

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

UNITED STATES OF AMERICA,)	
)	
v.)	Criminal No. 1:07CR209 (TSE)
)	
WILLIAM J. JEFFERSON,)	
)	
Defendant.)	

**MOTION FOR ALTERNATIVE SERVICE
OF TRIAL SUBPOENA ON JENNIFER DOUGLAS ABUBAKAR
AND FOR RECONSIDERATION OF REQUEST FOR RULE 15(a) DEPOSITION**

Pursuant to 28 U.S.C. § 1783 and Rule 4(f) of the Federal Rules of Civil Procedure, defendant William J. Jefferson respectfully moves for an order permitting service of a trial subpoena on Jennifer Douglas Abubakar by e-mail and international express mail.

Mr. Jefferson also requests that the Court reconsider its denial of Mr. Jefferson’s motion to take the deposition of Mrs. Abubakar, pursuant to Rule 15(a) of the Federal Rules of Criminal Procedure, in order to preserve her testimony for use at trial if necessary.

The specific grounds for this motion are set forth more fully in the accompanying memorandum of law.

**MEMORANDUM IN SUPPORT OF MOTION FOR ALTERNATIVE
SERVICE OF TRIAL SUBPOENA ON JENNIFER DOUGLAS ABUBAKAR
AND FOR RECONSIDERATION OF REQUEST FOR RULE 15(a) DEPOSITION**

In a *Brady* letter sent to the defense earlier this year, the government disclosed that Jennifer Douglas Abubakar, the wife of the former vice president of Nigeria, provided testimony during her grand jury appearance that directly contradicted key conspiracy allegations in the indictment. Because of the critical exculpatory nature of this evidence, the defense has made diligent efforts to serve a trial subpoena on Mrs. Abubakar, both in the United States and in

Nigeria, but these attempts have been unsuccessful. In the course of these efforts, the defense was advised that Mrs. Abubakar, while apparently maintaining a residence in Nigeria, is now primarily based in Dubai (in the United Arab Emirates). The defense does not have any more specific information as to where Mrs. Abubakar can be found in Dubai. In a further attempt to obtain her appearance at trial, Mr. Jefferson now seeks an order, pursuant to Fed.R.Civ.Pro. 4(f)(3), permitting service of the trial subpoena on Mrs. Abubakar by the alternative means of e-mail and international express mail, as detailed below.

Mr. Jefferson also asks the Court to reconsider its denial of his motion to take the deposition of Mrs. Abubakar pursuant to Rule 15(a) of the Federal Rules of Criminal Procedure. Although as an American citizen Mrs. Abubakar is subject to service of a subpoena overseas, there is strong reason to believe that she will not appear at trial even if served. Her attorneys have recently again confirmed in writing, however, that Mrs. Abubakar is willing to appear and testify under oath at a deposition held in Europe. The government may argue that Mrs. Abubakar should not be allowed to choose when and where she will testify. But this case is not about Mrs. Abubakar; instead, the issue here is Mr. Jefferson's right to mount an effective defense. This important exculpatory evidence may be obtainable only by way of deposition, which will be taken under oath and with full opportunity for the government to cross-examine Mrs. Abubakar, including on the question whether she will appear as a witness at trial. Under the circumstances, the interests of justice require that the deposition be permitted.

A. Factual and Procedural Background

Count 1 of the indictment charges Mr. Jefferson with, *inter alia*, conspiring to violate the Foreign Corrupt Practices Act ("FCPA") through the payment of a bribe to Atiku Abubakar, the former Vice President of Nigeria, to obtain his assistance for a telecommunications joint venture

in Nigeria involving iGate technology. Count 11 charges a substantive FCPA violation based on the alleged bribery of Mr. Abubakar. The government has identified Mrs. Abubakar as one of the unindicted co-conspirators in the conspiracy charged in Count 1, and the indictment specifically alleges that Mr. Jefferson communicated with Jennifer Abubakar about the bribe to be paid to her husband: “On or about June 7, 2005, in Washington, D.C., Defendant JEFFERSON met with [Atiku Abubakar]’s Spouse . . . and expressed his willingness to provide things of value to [Atiku Abubakar] in return for [Atiku Abubakar] assisting the Nigerian Joint Venture.” Ind., ¶ 101. Other than Mrs. Abubakar and Mr. Jefferson, there are no other witnesses to the conversation, nor is there a recording of it.

