

FOR PUBLICATION

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IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,

Plaintiff,

vs.

PATRICK MENDIOLA CALVO,

Defendant.

CRIMINAL CASE NO. 08-0105

ORDER DENYING GOVERNMENT'S
MOTION FOR DEPOSITION OF
WITNESSES PURSUANT TO
COM. R. CRIM. P. 15

I. INTRODUCTION

THIS MATTER came before the Court on June 19, 2009 at 9:30 a.m. on the Government's Motion for Deposition of Witnesses Pursuant to Com. R. Crim. P. 15. Defendant appeared with his counsel of record G. Anthony Long. Assistant Attorney General Brian Gallagher appeared on behalf of the Commonwealth of the Northern Mariana Islands (Government).

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ENTRE
DATE

II. STANDARD

2 The Government has moved this Court to order the deposition of three witnesses who
3 will be off island attending college at the time the trial is set to commence. Commonwealth Rule
4 of Criminal Procedure 15(a) provides in relevant part:

5 Whenever due to *exceptional circumstances* of the case it is in the interest of
6 justice that the testimony of a prospective witness of a party be taken and
7 preserved for use at trial, the court may upon motion of such party and notice to
8 the parties, order that testimony of such witness be taken by deposition

9 Com. R. Crim. P. 15(a) (Emphasis added). Since the Commonwealth Rules of Criminal
10 Procedure are modeled after the Federal Rules of Criminal Procedure, interpretation of the
11 federal rules is instructive. *Commonwealth v. Ramangmau*, 4 N.M.I. 227, 233 (1995).

12 "When Rule 15(a) was adopted, 'it was contemplated that in criminal cases depositions
13 would be used only in exceptional situations.'" *United States v. Hernandez-Escarsega*, 886 F.2d
14 1560, 1570 (9th Cir. 1989) (citing Fed. R. Crim. P. 15 note). Accordingly, "Rule 15(a) allows
15 the ... court broad discretion in deciding whether to order depositions in a criminal case."
16 *United States v. Olafson*, 213 F.3d 435 (9th Cir. 2000). *See also Furlow v. United States*, 644
17 F.2d 764, 767 (9th Cir. 1981) ("Whether to grant or deny a motion to depose a proposed witness
18 in a criminal trial is discretionary."). However, the only prerequisite to a Rule 15(a) deposition
19 is "that the trial court find 'due to *exceptional circumstances* ... it is *in the interest of justice* that
20 the testimony of a prospective witness ... be taken and preserved' for possible use at trial."
21 *United States v. Sines*, 761 F.2d 1434, 1439 (9th Cir. 1985) (citing 18 U.S.c. § 3503(a); Fed. R.
22 Crim. P. 15(a)» (Emphasis added).

23 "Rule 15(a) does not require any conclusive showing of 'unavailability' or 'material
24 testimony' before a deposition can be taken in a criminal case." *United States v. Omene*, 143
25 F.3d 1167, 1170(9th Cir. 1998); *See, e.g., Sines*, 761 F.2d at 1439. Rule 15(e) does require
26 substantive evidence that the witness is unavailable under Commonwealth Rule of Evidence
27 804(a). However that requirement is not a prerequisite to taking the deposition, rather it is a
28 prerequisite only to admitting the deposition at trial under the evidence rules. *See Sines*, 761

1 Fold at 1439. ("If the party taking the deposition seeks to introduce it as evidence at trial, he will
2 have to demonstrate at that time that the deponent is unavailable."). "[U]nder Rule 15, a
3 deposition, once it is taken, is not automatically admissible at trial it may only be used at
4 trial if the witness is then unavailable" *Id.* (citing H. Rep. No. 247, 94th Cong., 1st Sess
5 (1974)).

6 "Rule 15(a) only requires that the trial court find that due to exceptional circumstances it
7 is in the interest of justice that the testimony of a prospective witness be taken and preserved for
8 possible use at trial." *Omene*, 143 F.3d at 1170 (citing Fed. R. Crim. P. 15(a)). The court must
9 "consider[] the particular circumstances of each case to determine whether the 'exceptional
10 circumstances' requirement has been satisfied." *Id.* (citing *United States v. Farfan-Carreon*, 935
11 F.2d 678, 679 (9th Cir. 1989)). Furthermore, potential inconvenience to the party requesting the
12 Rule 15 deposition is not enough to fulfill the exceptional circumstances requirement.
13 *Commonwealth v. Cabrera, et. al.*, Criminal Case No. 01-0477T (N.M.I. Super. Ct. May 3, 2002
14 (Order Denying Motion For Deposition at 3).

15 16 III. DISCUSSION

17 The trial in this matter is scheduled to commence on September 14, 2009. The
18 Government has been informed that on that date three of its witnesses will be on the mainland
19 United States attending college. Pl.'s Mot. at 2. The Government has moved this Court to allow
20 these witnesses to be deposed under Rule 15, but has not made an attempt to prove the
21 exceptional circumstances requirement of that rule. Instead, in both its motion and reply brief,
22 the Government merely states that these witnesses will be off-island attending college. The
23 Government mistakenly believes that it is entitled to depose these witnesses under Rule 15
24 without fulfilling the exceptional circumstances requirement of that rule. The Defendant, in
25 opposition to the depositions, argues that the Government has failed to show that these witnesses
26 will be unavailable under Commonwealth Rule of Evidence 804(a). The Defendant's argument
27 is misplaced, as unavailability is a requirement to the admissibility of the deposition at trial, but
28 not to actually taking the deposition. *See Sines*, 761 F.2d at 1439; *Omene*, 143 F.3d at 1170.

