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United States v. Salim: A Harbinger for Federal Prosecutions Using Depositions Taken Abroad

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UNITED STATES v. SALIM: A HARBINGER FOR FEDERAL PROSECUTIONS USING DEPOSITIONS TAKEN ABROAD

Criminal suspects enjoy an array of protections under United States law that make evidence gathering for any federal prosecution a painstaking task.[1] When inculpatory evidence is located in foreign countries, however, the obstacles to acquiring it grow numerous and complex.[2] These difficulties notwithstanding, an ever-increasing number[3] and

1. These protections include the constitutional rights afforded criminal suspects under the fourth, fifth, and sixth amendments, including the rights to be free from warrantless searches and seizures, to protection against government overreaching during interrogation, to due process, to privilege against self-incrimination, to a speedy and public jury trial, and to adequate confrontation of and compulsory process for witnesses. *See* Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States,* 20 VA. J. INT'L L. 741, 742-45, 743 nn.9-10 (1980), *reprinted in* INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES LAW IN THE WORLD COMMUNITY 107, 108-12, 109 nn.9-10 (R. Lillich ed. 1981). These protections also include the statutory rights conferred by the authentication requirements of rule 901 of the Federal Rules of Evidence, and the requirements of the hearsay exceptions and exclusions of rules 801, 803 and 804. *See* H.R. REP. NO. 907, 98th Cong., 2d Sess. 3, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3578, 3579 [hereinafter H.R. REP. NO. 907].

2. *See* H.R. REP. NO. 907, *supra* note 1, at 1-4, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3578-80, accompanying amendments under the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984). The amendments, presented under H.R. 5919, made foreign-kept business records more readily admissible into evidence in criminal trials in United States courts, and extended statutes of limitations and Speedy Trial Act deadlines when evidence in foreign countries must be obtained. The amendments stemmed from the multiple difficulties involved in securing and obtaining the admission of foreign-based evidence at trial. *Id.; see also* III(a) UNITED STATES ATTORNEYS' MANUAL §§ 9-13.500 to 9-13.516 (1988). The manual advises that:

> An alien (*i.e.,* American) investigator or prosecutor who attempts to encroach on [the foreign police] function by investigating a crime or gathering evidence within another country's borders may be considered to violate its sovereignty. A telephone call, a letter, or an unauthorized visit to a witness overseas may fall within this stricture. Such violations can generate diplomatic protests and result in denial of access to the evidence or even the arrest of the agent or Assistant U.S. Attorney who plies his or her trade overseas.

Id. at § 9-13.510.

3. *See* H.R. REP. NO. 907, *supra* note 1, at 2-4, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3578-80; *see also* United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990) (Brennan, J., dissenting) ("Particularly in the past decade, our Government has sought, successfully, to hold foreign nationals criminally liable under federal laws for conduct committed entirely beyond the territorial limits of the United States that nevertheless has effects in this country."). *Id.* at 1068.

variety[4] of federal prosecutions now require evidence from abroad. This trend is nearly certain to continue, since the Justice Department sees international law enforcement as the preeminent development of the past decade and the top priority for coming years.[5]

Obtaining oral evidence from witnesses located abroad is particularly problematic.[6] Foreign nationals are not subject to subpoena beyond United States borders.[7] United States citizens and residents are subject to subpoena

4. *See* statement of Attorney General Dick Thornburgh: "Often, more than 50 percent of my day is devoted to some matter relating to our international involvement in fighting drug trafficking, money laundering, international organized crime and business fraud, environmental depredations, terrorism or espionage." Address by Attorney General Dick Thornburgh, American Bar Association annual meeting (Aug. 8, 1989), *quoted in* Wash. Post, Aug. 9, 1989, at A19, col. 1; *see also* United States v. Verdugo-Urquidez, 110 S. Ct. at 1068-69 (Brennan, J., dissenting) (observing that United States criminal laws governing drugs, antitrust, securities and "a host of other federal criminal statutes" now apply to the actions of foreign nationals abroad).

5. Attorney General Thornburgh, who previously served in the Justice Department as Assistant Attorney General for the Criminal Division during the Gerald Ford administration, stated that upon his return to the Justice Department, the biggest change he perceived was the "vast increase in the amount of international activity in which we are now engaged." Wash. Post, *supra* note 4, at A19, col. 1. Thornburgh said he was pressing Congress for additional support to "ensure that international matters are given the priority attention they deserve." *Id.*

6. In nearly all countries, witness depositions in criminal matters must normally be sought under the letter rogatory provisions of rule 28(b) of the Federal Rules of Civil Procedure. *See* III(a) UNITED STATES ATTORNEYS' MANUAL §§ 9-13.500, 13.510, 13.521-22, 13.535 (1988). The requested nation is under no obligation to fulfill such a request, though many nations comply, at least in part, as a matter of comity. *See id.* at 9-13.535.

