 2014 WL 144653, at *2 (S.D.N.Y. Jan. 15, 2014).

9 *See Al Fawwaz*, 2014 WL 627083, at *1; *Moalin*, 2012 WL 3637370, at *2; *Abu Ghayth*, 2014 WL 144653, at *2.

10 *Id.*

11 *Id.*

12 *See Al Fawwaz*, 2014 WL 627083, at *1; *Abu Ghayth*, 2014 WL 144653, at *2.

13 U.S. v. Mostafa, 14 F.Sup.3d 515, 518 (S.D.N.Y. 2014).

14 *See Id.* at 519; s*ee also* FED. R. CRIM. P. 15(c)(3).

especially is a consideration if a defendant is the party requesting the foreign deposition; and (f) whether the procedures to be used in the foreign country, as to reliability and trustworthiness, are compatible with our fundamental issues of fairness.[15]

From a practical standpoint, parties need to deal with issues related to foreign governments when making Rule 15(c)(3) motions. Often the party will need to request in its motion that the court issue 'letters rogatory.' These are essentially the manner in which one country requests assistance from a foreign country, via methods of court procedure present in both countries. Letters rogatory are often issued in order to assist with obtaining Rule 15(c)(3) depositions or live testimony.[16]

Additionally, parties and courts need to address how to ensure the testimony is trustworthy and that the method of deposition permitted by the foreign country still enables the defendant to "meaningfully participate" in the process, thus guaranteeing his Sixth Amendment right of confrontation. Generally speaking, this threshold is met if (a) a witness will testify under oath, (b) a 2-way live contemporaneous video feed where both the witness and defendant can see each other is used, (c) the defendant has attorneys present at the deposition location as well as with him, (d) the defendant can communicate with his attorneys on location, and (e) a videographer and stenographer record the proceeding.[17] While this scenario appears to be the basic ideal standard, with the Court observing in real time to rule on objections, sometimes a foreign country will not permit testimony to be taken in this manner. In those cases the court will have to evaluate whether what is permitted by the particular jurisdiction is enough to establish the testimony will be reliably truthful and that the defendant has his rights protected.[18]

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[15] *Moalin*, 2012 WL 3637370, at *2-*6.

[16] *See Al Fawwaz*, 2014 WL 627083, at *2.

[17] U.S. v. Ahmed, No. 12-CR-661 SLT S-2, 2014 WL 7399298, at *1 (E.D.N.Y. Dec. 30, 2014).

[18] *See, e.g.*, U.S. v. Cooper, 947 F. Supp.2d 108 (D.D.C. 2013), in which the Indonesian officials who approved the taking of the depositions were requiring that both the Government and defense provide the foreign magistrate with a list of their questions and topics prior to the deposition. The magistrate would initially ask the witness questions. It was eventually negotiated between the Government and the Indonesian official in charge that an oath would be administered to the witness, and that after the magistrate asked his questions both the Government attorney and the defense counsel would be permitted to fully question the witness using the format of the Government going first, followed by cross-examination by the defense, followed by a re-direct by the Government. The Court found that this procedure was sufficient even though there was no procedure to compel the witness to answer all questions, the U.S. Court would not be ruling contemporaneously on objections, and there would not be a real-time transcription. The Court said that the defendant could later raise arguments regarding admissibility of

III. RECENT CASES INVOLVING RULE 15 MOTIONS

A. U.S. v. Al Fawwaz[19]

In 2000, two defendants, Khalid Al Fawwaz and Adel Abdel Bary, were indicted on terrorism related charges related to conspiring with Osama bin Laden to kill Americans during embassy bombings in Kenya and Tanzania.[20] Allegedly, the defendants assisted bin Laden in establishing a London office for al Qaeda under a front called the Advice and Reformation Committee ("ARC"), and Fawwaz assisted with the storing and dissemination of bin Laden's 1996 Declaration of Jihad ("bin Laden's Declaration").[21] Both Bary and Fawwaz filed Rule 15 motions to depose witnesses.