In a letter dated February 7, 2008, the government disclosed to the defense that during her grand jury testimony, Jennifer Abubakar “denied that [Mr. Jefferson] talked to her about his interest in paying her husband money.” Feb. 7, 2008 letter at 3. The government admits that this statement – which directly contradicts the allegations in the indictment regarding the purported communications between Mr. Jefferson and Mrs. Abubakar – is exculpatory. *Id.* at 3.

After receiving the government’s letter, the defense unsuccessfully attempted to serve a trial subpoena on Mrs. Abubakar at the home she owned in Potomac, Maryland. The defense then requested that Mrs. Abubakar’s American counsel accept service of a trial subpoena on her behalf, but was told that they were not authorized to do so. Mrs. Abubakar’s counsel also advised the defense that Mrs. Abubakar now lives outside of the United States, but that they were not authorized to provide the defense with her current residential address.

By motion dated May 6, 2008, the defense sought leave pursuant to Rule 15(a) of the Federal Rules of Criminal Procedure to depose Jennifer Abubakar in order to preserve her

testimony for trial.¹ In an Order dated July 17, 2008, that motion was denied as moot, on the grounds that Jennifer Abubakar is an American citizen and, therefore, subject to service of a subpoena outside of the United States pursuant to 28 U.S.C. § 1783. The July 17, 2008 Order also authorized the issuance of a trial subpoena to be served outside of the country on Mrs. Abubakar.²

The defense then sought to personally serve Mrs. Abubakar in Nigeria. Nigerian attorney David Ogebe obtained addresses for a Nigerian residence of the Abubakars and for the Gede Foundation, a foundation for the promotion of health in Nigeria that was founded and is run by Mrs. Abubakar. As set forth in the affidavit attached as Exhibit 1, Mr. Ogebe attempted to serve Mrs. Abubakar at each of those locations, but was unsuccessful. Mr. Ogebe was advised by the executive director of the Gede Foundation, Ms. Boglosa, that Mrs. Abubakar was not in Nigeria and that her current address could not be released to him. Ex. 1, ¶ 5. Ms. Boglosa did state, however, that she would forward a letter or e-mail to Mrs. Abubakar. *Id.* Mr. Ogebe was advised by guards at the residential address that Mrs. Abubakar was currently based primarily in Dubai, and that they had no idea of when she would be available in Nigeria. Ex. 1, ¶ 7.

In addition to making these efforts at service, the defense again requested that Mrs. Abubakar's American attorneys make her available for testimony. They rejected this request, but reiterated their previous offer to make Mrs. Abubakar available for a sworn deposition in Europe. *See* letter attached as Exhibit 2.

¹ In that motion, the defense also sought leave to depose Atiku Abubakar and Suleiman Yahyah, and requested the issuance of letters rogatory seeking the assistance of the Nigerian authorities in obtaining the depositions of these individuals. That request is still pending.

² By Order dated July 31, 2008, the Court modified the July 17 Order to set forth the amount of the expenses to be tendered to Mrs. Abubakar in connection with the subpoena.

B. Mr. Jefferson Should Be Permitted to Serve Mrs. Abubakar by Alternative Methods.

Under Rule 17(e)(2) of the criminal rules, service of a subpoena on a witness in a foreign country is governed by 28 U.S.C. § 1783. Section 1783 provides that service “shall be effected in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country.” 28 U.S.C. § 1783(b). The relevant provision of the civil rules is Fed.R.Civ.Pro. Rule 4(f). With respect to countries that are not signatories to a treaty governing service of process,³ it provides

Unless federal law provides otherwise, an individual ... may be served at any place not within any judicial district of the United States:

* * *

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country’s law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request;

(C) unless prohibited by the foreign country’s law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

³ Neither Nigeria nor the United Arab Emirates, where Dubai is located, are signatories to the Hague Convention on service of process. See http://travel.state.gov/law/info/judicial/judicial_686.html.