At present, the United States has bilateral "mutual assistance" treaties with Canada, the Cayman Islands, Italy, the Netherlands, Switzerland, and Turkey, the terms of which compel compliance with requests for evidentiary assistance within strictly defined terms. *See* United States-United Kingdom Treaty on Mutual Assistance in Criminal Matters with Respect to the Cayman Islands, with Understandings, July 3, 1986, S. TREATY DOC. 8, 100th Cong., 2d Sess. (1988), *reprinted in* 26 I.L.M. 536 (entered into force Mar. 19, 1990); Treaty Between the United States and Canada on Mutual Assistance in Criminal Matters, Mar. 18, 1985, S. TREATY DOC. 14, 100th Cong., 2d Sess. (1988), *reprinted in* 26 I.L.M. 1092 (entered into force Jan. 24, 1990); Treaty Between the United States and the Italian Republic on Mutual Assistance in Criminal Matters, Nov. 9, 1982, S. EXEC. REP. NO. 25, 98th Cong., 2d Sess. (1984) (entered into force Nov. 13, 1985); Treaty Between the United States and the Kingdom of the Netherlands, June 12, 1981, T.I.A.S. No. 10,734 (entered into force Sep. 15, 1983); Treaty Between the United States and the Republic of Turkey on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, 32 U.S.T. 311, T.I.A.S. No. 9891 (entered into force Jan. 1, 1981); Treaty Between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters, May 25, 1973, 27 U.S.T. 2019, T.I.A.S. No. 8302 (entered into force Jan. 23, 1977).

Recently, the United States Senate ratified mutual assistance treaties with four more nations: the Bahamas, Belgium, Mexico, and Thailand. *See* 135 CONG. REC. S13,887 (daily ed. Oct. 24, 1989). These treaties will enter into force upon an exchange of instruments of ratification by representatives of the United States and these nations.

7. *See* 28 U.S.C. § 1783(a) (1988) (entitled "Subpoena of person in foreign country").

abroad, and federal courts may hold them in contempt and impose levies on their American property for failure to appear.[8] While a cooperative foreign court may, at its discretion, compel both United States and foreign nationals to appear before it at an American court's behest,[9] virtually no foreign court will force a witness of any nationality to come to America to testify at trial.[10] Therefore, as the number of transnational prosecutions increases, the refusal or inability of inculpatory witnesses to come to the United States will place increasing pressure on federal prosecutors to obtain testimony by depositions taken abroad.[11]

The taking and use of depositions in federal criminal cases is governed by rule 15 of the Federal Rules of Criminal Procedure.[12] Rule 15 grants both

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8. *Id.*; *see also* 28 U.S.C. § 1784 (1988) (governing contempt sanctions).

9. *See* H.R. REP. NO. 907, *supra* note 1, at 3, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3579.

10. *See id., reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3579-80; *see also* United States v. Kehm, 799 F.2d 354, 361 (7th Cir. 1986) (civilized countries do not turn over their nationals to foreign powers without a treaty); Merino v. United States Marshal, 326 F.2d 5, 13 (9th Cir. 1963), *cert. denied,* 377 U.S. 997 (1964) (attendance of witnesses in foreign countries not compellable by American subpoenas).

11. *See* United States v. Salim, 855 F.2d 944, 946 (2d Cir. 1988) (the court begins its opinion with the observation that "[i]n order to obtain evidence for use in domestic trials, litigants are apt to find it increasingly necessary to conduct depositions in foreign countries.").

12. FED. R. CRIM. P. 15. Rule 15 states in part:

> (a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. . . . After the deposition has been subscribed the court may discharge the witness.
>
> (b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. . . . The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause the defendant's removal from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify exclusion from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.
>
> (c) Payment of Expenses. Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney

federal prosecutors and defendants the power to take depositions from their own witnesses for use as substantive evidence at criminal trials.[13] While defendants traditionally have enjoyed this power under federal statute and common law, prosecutors have had this power only since 1975 when Congress amended rule 15.[14]

Rule 15 permits the parties to *take* a deposition only upon court order.[15] By including the court order requirement in rule 15, Congress precluded the rule's use as a discovery tool.[16] The party seeking the court order must show "exceptional circumstances" warranting the deposition, usually by demonstrating the prospective deponent's importance to the case and the likelihood of the deponent's unavailability at trial.[17] Showing probable un-

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for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.

(d) How Taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or the defendant's counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

13. *See* FED. R. CRIM. P. 15 advisory committee's note (Notes of Advisory Committee on Rules, Note to Subdivision (a), and Note on 1974 Amendment).

14. *See id.* FED. R. CRIM. P. 15 was amended by Pub. L. No. 94-64, §§ 3(15)-(19), 89 Stat. 373-74 (1975); *see also infra* note 54.

15. FED. R. CRIM. P. 15(a). *See* FED. R. CRIM. P. 15 advisory committee's note (Notes of Advisory Committee on Rules, Note to Subdivision (a), and Note on 1974 Amendment).

16. *See* FED. R. CRIM. P. 15 advisory committee's note (Note on 1974 Amendment).

17. *See id.* (Notes of Advisory Committee on Rules, Note to Subdivision (a), and Note on 1974 Amendment); *see also* United States v. Salim, 855 F.2d 944, 948 (2d Cir. 1988).