Bary sought to depose Iqbal Ahmed who was in the United Kingdom and who, along with his UK counsel, had been present when Bary was question by law enforcement. Ahmed had stated that he was willing to testify in the United States at trial but Bary filed a Rule 15 motion since Ahmed's schedule could not be guaranteed.[22] Bary also sought to have his brother, Mohamed, deposed in Cairo, Egypt.[23] Bary's brother was expected to testify as to Bary's activities and treatment in Egypt.[24] Bary admitted that his brother was willing to appear in the United States but believed Mohamed would be unable to obtain a visa; no denial of a visa had yet occurred.[25] The District Court ruled that "speculative concern that logistics, work, or travel schedules might prevent a witness's

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the deposition testimony, if appropriate; *See also* U.S. v. Little, No. 12 Cr. 647, 2014 WL 1744824, at*2 (S.D.N.Y, Apr. 23, 2014), in which the defendant sought the deposition of a Swiss resident who was outside subpoena power and who refused to travel to the United States, even though defendant offered to pay his travel expenses, since the witness was considered a co-conspirator by the Government. The Government argued that Swiss law would not permit the witness to be deposed in Switzerland or for his testimony to be transmitted via live feed during the trial. Citing to prior cases involving depositions taken in Switzerland, the Court ordered that the deposition was to be taken to the extent permissible under Swiss law and stated that procedural differences were permissible "unless the manner of examination required by the law of the host nation is so incompatible with our own fundamental principles of fairness or so prone to inaccuracy or bias as to render the testimony inherently unreliable." *Id.* at *3.

19 *See Al Fawwaz*, 2014 WL 627083, at *1.

20 *Id.*

21 *Id.*

22 *Id.* at *2.

23 *Id.*

24 *Id.*

25 *Id.*

attendance at trial is not sufficient to satisfy the unavailability requirement."[26] As a result, Bary's motion was denied.[27]

Defendant Al Fawwaz moved to depose nine different individuals in his Rule 15 motions, six of whom will be discussed herein. The first two proposed deponents were MI5 agents and he requested the District Court issue letters rogatory.[28] His motion stated that he had met regularly with both agents and that they would testify about their interactions with him and how he had disavowed bin Laden's Declaration, had security concerns as a dissident, and was advised by one of the agents concerning his communications with bin Laden and other ARC members.[29] Al Fawwaz's counsel had been unable to get contact information for the two witnesses. The District Court determined that the proposed testimony would be material since it was about matters specific to the indictment against Al Fawwaz such as his interactions with bin Laden and the role that ARC played, and such testimony was expected to be exculpatory in nature.[30] Further, the District Court explained that the defendant had met the required showing that the two witnesses were unavailable since al Fawwaz's counsel had provided information that they had been unable to even obtain contact information for the witnesses despite their good faith attempts to do so.[31] As a result, the Court granted this Rule 15 motion and issued letters rogatory to the United Kingdom.[32]

The third proposed deponent was Naomi Wood who was a rental agent for the London office leased by ARC.[33] Al Fawwaz proffered that Wood would testify that Al Fawwaz's access to the office ended in February 1998. Again, such testimony would be exculpatory against the Government's claims that incriminating documents found in late 1998 were in the control of Al Fawwaz.[34] Per Al Fawwaz, Wood had refused to respond to any of his attempts to reach her.[35] The District Court agreed that the "testimony could be material exculpatory evidence with respect to inculpatory documents" and that Wood's refusal to cooperate rendered her unavailable; thus the District Court issued letters rogatory for her deposition.[36]

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26 *Id.*
27 *Id.* at *7.
28 *Id.* at *2
29 *Id.* (noting that the Government did not oppose this Rule 15 motion).
30 *Id.*
31 *Id.* at *3.
32 *Id.* at *7.
33 *Id.* at *3.
34 *Id.* at *3 (noting that the Government did not oppose the request to depose Wood).
35 *Id.*
36 *Id.*