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

Fed.R.Civ.Pro. Rule 4(f).⁴

The alternative service provision in subsection (3) of Rule 4(f) permits service by any means permitted by the court and not prohibited by international agreement. *See Rio Properties, Inc. v. Rio International Interlink*, 284 F.3d 1007, 1014 (9th Cir. 2002). “[C]ourt-directed service under Rule 4(f)(3) is as favored as service available under Rule 4(f)(1) or Rule 4(f)(2).” *Id.* at 1015 (footnote omitted). It “is neither a ‘last resort’ nor ‘extraordinary relief;’” instead, it is “merely one means among several which enables service of process on an international defendant.” *Id.* However, a district court in its discretion may require the serving party to show “that reasonable efforts to serve the defendant have already been made and that the court’s intervention will avoid further unduly burdensome or futile attempts at service.” *Williams v. Advertising Sex LLC*, 231 F.R.D. 483, 486 (N.D. W.Va. 2005), *citing FMAC Loan Receivables v. Dagra*, 228 F.R.D. 531, 534 (E.D. Va. 2005).

“In order to fulfill due process requirements under Rule 4(f)(3), the Court must approve a method of service that is ‘reasonably calculated’ to give notice to defendant.” *BP Products North America, Inc. v. Dagra*, 232 F.R.D. 263, 264 (E.D. Va. 2005). *See also FMAC Loan Receivables*, 228 F.R.D. at 533. Alternative methods of service that have been approved by courts include

⁴ While subpoenas generally must be served personally, Section 1783’s reference to the rules governing service of process on persons overseas allows use of all of the methods in Rule 4(f). *See S. Rep. 88-1580*, 1964 U.S.C.C.A.N. 3782, 3791 (“Subsection (b) of proposed revised section 1783 makes available all methods of service provided for in the Federal Rules of Civil Procedure.”); *United States v. Danenza*, 528 F.2d 390, 392 (2d Cir. 1975) (discussing availability of methods under Fed.R.Civ.Pro. 4(i), the predecessor to 4(f)).

service by publication, by facsimile, by electronic mail, by mail to a defendant's last known address, and personal service on the party's attorney. *See FMAC Loan Receivables*, 228 F.R.D. at 535-36.

Here, as detailed above, the defense has made reasonable efforts to locate Mrs. Abubakar and has attempted personal service on her in two different countries, without success. During the most recent attempt, the defense learned that Mrs. Abubakar is apparently now based primarily in Dubai, in the United Arab Emirates, but the defense has still not been able to obtain her current address. Rather than undertaking the burdensome, expensive and potentially futile task of trying to locate Mrs. Abubakar in Dubai and attempting to effect personal service on her there, Mr. Jefferson requests an order permitting him to use the alternative methods of e-mail and international express mail sent via the Gede Foundation. Mr. Jefferson has been informed that communications by these means will be forwarded to Mrs. Abubakar, *see* Ex. 1, ¶ 5, and there is no reason to believe that would not occur.

The court has wide discretion in determining permissible methods of service under Rule 4(f)(3). *See BP Products North America, Inc. v. Dagra*, 236 F.R.D. 270 (E.D. Va. 2006). Mr. Jefferson respectfully submits that allowing service on Mrs. Abubakar by e-mail and international express mail to the Gede Foundation is appropriate under the circumstances of this case.

C. Mr. Jefferson Should Also Be Permitted to Depose Mrs. Abubakar.

Rule 15(a) permits the deposition of a witness to be taken to preserve testimony for trial, "because of exceptional circumstances and in the interest of justice." Fed.R.Crim.Pro. 15(a)(1). In his previous motion for a deposition of Mrs. Abubakar, Mr. Jefferson demonstrated that her testimony would be exculpatory and material, two of the key criteria under Rule 15(a). *See*

United States v. Rosen, 240 F.R.D. 204, 208 (E.D. Va. 2007); *United States v. Drogoul*, 1 F.3d 1546, 1552 (11th Cir. 1993). Because Mrs. Abubakar could be served with a trial subpoena under 28 U.S.C. § 1783, however, the government argued that she did not meet the criterion of unavailability, and Mr. Jefferson's motion was denied as moot.

The defense respectfully submits that the unique circumstances of this case warrant reconsideration of that decision. Mr. Jefferson wants Mrs. Abubakar to appear as a witness at trial, and as the first section of this memorandum makes clear, is continuing to attempt to put her under subpoena. Through her American attorneys, with whom the defense has communicated on multiple occasions, Mrs. Abubakar must be aware that Mr. Jefferson is seeking to serve her with a trial subpoena. But Mrs. Abubakar has not permitted her attorneys to accept service, or to disclose her current address,⁵ and they will not agree to make her available for testimony in the United States. *See* Exhibit 2. Based on these facts, it is likely that Mrs. Abubakar will refuse to travel to the United States to testify in compliance with a subpoena. In short, all of the available evidence suggests that Mrs. Abubakar will not appear at the trial in this matter.