Rule 15(a) provides that depositions may be ordered by the court in "exceptional circumstances . . . in the interest of justice." The advisory committee's notes on the rule state that important to determining these circumstances is "the presence or absence of factors which determine the *use* of a deposition at the trial, such as the agreement of the parties to use of the deposition; the possible unavailability of the witness; or the possibility that coercion may be used upon the witness . . . ." FED. R. CRIM. P. 15 advisory committee's note (Note on 1974 Amendment)(emphasis added). The advisory notes later state, apparently with undue narrowness, that a rule 15 deposition "may *only* be *used* at trial if the witness is unavailable, and the rule narrowly defines unavailability." *Id.* (Notes of Committee on the Judiciary, House Report No. 94-247)(emphasis added); *see also infra* note 46.

One commentator has noted that "[u]nder the former (pre-amendment) rule a showing that the prospective witness may be unable to attend the trial was mandatory before a deposition

availability is generally a simple task in transnational cases because of the dearth of powers that American courts possess to compel witnesses who are located abroad to appear at trials in the United States.[18] Prosecutors in transnational cases face a far more difficult task complying with rule 15's "presence" requirement, which mandates that prosecutors present the defendant at the deposition if the defendant is in custody awaiting trial.[19] This provision presents a quandary for prosecutors because the United States currently has agreements with only six countries to hold American defendants in custody abroad for purposes of such proceedings.[20]

Once a rule 15 deposition is taken, rule 15 limits its *use* at trial by requiring that the testimony, however recorded, be otherwise admissible under the narrow hearsay exceptions of the federal evidence rules.[21] Implicitly, when the government proffers a rule 15 deposition, the testimony must also pass muster under the sixth amendment of the Constitution to be admitted against the defendant at trial.[22]

Rule 15 does not distinguish between depositions taken abroad and those conducted in the United States. Rather, the rule generally prescribes that depositions should be obtained under the rules used in federal civil litigation,[23] which contain several options regarding depositions taken in foreign

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could be ordered." 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 242, at 14 (2d ed. 1982). Under the amended rule:

> This will still be an important factor in deciding whether the necessary "exceptional circumstances" are present, but when the question is close the court may allow a deposition in order to preserve the testimony of a witness and put off until trial decision on whether the deposition will be admitted as evidence.

Id.

18. *See infra* text accompanying notes 170-91.

19. FED. R. CRIM. P. 15(b).

20. To date, the United States has agreements in effect with only six nations that provide for reciprocal jurisdiction over detainees or prisoners transferred abroad for purposes of confrontation at trial or to serve as witnesses: Canada, the Cayman Islands, Italy, the Netherlands, Switzerland, and Turkey. *See supra* note 6. Under all six of these mutual assistance treaties, the prisoner must voluntarily agree to testify when asked to appear as a witness.

21. FED. R. CRIM. P. 15(e).

22. *See* FED. R. CRIM. P. 15 advisory committee's note (Note on 1974 Amendment) (stating Congress' view that doubts as to the underlying constitutionality of permitting use at trial of government depositions were resolved in 1970 by California v. Green, 399 U.S. 149 (1970), discussed *infra* at notes 78-84, 122 and accompanying text); *see also* United States v. Kelly, 892 F.2d 255, 260-63 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 3243 (1990); United States v. Salim, 855 F.2d 944, 946, 954-55 (2d Cir. 1988); United States v. Sines, 761 F.2d 1434, 1441-42 (9th Cir. 1985).

23. "The procedure prescribed is similar to that in civil cases, Rules 28-31, Federal Rules of Civil Procedure . . . ." FED. R. CRIM. P. 15 advisory committee's note (Notes of Advisory Committee on Rules, Note to Subdivision (b)).

countries.[24] In practice, however, when a potential prosecution or defense witness is beyond United States jurisdiction, reasons of sovereignty usually necessitate that the party needing the rule 15 deposition make a motion for a formal request by "letter rogatory"[25] from the United States court to a judicial authority in the foreign nation.[26] Such a request, if granted, subjects the parties to the incompatibilities of the foreign nation's law and to the procedural discretion of the foreign authority conducting the deposition.[27] A rule 15 deposition thus may have to be obtained abroad under any number of circumstances that conflict with rule 15's own strictures and the evidence rules it incorporates.[28] Therefore, an American judge may ultimately deny admission of the deposition at a criminal trial because the procedures used failed to provide the opposing party adequate opportunity for cross-examination, and because of other deviations from United States evidence law.[29]

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24. *See* FED. R. CIV. P. 28(b). The rule provides that foreign depositions may be taken in three ways:

> (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the [United States] court, . . . or (3) pursuant to a letter rogatory. . . . Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

Id.

25. *See id.*; *see also* III(a) UNITED STATES ATTORNEYS' MANUAL § 9-13.510 (1988) ("*Obtaining Evidence Abroad: General Considerations* . . . Most problems associated with international evidence gathering revolve around the concept of sovereignty. Virtually every nation vests responsibility for enforcing criminal laws in the sovereign."); *supra* note 2.