Abdel Bari Atwan, a journalist who wrote about Islamic affairs, was the fourth proposed deponent.[37] Al Fawwaz wanted to depose him regarding his knowledge of the role and activities of dissident groups, as well as how Al Fawwaz reacted immediately after the publication of bin Laden's Declaration.[38] Atwan refused to travel to the United States to testify since he previously was denied entry when he requested it to speak at Brown University.[39] With respect to Atwan's expected opinion testimony regarding the ARC, the District Court determined such testimony was neither material nor admissible.[40] In 1999, however, Atwan provided an affidavit which stated that Al Fawwaz approached him "in a state of shock . . . literally shaking and said 'I disagree with it,'" almost immediately after the bin Laden Declaration was published.[41] The Government opposed Al Fawwaz's motion on the basis that such testimony as to what he said to Atwan was inadmissible hearsay.[42] The District Court disagreed, and stated that such testimony was admissible as a "statement of the declarant's then existing state of mind" under Federal Rule of Evidence 803.[43] Furthermore, Al Fawwaz's alleged statements disclaiming responsibility or agreement with bin Laden's Declaration was material because it refuted the Government's claim that the defendant was involved in disseminated the manifesto.[44] The District Court also found that Al Fawwaz had made the requisite showing that Atwan was unavailable when he stated in his motion that Atwan refused to travel to the U.S., and even provided the partial basis for such refusal.[45] As a result, the District Court ordered granted the defendant's request but limited the scope of the deposition specifically to the matters it had found to be material.[46]

The fifth proposed witness was Dr. Mustapha Alani, who was expected to testify regarding his research on dissident organizations and meetings he had with Al Fawwaz regarding ARC, as well as statements made by al Fawwaz regarding his disagreement with bin Laden's Declaration.[47] The Court found that such testimony was not material or admissible.[48], Since Al Fawwaz's statements regarding bin Laden's

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37 *Id.*
38 *Id.*
39 *Id.*
40 *Id.* at *4.
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.* at *7.
47 *Id.* at *5.
48 *Id.*

Declaration were not made immediately after its issuance, testimony regarding such statements would be inadmissible hearsay.[49] As a result, the Court denied the defendant's request to depose Alani.[50]

Abdullah Anas, the seventh proposed deponent, refused to travel to the United States "without guarantees of his safety."[51] His proposed testimony detailed his personal knowledge specific to the role bin Laden played when bin Laden was a dissident and relief worker prior to bin Laden's terrorist work.[52] Anas was also to testify as to the meaning of giving "bayat," which was a significant issue in the prosecution of Al Fawwaz. The District Court determined that testimony regarding bin Laden the dissident versus the terrorist was not exculpatory.[53] As for the testimony regarding "bayat," the District Court found that, even though the testimony might support Al Fawwaz's defense, there were less burdensome methods of obtaining evidence as to the definition of "bayat" for purposes of his defense.[54] Additionally, the District Court found the unavailability of Anas had not been established because no attempt had been made to ascertain and alleviate the safety concerns in order to obtain Anas' presence at trial.[55] As a result, the defendant's Rule 15 motion with respect to Anas was denied.[56]

B. U.S. v. Moalin[57]

This case involved multiple defendants who jointly filed a Rule 15 motion requesting leave to take the depositions of eight witnesses in Somalia.[58] The defendants were charged with multiple terrorism related offenses including conspiracy to provide material support to terrorists, conspiracy to provide material support to a foreign terrorist organization, conspiracy to launder money, providing material support to terrorists and providing material support to a foreign terrorist organization.[59] The proposed witnesses all had agreed to be deposed in Somalia and were individuals to whom the Defendant, Moalin, either had transferred funds

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49 *Id.*
50 *Id.* at *7.
51 *Id.* at *6.
52 *Id.*
53 *Id.*
54 *Id.* at *7.
55 *Id.*
56 *Id.*
57 U.S. v. Moalin, No. 10CR4246-JM, 2012 WL 3637370, at *2 (S.D. Cal. Aug. 22, 2012).
58 *Id.* at *1.
59 *Id.*

or who had personal knowledge of how the funds transferred from the defendants had been spent.[60]