Accordingly, Mrs. Abubakar should be treated as unavailable for Rule 15(a) purposes. As the Eleventh Circuit stated in *United States v. Drogoul*,

A potential witness is unavailable for purposes of Rule 15(a) . . . whenever a *substantial likelihood* exists that the proposed deponent will not testify at trial. In that situation, justice usually will be served by allowing the moving party to take the deposition, thereby preserving the party's ability to utilize the testimony at trial, if necessary.

1 F.3d at 1553 (emphasis added). Indeed, as the court in *Drogoul* further explained,

[U]navailability is not the focus *per se* of Rule 15(a). Unavailability is required for *use* of the depositions at trial. Fed.R.Crim.P. 15(e). All that is necessary to

⁵ The executive director at the Gede Foundation and the security guards at the Abubakar residence also did not provide Mrs. Abubakar's address. *See* Exhibit 1, ¶¶ 5, 7.

take depositions is a showing that “exceptional circumstances” exist and that justice would be served by preserving the deposition testimony.

Id. at 1557 (emphasis original).

It is in the defense’s interest for Mrs. Abubakar to be present at trial, so that the jury could hear live testimony refuting the government’s conspiracy allegations. But while she is unlikely to appear at trial, it is clear that she will sit for a deposition. *See* Exhibit 2.⁶ If Mrs. Abubakar does appear at trial after being deposed, the deposition presumably will be inadmissible. If she does not appear, however, the defense will be able to present her exculpatory testimony by means of the deposition. Under these unusual circumstances, the interests of justice require that Mr. Jefferson be permitted to depose Mrs. Abubakar.

D. Conclusion

For the reasons set forth above, Mr. Jefferson respectfully requests that the Court grant his motion and enter an order (1) permitting him to serve Mrs. Abubakar by e-mail and international express mail via the Gede Foundation, and (2) permitting him to take the deposition of Mrs. Abubakar in Europe pursuant to Rule 15(a).

⁶ If Mrs. Abubakar appears at a deposition in Europe, she could be personally served with a trial subpoena at that time. The problem is that there is a substantial likelihood that Mrs. Abubakar will not appear at trial even if served with a subpoena personally or by the alternative means requested in the first part of this motion.

Respectfully submitted,

/s/ Robert P. Trout

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Certificate of Service

I hereby certify that on this 30th day of December, 2008, I electronically filed the foregoing motion and the accompanying memorandum with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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Med @ 12:29
IN THE FEDERAL HIGH COURT OF NIGERIA
HOLDEN AT LAGOS

AFFIDAVIT OF SERVICE OF SUBPEONA

I, **DAVID OGENYI**, Adult, Male Nigerian Citizen of 315 Bornu Way Yaba Lagos do hereby make Oath and state as follows that:

Background Facts/Personal Details

1. I am a private Legal Practitioner in the Law firm of Ogebe & Okosun instructed by Trout Cacheris PLLC to effect the service of a subpoena on Mrs. Jennifer Douglas Abubakar, American Citizen resident in Nigeria.
2. The addresses for service on the recipient were:

(a) c/o Gede Foundation,

Plot 2813, No.9 Zaire Crescent

off Danube Street

Maitama Abuja.

(b) No.18 Oba Akenzua Street,

Asokoro, Abuja.

Attempts at Service

3. On 25 November 2008 I proceeded in the company of my litigation officer in Chambers, Mr. Owode Johnson Balogun to the above stated address of Gede Foundation and were informed by the security personnel that the Foundation had moved to No. 13 Danube Street Maitama
4. At No.13 Danube Street we located the Foundation and met with the Executive Director of the Foundation Ms. Jeremy Boglosa who informed me that Mrs. Jennifer Douglas Abubakar, the proprietor of the Foundation, was unavailable and therefore unable to receive the subpoena personally.