26. FED. R. CIV. P. 28(b).

27. *See* III(a) UNITED STATES ATTORNEYS' MANUAL § 9-13.535. The manual states:

> Depositions pursuant to formal requests must be taken in accordance with the laws and procedures of the place where the request is executed. In some cases, those laws do not contemplate direct examination by attorneys for the parties, or even the presence of both parties. In most civil law countries, for example, the questioning of witnesses is done by the judge. Other countries limit videotaping or even verbatim transcripts. Administering an oath to a witness may be prohibited if he or she is a potential defendant. The request may ask that the deposition be conducted in accordance with U.S. procedures but such requests will be honored only if they do not violate local laws, the resources for compliance are available, and the significance of the request is understood by the executing authority.

Id.; *see also* United States v. Salim, 855 F.2d 944 (2d Cir. 1988). This case states that:

> [F]oreign laws do not always permit witnesses to be deposed in the manner to which American courts and lawyers are accustomed. In certain cases, the use of unconventional foreign methods of examination may exceed the limits of accepted American standards of fairness and reliability, such as underlie the confrontation clause and the rule against hearsay.

Id. at 946.

28. *Salim*, 855 F.2d at 946.

29. *Id.*; *see also* FED. R. EVID. 804(b)(1), *infra* note 57.

In the case of a prosecution witness, the deposition may independently defy admission for a lack of adequate confrontation, which is guaranteed to the defendant by the sixth amendment's confrontation clause.[30]

In the fifteen years since Congress amended rule 15 to permit government depositions, federal courts have decided about a dozen cases involving challenges to the use of such evidence obtained in eight foreign countries.[31] The courts have decided more than half of these cases in the past five years.[32] While each of these cases presented some question as to the proper procedural, evidentiary, or constitutional limits on the use of prosecution depositions taken abroad,[33] in only one case, *United States v. Salim,*[34] was the actual *conduct* of the foreign deposition sufficiently awry of American procedures to merit serious challenge on both statutory and confrontation clause grounds.[35]

In *Salim,* the United States Court of Appeals for the Second Circuit encountered an amalgam of foreign-imposed deposition procedures far more divergent from American norms than courts had considered in any previous rule 15 cases.[36] Chief among the problems in the case, which involved a deposition conducted in France, was that French law precluded both the defendant Salim, a suspected drug trafficker, and his defense attorney from attending the deposition. French law also required a French judge to question the deponent, which the presiding judge agreed to do based on written interrogatories the American parties submitted in advance.[37] French law

30. U.S. CONST. amend. VI provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and . . . to be confronted with the witnesses against him. . . ." *See also supra* notes 22, 27.

31. United States v. Kelly, 892 F.2d 255, and United States v. Gifford, 892 F.2d 263 (3d Cir. 1989), *cert. denied,* 110 S. Ct. 3243 (1990) (Belgium) (related cases); United States v. Casamento, 887 F.2d 1141 (2d Cir. 1989), *cert. denied,* 110 S. Ct. 1138 (1990) (Switzerland); United States v. Salim, 855 F.2d 944 (2d Cir. 1988) (France); United States v. Kehm, 799 F.2d 354 (7th Cir. 1986) (Bahamas); United States v. Sines, 761 F.2d 1434 (9th Cir. 1985) (Thailand); United States v. Johnpoll, 739 F.2d 702 (2d Cir.), *cert. denied,* 469 U.S. 1075 (1984) (Switzerland); United States v. Steele, 685 F.2d 793 (3d Cir.), *cert. denied,* 459 U.S. 908 (1982) (Bermuda); United States v. Sindona, 636 F.2d 792 (2d Cir. 1980), *cert. denied,* 451 U.S. 912 (1981) (Italy); United States v. King, 552 F.2d 833 (9th Cir. 1976), *cert. denied,* 430 U.S. 966 (1977) (Japan); and United States v. Badalamenti, No. 84 Cr. 236 (S.D.N.Y. Nov. 8, 1985) (WESTLAW, U.S. Dist. Ct. database) (Switzerland); *see* discussion of these cases *infra* notes 139-209 and accompanying text; *see also* Mehler, *Use of Foreign Depositions In Federal Criminal Trials,* N.Y.L.J., Oct. 3, 1988, at 2 & n.5, col. 2.

32. *See supra* note 31.

33. *See infra* notes 139-209 and accompanying text.

34. 855 F.2d 944 (2d Cir. 1988).

35. *See infra* text accompanying notes 139-209. *See generally* Mehler, *supra* note 31, at 2 & n.5, col. 2.

36. *See infra* notes 139-209 and accompanying text.