In making its determination to deny the Rule 15 motion, the District Court applied a detailed analysis of the totality of circumstances which included whether (1) the witnesses were unavailable for trial, (2) the motion was timely made, (3) whether the purpose for the deposition was for use at trial or impermissibly for discovery, (4) whether the proposed testimony would be material and helpful, (5) the safety of those traveling to the foreign location in question would be compromised, and (6) whether "the deposition procedures in the foreign country, as to reliability and trustworthiness, are compatible with the fundamental issues of fairness."[61]

With respect to availability, the defendants stated that the witnesses could not be compelled to travel to the United States and that travel from Somalia was "not regularly permitted, and is not feasible."[62] However, defendants provided no evidence that any of the witnesses applied for a visa or would be denied one if requested, and thus the Court found that the defendants failed to make good faith efforts to obtain the witnesses' presence in the United States for trial.[63] As a result, the District Court found this factor went against granting the motion.[64]

With respect to the issue of timeliness, the defendants first mentioned the possibility of seeking Rule 15 depositions a year prior.[65] By the time the motion was filed and set for hearing, a trial continuance would be required if the request to take the depositions was granted. The Court found that in light of the defendants "longstanding knowledge" about the interactions between the witnesses and themselves, the request was not timely brought.[66]

The District Court stated that the strongest argument made by the defendants was that the witnesses would provide exculpatory evidence that the funds provided by the defendants were not intended to assist any terrorist network or organization.[67] While none of the proposed witnesses submitted affidavits regarding their anticipated testimony, the Court relied upon the filed declaration of one of the attorneys regarding the anticipated testimony.[68]

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60 *Id.*
61 *Id.* at *2-*6.
62 *Id.*
63 *Id.*
64 *Id.*
65 *Id.* at *3.
66 *Id.* at *3.
67 *Id.*
68 *Id.*

The District Court next addressed the safety issue. It stated that "the dangers of travel to Somalia are acute and present risks to both United States personnel and defense counsel."[69] Since there was a State Department issued travel warning in place and no State Department presence in Somalia to assist in the event of an emergency, this factor weighed "strongly and, in and of itself, decisively against Rule 15 depositions going forward in Somalia."[70] Furthermore, even the Defendants' contention that the depositions could take place in a secure facility adjacent to the airport that was protected by African Union peacekeepers, was not enough to alleviate that concern.[71]

Finally, the Court found that the procedures for the depositions provided no indicia of reliability. There was no showing that the oath that would be administered would have the same meaning as oaths in the United States or under the Hague Convention, or that penalties of perjury would apply if violated.[72] Furthermore, since enforcement of criminal law in Somalia was non-existent, there could be no trustworthiness even if penalties of perjury could apply.[73] As a result, the District Court determined that this factor of reliability and trustworthiness strongly disfavored granting the Rule 15 motion.[74]

C. U.S. v. Abu Ghayth[75]

The defendant was accused of conspiring to kill United States citizens and other terrorism related charges. Both the Government and Abu Ghayth filed motions regarding foreign witnesses. The Government sought to introduce testimony of a confidential witness at trial via closed-circuit television ("CCTV"), while the defendant moved to take a Rule 15 deposition of Salim Ahmed Hamdan, a prior driver of bin Laden's.[76]

In its opinion, the District Court noted that the Second Circuit has applied the standards of Rule 15 in ruling on whether to grant motions allowing prosecution witnesses to testify via CCTV.[77] The Circuit held that when the government satisfies the showing required under Rule 15 and trial testimony is allowed via CCTV, the fact that the defendant and witness are not present in the same room does not violate the

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69 *Id.* at *5.
70 *Id.* at *6.
71 *Id.*
72 *Id.*
73 *Id.*
74 *Id.*
75 U.S. v. Abu Ghayth, No. S14 98 CRIM. 1023, 2014 WL 144653, at *2 (S.D.N.Y. Jan. 15, 2014).
76 *Id.* at *1.
77 *Id.* at *2.