5. On further prodding we were informed by the said Ms. Boglosa that Mrs. Jennifer Douglas Abubakar was not in the country and her current address cannot be released to me. She thereafter suggested that I write a letter or an email detailing why I want to see Mrs. Abubakar which she – Ms. Boglosa – would then forward to Mrs. Abubakar.
6. Seeing as we were trying to accomplish personal service of the subpoena, I decided to try to serve Mrs. Abubakar at her residence. .
7. We thereafter proceeded to the residential address of No.18 Oba Akenzua Street Asokoro Abuja where I was informed by the security guards at the residence that Mrs. Jennifer Douglas Abubakar is currently primarily based in Dubai and they have no idea of when she would be available to receive the subpoena. They however stated that Mrs. Abubakar regularly makes trips back to Nigeria, but they did not tell me when she would next be in Nigeria.


Miscellany

8. The subpoena has not been served on the recipient, Mrs. Jennifer Douglas Abubakar due to the foregoing reasons though all reasonable steps to meet her have been followed.

AND I make this Oath in good faith conscientiously believing its contents to be true and correct to the best of my knowledge and in accordance with the Oaths Act Laws of the Federation of Nigeria 2004.


DEPONENT

Sworn to at the Federal High Court
Registry Lagos this *11th* day
of *December* 2008


BEFORE ME
11/12/08
DOKUBO
COMMISSIONER FOR OATHS
FEDERAL HIGH COURT
01/11/08 - 170
PC 000265483
11/12/08

STEPTOE & JOHNSON^{LLP}

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November 5, 2008

Robert P. Trout, Esquire
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RE: U.S. v. Jefferson

Dear Bob:

I am writing in response to your request that we make our clients, the Abubakars, available for testimony in the above matter. As we have discussed previously, we are not authorized to accept service and our position on this matter remains unchanged. Having reviewed the pleadings related to your motion regarding my clients, I do want to share with you some observations regarding the proposed deposition of Mrs. Abubakar.

As you know, given that Mrs. Abubakar currently resides with her husband and children outside the U.S., we have offered to make her available for a sworn deposition in Europe. While I believe you have indicated your agreement to this proposal, it is my understanding that the prosecution has objected on the grounds that a foreign deposition would allow Mrs. Abubakar to commit perjury without fear of prosecution. This position is both legally inaccurate and at odds with the facts of this case. It thus provides no basis to reject our proposal.

First, the claim that it allows Mrs. Abubakar, a U.S. citizen, to perjure herself with impunity is legally incorrect. When a deposition taken as part of a U.S. proceeding is given in a foreign country, knowingly false testimony may still be prosecuted in the United States. *See, e.g., Christian v. Rhode*, 41 F.3d 461, 468 (9th Cir. 1994) (deposition testimony given in Cayman Islands subject to penalty of perjury). Existing criminal statutes, including, *inter alia*, 18 U.S.C. § 1621 (perjury) and 18 U.S.C. § 1501 *et seq.* (obstruction of justice), permit prosecution in the U.S. for any act of perjury or obstruction of justice in connection with U.S. proceedings, even where the misconduct took place in a foreign country. *See also* 22 U.S.C. § 4221. Thus the government's argument is incorrect as a matter of law.

EXHIBIT 2 TO MOTION FOR ALTERNATIVE SERVICE

Second, as a factual matter, there is no basis to believe that Mrs. Abubakar is likely to commit perjury. Indeed, based on what we know we are surprised that the prosecution would even raise this possibility. On December 6, 2005, during the investigation of Congressman Jefferson, Mrs. Abubakar was subpoenaed to the grand jury. Prior to testifying she met with prosecutors on November 9, 2005 and answered each and every question as to the specifics of her testimony. The government thereafter put her before the grand jury, and Mrs. Abubakar testified completely consistent with her prior government interview. This testimony (and interview) occurred almost three years ago. If the government believed Mrs. Abubakar's testimony was untrue, it has had more than enough time to bring charges against her. Indeed the government appears to not have even asserted that her prior testimony was in fact untrue. Having failed to do so, it is bizarre that they would now raise the specter of perjury simply because a mother of small children who now lives outside the U.S. offered to give testimony (well known to the government) outside the U.S.

Given these circumstances, we believed that our offer to make Mrs. Abubakar available for sworn testimony closer to her residence was a reasonable accommodation to all parties. We continue to so believe.

We understand that these issues may be argued before Judge Ellis at some time in the future. If so, please convey our views on this matter to the Court.

If you have any further questions please do not hesitate to contact me.

Very truly yours,



Mark J. Nulkower

cc: Christopher Mead, Esquire