37. *Salim,* 855 F.2d at 947-48.

further permitted the deponent, herself charged with drug trafficking in France, to preview these written questions and to confer with her attorney before responding.[38] French law also barred the prosecution's use of both open phone lines and videotaping at the deposition. As a result of these foreign deposition requirements, Salim was wholly excluded from participation in the proceeding, and the jury at his subsequent American trial was denied a first-hand view of the deponent's demeanor during questioning.[39]

Mindful that the French legal model is far more common abroad than the American system,[40] the *Salim* court chose to sanction these foreign deposition procedures. In particular, the *Salim* court held that a foreign court's refusal to abide by American methods of taking depositions should not preclude the prosecution from seeking to uncover this evidence abroad under rule 15.[41] The court further held that unless the foreign methods used to obtain the deposition are inherently unreliable, a deposition taken in conformance with the host country's law generally satisfies United States law for purposes of admission into evidence.[42]

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38. *Id.*

39. *Id.*

40. *Id.* at 951 ("It is evident that it is not always possible to take a deposition in a foreign country in the manner that we might prefer, or even that we might require for a deposition taken domestically"); *see also* United States v. Salim, 664 F. Supp. 682, 688 (E.D.N.Y. 1987), *aff'd*, 855 F.2d 944 (2d Cir. 1988) (" 'The French administration of justice, far more than the Anglo-American, has become a model abroad' ") (quoting H. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND AND FRANCE (1975)).

41. *Salim*, 855 F.2d at 949-950. The court stated that:

> [T]he purpose of [Rule 15] should [not] be subverted by allowing the presence requirement of Rule 15(b) to become an obstacle that prevents the deposition from being taken at all. A sovereign nation is entitled to refuse to acquiesce in the use within its borders of American methods of gathering, preserving, and presenting evidence; such refusal, however, should not automatically and invariably cause the prosecution to abandon its efforts to obtain evidence abroad.

Id.

42. *Id.* at 953. The court stated:

> In short, unless the manner of examination required by the law of the host nation is so incompatible with our fundamental principles of fairness or so prone to inaccuracy or bias as to render the testimony inherently unreliable (or, in the words of the advisory notes to Rule 28, are 'so devoid of substance or probative value as to warrant its exclusion altogether'), a deposition taken pursuant to letter rogatory in accordance with the law of the host nation is taken 'in compliance with law' for purposes of Rule 804(b)(1).

Id. The Second Circuit reaffirmed this view in the much publicized "Pizza Connection" drug trafficking case, United States v. Casamento, 887 F.2d 1141 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1138 (1990); *see infra* notes 150-54, 208-09 and accompanying text. *Casamento* quoted the above language from *Salim* in holding that a deponent's affirmation to a foreign tribunal to tell the truth satisfied the "oath or affirmation" requirement of rule 603, Federal Rule of Evidence. *Casamento*, 887 F.2d at 1175.

The *Salim* decision thus provides a benchmark for assessing the acceptability to American courts of the gamut of incompatible deposition procedures that American prosecutors are likely to encounter abroad.[43] Further, the decision squarely addresses the leeway the law presently affords prosecutors in the conduct and use of foreign depositions.

This Note examines the development of the evidential and constitutional standards applicable when a federal prosecutor seeks to take a rule 15 deposition in a foreign country and introduce it at an American trial. Next, this Note examines rule 15 itself in the context of its legislative history and discusses how federal courts have applied the rule thus far in prosecutions extending beyond United States borders. This Note then examines the Second Circuit's efforts in *United States v. Salim* to accommodate diverse foreign procedures to American evidence law and the Constitution so as to "prevent a failure of justice," the intent of rule 15.[44] This Note shows that the *Salim* court's treatment of the foreign deposition essentially as a matter of evidentiary weight and sufficiency, rather than admissibility, is amply supported by Supreme Court decisions governing hearsay and confrontation. This Note further shows that the *Salim* court's construction of rule 15 comports with congressional intent, if not with the letter of the rule 15 presence requirement, to effectuate justice in circumstances that Congress arguably had not foreseen. This Note concludes that the *Salim* court's holding delineates a broad avenue of approach for prosecutors in need of pivotal testimony located outside United States jurisdiction.

I. EVIDENTIAL AND CONSTITUTIONAL UNDERPINNINGS FOR RULE 15

Congress provided in rule 15 that testimony preserved under the rule may be used as substantive evidence at criminal trials.[45] A trial judge may admit this testimony so long as (1) the witness who testified is unavailable at trial, and (2) the testimony is "otherwise admissible under the rules of evi-

43. *See* Mehler, *supra* note 31, at 6, col. 4 ("The *Salim* decision significantly broadens the ability of criminal lawyers to gather and introduce testimony obtained abroad"). The author of this news article is an Assistant United States Attorney for the Eastern District of New York and served as both trial and appellate counsel in United States v. Salim, 855 F.2d 944 (2d Cir. 1988). The article provides an analysis of the Second Circuit's decision in *Salim*.

44. FED. R. CRIM. P. 15 advisory committee's note (Notes of Advisory Committee on Rules, Note to Subdivision (a)).

45. FED. R. CRIM. P. 15(e). Use as substantive evidence means that the trier of fact, usually a jury in a criminal case, may consider the statement for its literal truth. *See* FED. R. CRIM. P. 15 advisory committee's note (Note on 1974 Amendment).

dence."[46] Incorporated within the rules of evidence is the hearsay rule, a principle that categorically bars juries from hearing out-of-court statements offered for their truth.[47] The hearsay rule has a well-established exception, however, governing "former testimony" evidence for which depositions can qualify.[48]

The prosecution's use of rule 15 also implicates the sixth amendment's confrontation clause, which guarantees criminal defendants the right to confront the witnesses against them at trial.[49] This constitutional guarantee also has exceptions.[50] Prosecutors and courts must therefore be mindful of the law governing both the hearsay rule and the confrontation right when addressing rule 15 matters. The Supreme Court's interpretation of both the confrontation clause and the former testimony exception has undergone significant development in the past 25 years.