Confrontation Clause.[78] This is due to the fact that Rule 15 "facilitates (1) the giving of testimony under oath; (2) the opportunity for cross-examination; (3) the ability of the fact-finder to observe demeanor evidence; and (4) the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in his presence."[79] As a result, the Court applied the same Rule 15 standard analysis to both the Government and defendant's motions.[80]

With respect to the Government's motion, it was anticipated that its witness's testimony would be about his personal involvement in a terrorist plot against the United States that involved detonating explosives on airplanes.[81] The witness would also testify that he was receiving terrorist training at a camp at the same time the defendant gave speeches there.[82] The District Court ruled that the Government had met its burden to show the testimony would be material and inculpatory against Abu Ghayth.[83] Furthermore, the Government provided evidence showing that the witness was refusing to travel to the United States to testify since he feared he would be arrested if he entered the country, and that such fear was reasonable since both the witness and prosecutors were notified that the witness would, in fact, be arrested upon arrival.[84] The District Court held that this met the required showing for unavailability, and that a good faith requirement does not obligate the government to extradite a defendant, when possible, as argued by the defendant in his opposition papers.[85] As a result, the Government's motion for the trial testimony to be offered through CCTV was granted.[86]

With respect to Abu Ghayth's motion, he argued that Hamdan would testify that he spent much time with bin Laden, met Abu Ghayth various times, and that he never observed Abu Ghayth engaging in any of the acts contained in the indictment or in possession of a brevity card.[87] Furthermore, Hamdan would testify that he does not believe Abu Ghayth swore an oath to al Qaeda, and that brevity cards contained the names of both inner circle al Qaeda members as well as non-al Qaeda individuals.[88] The District Court determined that some of the proposed

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78 *Id.*
79 *Id.*
80 *Id.*
81 *Id.*
82 *Id.* at *3.
83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.* at *4.
87 *Id.* at *2. Brevity cards supposedly contained coded names and locations for individuals who may or may not have been al Qaeda members.
88 *Id.*

testimony was exculpatory, but other parts were irrelevant or inadmissible. For example, the fact that Hamdan never heard Abu Ghayth take an oath or saw him engage in the accused activities does not mean they did not occur outside Hamdan's presence; thus, this would not be material exculpatory evidence.[89] Similarly, any statement Abu Ghayth may have made to Hamdan regarding his reasons for being present in Afghanistan would be inadmissible hearsay.[90] However, testimony that a person's inclusion on a brevity card does not equate with membership in al Qaeda would directly offset the Government's contention that such inclusion is probative of Abu Ghayth's guilt.[91] Additionally, Hamdan's testimony that the camps were almost exclusively used for training individuals to fight against the Northern Alliance was material for countering the Government's claims that the camps were solely "in furtherance of a conspiracy to kill Americans."[92] The District Court also determined that Abu Ghayth had shown that he requested Hamdan travel to the United States to testify and had offered to pay all associated travel expenses, yet Hamdan had refused to travel to the United States and might even be legally barred from entering the country; thus, Abu Ghayth had met his burden of showing Hamdan was unavailable under Rule 15.[93] While the Government raised the argument that there was no means to ensure truthful testimony from a person in Yemen, the District Court specifically stated that the Government could use the "lack of a viable enforcement mechanism against Hamdan to impeach his credibility."[94] As a result of its analysis, the District Court granted Abu Ghayth's motion with the conditions that the deposition take place over CCTV, each side be given three hours to question the witness, and the topics be limited to brevity cards, the purpose of the training camps Abu Ghayth visited, and testimony as to the defendant's role in al Qaeda.[95] The Court also noted that the Government would still have the opportunity to move to limit or exclude the deposition testimony at trial using any appropriate grounds including that of materiality.[96]

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89 *Id.* at *3.
90 *Id.*
91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.* at *4.
95 *Id.*
96 *Id.*

