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Expert Analysis

Statements to Foreign Police, Interpol Immunity, Solicitation Sanctions

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This column reports on several significant representative decisions handed down recently in the U.S. District Court for the Eastern District of New York. Judge Eric R. Komitee, denying a motion to suppress statements made to foreign officials in Bulgaria, found that there was no "joint venture" between U.S. and Bulgarian agents so as to require *Miranda* warnings. Judge Sterling Johnson Jr., held that there was no subject matter jurisdiction over claims against Interpol. And Judge Brian M. Cogan sanctioned plaintiffs' counsel, in a Fair Labor Standards Act case, for improper client solicitation.

'Miranda' Statements Made To Foreign Officials

In *United States v. Zhukov*, 18 CR 633 (E.D.N.Y. May 3, 2021), Judge Komitee declined to suppress statements made by defendant to Bulgarian officials in Varna, Bulgaria, without *Miranda* warnings, where the degree and nature of coordination between U.S. and Bulgarian law enforcement did not amount to a "joint venture".

Defendant Zhukov is a Russian national. Bulgarian police officers searched his apartment in Varna in November 2018. The Cybercrime Department to combat organized crime (GDBOP), led by Inspector Dimitrov, conducted the search. U.S. law enforcement had requested the search and arrest pursuant to a Mutual Legal Assistance Treaty (MLAT). There was no independent Bulgarian investigation. The MLAT request asked Bulgarian officials to coordinate with FBI Legal Attaché Jack Liao, to permit him to participate in the search, and to seize certain electronic devices.

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During the search Dimitrov asked Zhukov whether a recovered cellphone and computer were his. Zhukov said he owned all devices and documents seized. Zhukov, now charged with wire fraud in the Eastern District, seeks to suppress these statements.

FBI Special Agents Aslanyan and Merriman, along with an Assistant U.S. Attorney, had flown from New York to Bulgaria in connection with these events. Aslanyan attended the search as an observer and asked no questions. After the arrest the two Special Agents conducted their own interview of Zhukov, giving him *Miranda* warnings at a GDBOP office in Varna.

Before the November search and arrest, the Americans had told the Bulgarians that they wished to coordinate with them regarding the questions to ask Zhukov. At that point the Americans believed that Bulgarian law and policy prohibited them from asking Zhukov questions on Bulgarian soil. As the date for the search and arrest approached, the Americans got authorization from the Bulgarians to conduct their own interview and thus decided not to coach the Bulgarians on what to ask. The U.S. prosecutor eventually drafted questions preceded

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by *Miranda* warnings, to be used by the FBI in post-search questioning.

Liao testified at the suppression hearing that, because he was traveling from his office in Sofia to Varna and had no access to his own printer, he forwarded a list of questions to Dimitrov with the notation "For printing." That list does not contain the questions at issue here, but does contain full *Miranda* warnings. Dimitrov testified that U.S. personnel did not draft questions for their Bulgarian counterparts, that he did not prepare or use a list of questions in speaking with Zhukov, and that it is standard procedure to ask about items seized in a search and their ownership.

As Komitee noted, "'statements taken by foreign police in the absence of *Miranda* warnings are admissible if voluntary.' *United States v. Yousef*, 327 F. 3d 56, 145 (2d Cir. 2003)." Slip op. 8. Because the threat of suppression in U.S. courts is of little moment to foreign authorities, the Second Circuit has not applied *Miranda* to statements obtained overseas by non-U.S. officials. The exception to the general rule is a "joint venture" between U.S. and foreign authorities. Coordination between the United States and another country becomes a joint venture when U.S. personnel actively participate in and direct the questioning by foreign officials. The joint venture doctrine may also apply if U.S. personnel use foreigners as their agents to avoid giving *Miranda* warnings. The "mere presence" of U.S. personnel at an interrogation does not prove a joint venture. Slip op. 8-11. "In the Second Circuit in particular, the joint venture doctrine focuses less on the overall level of cooperation between the two nations, and more on the U.S. agents' efforts to direct the specific questioning at issue." Slip op. 12.

Here the evidence at the suppression hearing did not show that the Americans "directed" Dimitrov's questioning of Zhukov or engaged in a joint venture to circumvent *Miranda*. Slip op. 13-18.

Interpol Immunity From Suit

In *El Omari v. The International Criminal Police Organization-Interpol*, 19 CV 1457 (E.D.N.Y. May 13, 2021), Judge Johnson dismissed an action against Interpol for negligent infliction of emotional distress and violation of the New York State Constitution based on Interpol's immunity from suit.

Interpol is an international police organization with 194 member countries. Its headquarters and staff are based in Lyon, France. Every member country has a National Central Bureau (NCB) run by national police officials. Interpol facilitates transnational policing by providing member countries with a communication network. It acts as a conduit for international arrest warrants, extradition requests and requests for criminal evidence. It is not an operational police force.