A. The Hearsay Rule and the Former Testimony Exception

The hearsay rule originated in Anglo-American law about 500 years ago in response to the English common-law practice of trying criminal defendants based on ex parte affidavits and depositions.[51] The premise of the rule is to exclude out-of-court statements because they lack three intertwined protections that courts consider vital to fostering truthfulness: (1) testimony under oath; (2) by a witness subject to cross-examination; (3) with opportunity for the trier of fact to scrutinize the witness' demeanor during testimony.[52]

Exceptions gradually have eroded the basic hearsay rule.[53] At early common law, for example, a restrictive exception for depositions existed that required the presence of the criminal defendant during the deposition; the Supreme Court recognized this deposition exception as early as 1904.[54] The

46. FED. R. CRIM. P. 15(e). Section (e) also allows for admission of the deposition for impeachment purposes when the witness is available at trial and gives inconsistent testimony. Section (e) incorporates the definition of unavailability contained in FED. R. EVID. 804(a).

47. *See* FED. R. EVID. 801 (defining hearsay) and 802 (excluding hearsay).

48. FED. R. EVID. 804(b)(1).

49. U.S. CONST. amend VI; *see supra* notes 22, 27, 30 and accompanying text.

50. *See* Ohio v. Roberts, 448 U.S. 56, 63 (1980) (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)); *see infra* text accompanying notes 89-93.

51. *See* C. MCCORMICK, EVIDENCE § 223 (1954); *see also* California v. Green, 399 U.S. 149, 156-57 & nn.9-10 (1970).

52. *See Green*, 399 U.S. at 154-55; *see also* FED. R. EVID. Article VIII advisory committee's note (Introductory Note: The Hearsay Problem).

53. *See Roberts*, 448 U.S. at 62.

54. *See* West v. Louisiana, 194 U.S. 258, 262 (1904). The common law exception permitted the reading of the deposition at trial when the deponent was dead, insane, too sick to attend, or absent "by the connivance of the defendant." *Id.* This common-law right was con-

rationale supporting such exceptions was that the statements they admitted into evidence were made under circumstances that furnished guarantees of trustworthiness which offset the absence of oath, cross-examination, and scrutiny.[55] The drafters of the uniform Federal Rules of Evidence, which Congress adopted in 1975, observed that the modern emphasis has been on the second of these factors, cross-examination, as the prime guarantor of witness veracity.[56] Accordingly, rule 804(b)(1), which codified the former testimony exception, requires that the defendant have had an opportunity and similar motive to develop the former testimony by examination of the witness.[57] In its criminal context, the rule does not require a defendant to have been present when the former testimony was taken, indicating that an absent defendant who is represented by counsel will be held to have the requisite opportunity to develop the testimony given. Rule 804(b)(1) expressly excepts depositions taken in compliance with the law from exclusion under the hearsay rule.[58]

B. The Sixth Amendment's Confrontation Clause and the "Rule of Necessity" Doctrine

By 1895, the Supreme Court recognized that the primary object of the sixth amendment confrontation clause was to establish a constitutional bar to the same injustice of trial by deposition that the hearsay rule addressed.[59] The Court perceived, however, that a literal application of the confrontation clause would exclude from evidence, as would the hearsay rule, *all* statements made by declarants not present at trial.[60] The Court rejected such an

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ditioned, however, on the the presence of the defendant at the deposition, his representation by counsel there, and the opportunity for cross-examination. *Id.*

55. FED. R. EVID. Article VIII advisory committee's note (Introductory Note: The Hearsay Problem); *see Green,* 399 U.S. at 154.

56. FED. R. EVID. Article VIII advisory committee's note (Introductory Note: The Hearsay Problem).

57. FED. R. EVID. 804(b)(1) provides:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Id.

58. *Id.*

59. *See* California v. Green, 399 U.S. 149, 157-58 (1970) (quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895)).

60. *See* Ohio v. Roberts, 448 U.S. 56, 62-63 (1980) (citing *Mattox,* 156 U.S. at 243).

absolute constitutional bar as unintended and too extreme.[61] Accordingly, the Supreme Court held, and has consistently maintained, that the confrontation right is subject to a "rule of necessity"[62] under which a criminal defendant's constitutional protections must sometimes yield to public policy considerations and the necessities of a case.[63]

Despite the Supreme Court's long recognition of the confrontation clause's general exclusionary role, however, successful use of the clause to attack evidence properly admitted under hearsay exceptions is a relatively recent occurrence.[64] This fact is largely attributable to the inapplicability of the confrontation clause to state criminal proceedings until 1965, when, in *Pointer v. Texas,*[65] the Supreme Court applied the clause to bar admission of preliminary hearing testimony from use at trial.[66] Until that time, in the few federal criminal cases in which the clause was applied,[67] it was construed as a constitutional embodiment of the hearsay rule, allowing for such traditional exceptions as dying declarations and former trial testimony of deceased witnesses.[68]

In the years since *Pointer,* the Supreme Court has construed the confrontation right as granting two specific protections to criminal defendants: (1) an implied opportunity for full and effective cross-examination of hostile witnesses,[69] and (2) a literal right to meet face-to-face all those who appear and

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61. *Id.*

62. *Id.* at 65.