D. U.S. v. Mostafa[97]

Defendant Mostafa Kamel Mostafa a/k/a Abu Hamza al-Masri was indicted for numerous terrorism related charges.[98] The Government filed a motion requesting Saajid Badat be permitted to testify via CCTV or, alternatively, by Rule 15 deposition.[99] Badat had refused to come to the United States to testify but had agreed to provide testimony under oath via CCTV.[100]

The District Court began its analysis with a discussion of the Confrontation Clause. The Court addressed how the right to confrontation promotes justice by advancing "the pursuit of truth in criminal trials" through the use of the witness oath, cross-examination and the jury's ability to observe the demeanor of the witness.[101] The District Court emphasized, however, that the right to a face-to-face meeting was not a requirement.[102]

The District Court proceeded to identify the five requirements created by Rule 15(c)(3), as listed hereinabove and in the rule itself.[103] The Court also noted that there was a substantial record of courts approving testimony via CCTV for both taking depositions and for trial proceedings; the Court even stated that CCTV provides trier of fact with an opportunity to observe the witness's demeanor and that the Supreme Court appeared to be in favor of its use.[104]

Applying the requirements of Rule 15(c)(3), the District Court first determined that the proposed testimony would provide substantial proof of material facts. For example, Badat was expected to testify as to the leadership structure, background of jihadist training camps, and camp locations, which were material and relevant to the charges of the indictment that the defendant "facilitate[ed] violent jihad in Afghanistan.[105]

Next, the Court found that the Government had met its burden to show Badat was unavailable for either trial or deposition in the United States. The reasons cited included that: Badat was a citizen of the United Kingdom who had criminal charges pending against him in the United States, that he believed he would be arrested upon arrival in the United States, and it was confirmed that the United States would not give him

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97 U.S. v. Mostafa, 14 F.Sup.3d 515, 518 (S.D.N.Y. 2014).
98 *Id.* at 517.
99 *Id.* at 517-518.
100 *Id.* at 518.
101 *Id.*
102 *Id.* at 519 (citing Maryland v. Craig, 497 U.S. 836 (1990)).
103 *Id.*
104 *Id.* at 520-521.
105 *Id.* at 522.

safe passage.[106] The defendant argued that this made the Government "complicit in Badat's unavailability" and that the Government had not made a good faith attempt to obtain Badat's presence in the United States, because in effect it was the Government that was preventing his presence.[107] The District Court disagreed, stating that it would not interfere with or second-guess decisions regarding extradition and safe passage, which are the Government's decisions to make.[108] Since Mostafa's main contention appeared to be that allowing Badat to testify remotely would prevent Mostafa from being able to probe "the benefits that the witness may have obtained or been promised" in exchange for his testimony, the District Court emphasized that counsel for Mostafa would be permitted to ask questions regarding the cooperation agreement in place between Badat and United Kingdom authorities, as well as any related benefits.[109]

As a result of the foregoing analysis, the District Court found that the Government had met the requirements to prove "exceptional circumstances" existed under Rule 15.[110] The District Court ordered that the Government's motion to permit Badat to testify via CCTV was granted with the following conditions to be followed: first, that Badat be bound by an oath subjecting him to the penalty of perjury in the United States and second, that the cameras be positioned so that the jury could see Badat's face and he could see the jurors' faces along with the defendant and the questioner as he testified.[111]

E. U.S. v. Ahmed[112]

This case involves a group of defendants charged with terrorism related crimes including, but not limited to, providing material support to al-Shabaab, conspiring to provide material support to al-Shabaab, and receiving military-style training from al-Shabaab.[113] The Government

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106 *Id.*

107 *Id.* at 523.

108 *Id.* at 524.

109 *Id.* at 523.

110 *Id.* at 524.