To facilitate communication among its members' police forces, Interpol uses a system of color-coded notices. A red notice functions as an international "wanted person" notice. The General Secretariat of Interpol conducts a legal review for compliance with certain criteria before publication of a red notice. The subject of the red notice may request (1 information about or deletion of the red notice, and (2) revision based on new information. There is no appeals process.

U.S. participation and payment of member dues to Interpol is authorized by Congress. President Reagan designated Interpol as an International Organization with limited immunity under the International Organization Immunities Act (IOIA) in June 1983. This designation entitles organizations to the same immunity granted to foreign sovereigns under the Foreign Sovereign Immunities Act (FSIA). Since 1983 presidents have decreased the restrictions on Interpol's immunity. In 2009, President Obama removed all immunity limitations on Interpol.

Interpol issued a red notice against plaintiff on request of the United Arab Emirates (UAE) through its NCB, "in connection with plaintiff's February 2015 conviction in absentia of embezzlement and abuse of power by the Criminal Court of Ras Al Kaimah." Slip op. 7.

Plaintiff, a U.S. and North Carolina citizen, had worked in an Economic Free Zone in the UAE as an employee of a member of the royal family. After plaintiff landed at JFK Airport in July 2016, U.S. Customs and Border Protection officers warned him against returning to the UAE because he would be arrested and put in jail there.

In response to a request for information about him, Interpol confirmed that plaintiff's file contained a red notice. Plaintiff asked Interpol to delete the notice and sought an opportunity to appear by counsel with an expert witness. Interpol declined to delete the red notice, did not respond to the request for a hearing, and denied plaintiff's request for revision. Plaintiff

claims here that the failure to delete the red notice made him fear for his safety and trapped him in the United States—a problem because his family lives in Morocco and his field of expertise is Economic Free Zones.

The court found that it lacked subject matter jurisdiction over plaintiff's claim. Interpol satisfied the three criteria to be considered an international organization under the IOIA. First, it is a public international organization, composed of member states and assisting them in executing their police powers. Second, the United States participated in the international organization pursuant to Congressional authorization. Third, Interpol was designated by the President—the sole organ of the federal government in the field of international relations—through Executive Orders to be entitled to all immunity conferred by the IOIA.

As Johnson also determined, Interpol has not waived its immunity, which equals that enjoyed by foreign governments under FSIA. Slip op. 17-19.

Sanction Under Disciplinary Rule Regarding Attorney Solicitation

In *Shibetti v. Z Restaurant, Diner & Lounge*, 18 CV 856 (E.D.N.Y. May 3, 2021), Judge Cogan sanctioned plaintiffs' counsel for having engaged in client solicitation prohibited by New York's attorney disciplinary rules.

Plaintiffs sued the owners of the Parkview Diner in Brooklyn, alleging failure to pay minimum wage or overtime to non-exempt, tipped employees, among other wrongs. Plaintiffs sought to bring a collective action for violations of the Fair Labor Standards Act (FLSA) and a class action for claims under the New York Labor Law**.** Prior to the events giving rise to the sanctions application, Cogan had granted conditional approval to proceed with a collective action by non-exempt, tipped employees, had directed defendants to provide information regarding the identities and addresses of such persons that had been missing from defendants' prior responses, and had authorized the distribution of notices under FLSA.

Plaintiffs' counsel subsequently placed telephone calls to at least 12 potential plaintiffs, asking whether they had received the notice and had any interest in joining the lawsuit. Counsel sent letters to the same effect, accompanied by the court-approved notices.

Defendants sought sanctions under New York Rule of Professional Conduct 7.3, which (in pertinent part) prohibits its attorneys from soliciting business by means of: "(b) any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain." Cogan granted sanctions for the phone calls (Slip op. 9-12) and denied them for the letters (Slip op. 12-16).

The court's authority to oversee communications with possible plaintiffs in a collaborative action is similar to that in the more common class action context. Outright bans are strongly disfavored, but limits on such communications will be sustained if the need for them outweighs the potential interference with the parties' rights. Slip op. 7-9.

An attorney's call asking if the recipient would like to join a lawsuit is solicitation within the meaning of Rule 7.3(b). Slip op. 10, citing *Maracich v. Spears*, 570 U.S. 48, 55 (2013) ("describing letters 'asking [individuals] to join the lawsuits' as 'solicitation letters'"). Punishment for such action enforces the law without prohibiting future speech and is well within the court's authority. Cogan dismissed plaintiffs' argument that the communications were justified by defendants' failure to provide complete identifying information pursuant to earlier orders. Plaintiffs had recourse to the court for any such failings and two wrongs do not make a right. Slip op. 11.

Sanction for the letters was not warranted, as they conveyed the same information as the court-approved notice, and defendants had not moved for a protective order expressly prohibiting letters to potential plaintiffs when opposing the motion for conditional approval to proceed with a collective action. Slip op. 15.