63. *Id.* at 64 (quoting *Mattox,* 156 U.S. at 243).

64. FED. R. EVID. Article VIII advisory committee's note (Note on Confrontation and Due Process).

65. 380 U.S. 400 (1965).

66. *Id.* at 406. In *Pointer,* the state proffered at trial the transcript of a crucial witness' testimony that had been taken at a preliminary hearing at which the defendant had not been represented by counsel. *Id.* at 401. The trial judge admitted the testimony over defense objections, "apparently in part because, as the judge viewed it, [the defendant] had been present . . . and therefore had been 'accorded the opportunity of cross examining the witnesses there against him.' " *Id.* at 402. The Supreme Court applied the confrontation clause to the state prosecution as incident to the fourteenth amendment and held that "[b]ecause the transcript . . . had not been taken at a time and under circumstances affording [the defendant] through counsel an adequate opportunity to cross-examine [the witness]," the transcript's introduction in a federal criminal case would have violated the sixth amendment's guarantee of confrontation. *Id.* at 407.

67. FED. R. EVID. Article VIII advisory committee's note (Note on Confrontation and Due Process) ("Until very recently, decisions invoking the confrontation clause of the Sixth Amendment were surprisingly few, a fact probably explainable by the former inapplicability of the clause to the states and by the hearsay rule's occupancy of much the same ground.").

68. *Id.; see also* Ohio v. Roberts, 448 U.S. 56, 66 & n.8 (1980).

69. California v. Green, 399 U.S. 149, 158 (1970); *see also* United States v. Owens, 484 U.S. 554, 557 (1988); Kentucky v. Stincer, 482 U.S. 730, 737 (1987).

give evidence at trial.[70] The core goal of the first protection is to promote reliability in truth-finding at criminal trials.[71] The aim of the second, while more ethereal, is to foster "the perception as well as the reality" that fairness prevails.[72]

1. The Confrontation Clause-Hearsay Conundrum

Just a few years after the Supreme Court's *Pointer* decision invited sixth amendment review of state criminal appeals, Justice Byron White, writing for the Court in the seminal case *California v. Green,*[73] perceived the persistent conundrum of reconciling application of the growing number of hearsay exceptions with the confrontation clause.[74] Justice White determined that while the hearsay rule is designed generally to protect values similar to those of the confrontation clause, the overlap is not complete.[75] In short, the Court observed that evidence which is properly admissible under hearsay exceptions may well violate the confrontation right, while evidence admitted in contravention of recognized hearsay exceptions may fully satisfy confrontation.[76]

Until a decade ago, the Supreme Court took a largely ad hoc approach to sorting out these evidential and constitutional distinctions.[77] But by 1970, the Court had acknowledged in its *Green* decision that policing state initiatives to create new hearsay exceptions would raise recurring questions about the compatibility of these exceptions with the confrontation right, and therefore would require assessment of the reasons for, and fundamental scope of, the clause.[78]

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70. Coy v. Iowa, 108 S. Ct. 2798, 2800 (1988) (quoting Harlan, J., in *Green,* 399 U.S. at 175).

71. *Stincer,* 482 U.S. at 737.

72. *Coy,* 108 S. Ct. at 2802 (quoting Lee v. Illinois, 476 U.S. 530, 540 (1986)).

73. 399 U.S. 149 (1970).

74. *Id.* at 155-56.

75. *Id.* at 155.

76. *Id.* at 155-56.

77. *See* Ohio v. Roberts, 448 U.S. 56 (1980). The opinion stated:

> This Court, in a series of cases, has sought to accommodate [the] competing interests [between the hearsay exceptions and the confrontation clause]. True to common-law tradition, the process has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions. The Court has not sought to "map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay exceptions." But a general approach to the problem is discernible.

Id. at 64-65 (quoting California v. Green, 399 U.S. at 162).

78. *Green,* 399 U.S. at 156.

2. *Implying the Right to Adequate Opportunity for Cross-Examination*

a. *The Evolving Former Testimony Exception and the Confrontation Clause*

In assessing the scope of the confrontation clause, the *Green* Court postulated that an absent declarant's testimony, taken at a preliminary hearing where counsel represented the defendant, might satisfy confrontation at trial when admitted as a hearsay exception, even though such pretrial proceeding is usually less probative than the trial itself.[79] *Green* did not involve an absent declarant; rather, the witness at issue, a teenager, was present on the stand but claimed no recall of the events underlying his prior preliminary hearing testimony, in which he had identified the accused.[80] But the *Green* Court recognized that most of the Supreme Court's confrontation clause decisions involved the recurrent situation of a trial court admitting out-of-court statements of *absent* declarants under exceptions to the hearsay rule.[81]

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79. *Id.* at 165-66.