111 *Id.* It should be noted that in his filed (Opposition to the Government's motion Memorandum of Law in Opposition to the Government's Motion, U.S. v. Mostafa, 14 F.Sup.3d 515 (S.D.N.Y. 2014) (No. 04 Cr 356), 2014 WL 5111546.), Mostafa expressed his preference for "live" CCTV trial testimony over a Rule 15 deposition. It also should be noted that Mostafa was convicted and has since filed an appeal. The initial brief is not yet due and has yet to be filed. It is unknown whether the ruling to permit Badat to testify via CCTV will be one of the grounds for his appeal.

112 U.S. v. Ahmed, No. 12-CR-661 SLT S-2, 2014 WL 7399298, at *1 (E.D.N.Y. Dec. 30, 2014).

113 *Id.* (noting that al-Shabaabz is a designated foreign terrorist organization).

filed a Rule 15(c)(3) motion for permission to take the depositions of two witnesses outside the United States and outside the presence of the defendants.[114]

The District Court stated that a "criminal defendant must have a meaningful opportunity to cross-examine witnesses against him in order to show bias or improper motive for their testimony."[115] It then began its analysis of the requirements under Rule 15(c)(3). First, the District Court ruled that the proposed testimony "could provide substantial proof of material facts" in this situation since the witnesses had personal knowledge of the conduct of one or more defendant's activities in relation to the charges of the indictment.[116] Second, the Government was unable to secure the witnesses' presence in the United States for either trial or deposition, despite its efforts, since the witnesses were in the custody of a foreign government that would not permit them to travel to the United States to testify. The Court also noted that the proposed witnesses might not be permitted to enter the United States due to their criminal convictions.[117] Third, the Court found that the in-custody defendants could not travel abroad to the location of the deposition since secure transportation and continuing custody could not be guaranteed.[118] Finally, the procedures outlined by the Government assured the Court that the defendants would be able to meaningfully participate.[119] Such procedures included that the witnesses would testify under oath with counsel for each defendant present on location while each defendant attended "virtually" via live video feed with counsel in New York. Additionally, defendants would be able to communicate with their on-site counsel.[120] Finally, a videographer and stenographer would record the proceedings and the Government would pay the costs for the defendants' attorneys to attend the depositions on site.[121] The Court therefore granted the Government's Rule 15 motion in this case.

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114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.*
118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.*; *see also* United States v. Ahmed, No. 12-CR-661 SLT S-2, 2015 WL 2084628, at *1 (E.D.N.Y. Apr. 28, 2015), where the defendants later moved to suppress the deposition testimony of the two witnesses on the basis that the testimony was unreliable since the witnesses were originally subjected to torture when first taken into custody by the foreign government. While evidence collected through torture is deemed inherently untrustworthy, the Court found that there was no indication that the torture that had occurred years before had colored the witnesses' testimony. In fact, attorneys for the defendants had been given the opportunity to question the witnesses to determine the

IV. CONCLUSION

As shown above, the current case law reflects that the courts are very willing to utilize Rule 15(c)(3) to permit foreign depositions outside the presence of defendants as long as certain, now-routine procedures are in place. Interestingly, the recent decisions also indicate a trend toward using the same analysis to permit live CCTV trial testimony from a foreign location. Notably, Rule 15 has been used with success by both defendants and prosecutors, often over opposing counsel's objections. Ultimately, *Mostafa*, which is on appeal, may shed more light on the intended direction and possible expanded use of Rule 15. In the meantime, Courts appear relatively consistent in their approach to analyzing whether the requirements of Rule 15 are met. This does not mean that differences have not occurred when applying the analysis to the particular facts of a case, particularly regarding certain nuances regarding availability, but most of the differences likely have and will continue to occur with respect to determining when foreign procedures meet the threshold for ensuring the reliability of the testimony at issue and the meaningful participation of a defendant in the process. What is clear is that Rule 15 will continue to be an invaluable tool that Article III courts use with respect to balancing the interests and rights of the Government and defendants in terrorism trials.

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reliability of their testimony, and each witness had repeatedly, credibly and consistently indicated to each of the three defense counsel that such witness was testifying voluntarily.