1 The only requirement to taking the Rule 15 deposition is the exceptional circumstances
2 prerequisite. *Omene*, 143 F.3d at 1170.

3 To meet the Rule 15(a) exceptional circumstances prerequisite, this Court examines the
4 circumstances surrounding the request for the deposition on a case-by-case basis. *See id.*
5 However, while there is no list of factors for this Court to look to, in addition to the facts of the
6 case, this Court will consider whether the witness will be within the subpoena power of the Court
7 and whether obtaining the witness at trial is more than an inconvenience to the party requesting
8 the witness. Since Rule 15 depositions are only used in exceptional circumstances, the facts
9 must be compelling for this Court to grant the request. *See Hernandez-Escarsega*, 886 F.2d at
10 1570. For instance, the Ninth Circuit upheld the taking of a Rule 15 deposition for the
11 exceptional circumstance that the witness was seriously ill, so that the testimony would be
12 preserved for trial. *Furlow*, 644 F.2d at 767. The Ninth Circuit also allowed the admission of a
13 videotaped deposition taken in Thailand, at the Government's request, because of the exceptional
14 circumstances of the witness being incarcerated in a foreign country. *Sines*, 761 F.2d at 1437.
15 In a situation dealing with student witnesses, the Ninth Circuit allowed the deposition of four
16 foreign students planning on returning to their own country. *United States v. Hayes*, 231 F.3d
17 663, 668 (9th Cir. 2000) (While the Rule 15 depositions were not used at trial, there would have
18 been an issue as to the admissibility of the depositions).

19 In this case, three of the Government's witnesses will be attending college on the
20 mainland United States during the time of trial. However, unlike in *Hayes*, these students will
21 still be within the subpoena power of this Court. Also, in contrast to the situation in *Furlow*,
22 presumably these witnesses are healthy and would be able to attend the trial but for being away
23 at college. The three Ninth Circuit cases cited above present truly exceptional circumstances
24 where there is almost no possible way the Government could procure the witness at trial. That is
25 not the case here. Unlike in *Hayes*, which dealt with foreign students attending college in the
26 United States, here we have students who are citizens of the Commonwealth attending college in
27 the United States. While the foreign students could leave the United States and no longer be
28 within the court's subpoena power to be compelled to testify at trial, here these students are

1 remaining within the Commonwealth's subpoena power, even while they are attending college in
2 the United States. Therefore, there are other options that the Government can pursue to obtain
3 the presence of these witnesses at trial, however inconvenient those options may be. The
4 Government can schedule the trial during the summer vacation of these student witnesses. The
5 Government can schedule the trial to coincide with the student witnesses' fall, winter, or spring
6 breaks from college. The Government can subpoena the witnesses at any time and pay to have
7 them flown to the Commonwealth in order to testify at the trial. While these options may be
8 inconvenient for the Government, they are all valid options that should be explored and pursued
9 before a Rule 15 deposition is ordered.

10 The current facts present no exceptional circumstances which justifies a Rule 15
11 deposition. The Court is mindful of the unique situation that affects the Commonwealth
12 regarding witnesses at trial. Being away at college, when you are a citizen of the
13 Commonwealth, may mean that the witness is on the other side of the world in the mainland
14 United States. However, these students remain within the subpoena power of the
15 Commonwealth Superior Court, and can therefore be compelled to return to the Commonwealth
16 to testify at a trial. Furthermore, at some point these students will voluntarily return to the
17 Commonwealth. A trial can be scheduled around the witnesses' availability or the witnesses
18 may be subpoenaed and brought here at the expense of the Government. It is an exceptional
19 circumstance when a witness is seriously ill, incarcerated, or leaves the Commonwealth and
20 enters a country outside of the subpoena power of the Commonwealth.¹ If the witness can never
21 be compelled to return to the Commonwealth and there is no chance that the witness will
22 voluntarily return to the Commonwealth, then it would be appropriate to depose the witness
23 under Rule 15(a) because there are no other options available to have the witness's testimony at
24 trial. Here, the Government has options to obtain the presence of its witnesses. While these
25 options are inconvenient to the Government in prosecuting the Defendant, these options need to
26 be fully explored before the 'exceptional circumstances' prerequisite of Rule 15(a) is satisfied.

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28 ¹ See also *United States v. Cannon*, 539 F.3d 601, 603 (7th Cir. 2008) (Deployment to Iraq satisfies the exceptional circumstances requirement of Fed. R. Crim. P. 15).

IV. CONCLUSION

2 For the foregoing reasons, the Government's Motion for Deposition of Witness
3 Pursuant to Com. R. Crim. P. 15 is DENIED.

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5 **SO ORDERED** this 27th day of July, 2009.

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9 **ROBERT C. NARAJA,**
10 Presiding Judge

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