The *Green* Court also recognized that the Supreme Court had never excluded prior statements by *available* declarants from evidence on confrontation grounds. *Id.* at 161. It concluded that history gave good reason not to bar such statements, provided the requisite opportunity for effective cross-examination existed at trial, together with the oath and jury scrutiny. *Id.* at 158. The Court characterized effective cross-examination generally as that affording the jury "a satisfactory basis for evaluating the truth of the prior statement." *Id.* at 161.

80. *Id.* at 152. In *Green,* a teenage witness had identified the defendant as his drug supplier both in an out-of-court statement to a policeman and later under oath at a preliminary hearing in which the witness was cross-examined extensively by defense counsel. At trial, however, the witness professed no recall of dealing with the defendant, attributing his mental lapse to LSD he took before the deal. Both prior inconsistent statements were admitted as substantive evidence at trial and were later ruled inadmissible by the California Supreme Court. *Id.* at 151-53.

On review, the United States Supreme Court held that the unsworn statement was improperly excluded by the California Supreme Court because the witness had been available at trial for cross-examination, despite his mental lapse, and was under oath and subject to jury scrutiny. *Id.* at 166-67 (footnote omitted). The Court reserved the question of whether a witness's professed lack of memory regarding his own out-of-court statement might critically affect cross-examination beyond confrontation clause bounds, but it noted that authorities stood divided on the issue and that common-law practice would likely deny admission of the unsworn statement. *Id.* at 168-69, 169 n.18.

Of more importance here, the *Green* Court also held that the sworn statement was improperly excluded, even absent the opportunity for full cross-examination at trial, because confrontation was satisfied at the preliminary hearing. *Id.* at 165. The Court saw no reason to exclude such past sworn testimony of a present witness, whether he claimed memory loss, privilege, or simply refused to answer, when the same would be admissible, under established hearsay exceptions, if the witness were physically unavailable. *Id.* at 166-67.

81. *Id.* at 161.

With this in mind, the Court observed that its usual theory allowed absent declarants' statements into evidence if the statements bore "other indicia of 'reliability' " deriving from the circumstances under which they were taken.[82] Applying this logic to former testimony, the *Green* Court enumerated several indicia of reliability that would support admission of the teenage witness' pretrial statement even if he actually had been unavailable to testify at trial. Specifically, the Court noted that: (1) the witness was under oath at the prior proceeding; (2) the defendant had counsel at that proceeding who had ample opportunity to cross-examine the witness, and (3) the proceeding was conducted before a judicial tribunal equipped to record it.[83] Despite these findings, the *Green* Court still declined to chart a general theory of the confrontation clause to govern hearsay exceptions admitting statements of unavailable declarants.[84]

b. Adopting a "General Approach" to Confrontation and Hearsay: Ohio v. Roberts

Ten years later, in the wake of Congress' passage in 1975 of the Federal Rules of Evidence and amended rule 15, the Supreme Court moved to unify

82. *Id.* at 161-62. The Court also indicated that the government's good faith efforts to ensure confrontation with the declarant had been a prerequisite to admission of unavailable declarants' statements, even when these statements bore indicia of reliability. *Id.*

83. *Id.* at 165. Note that in 1980, in *Roberts,* the Court categorically rejected the characterization by the Ohio Supreme Court that this analysis, contained in Part III of the *Green* opinion, was "dictum." Ohio v. Roberts, 448 U.S. 56, 69-70 n.10 (1980). The *Roberts* Court also rejected *Green*'s characterization by the United States Solicitor General as an "alternative holding." The *Roberts* Court stated that either view "would diminish *Green*'s precedential significance." *Id.*

84. *Green,* 399 U.S. at 162. Six months after *Green*, the Court applied for the first time the indicia of reliability as a discrete precept to uphold admission of an absent declarant's statement. In Dutton v. Evans, 400 U.S. 74 (1970), the Court held that admission of third-party testimony relating to an unavailable co-conspirator's statement, which identified the accused as a murderer, did not violate the confrontation clause since the statement bore separate indicia of reliability inherent in the circumstances under which it was made: specifically, that the statement was made during concealment of the conspiracy. *Id.* at 77-78, 88-90.

Because *Dutton* concerned the long-recognized hearsay exception for co-conspirator's statements (*see* Bourjaily v. United States, 483 U.S. 171, 183 (1987) (noting that admissibility of co-conspirators' statements was first established by the Supreme Court in 1827)), it is largely inapposite to the admissibility problems posed by the former testimony exception. *Dutton* is significant here, however, for its characterization of discernible reliability indicia such as the motive and circumstances of the declarant when he spoke, and the existence of facts to corroborate his statement as "*determinative* of whether [such] statement may be placed before the jury though there is no confrontation of the declarant." *Id.* at 89 (emphasis added). This use of reliability indicia as dispositive of admissibility of an absent declarant's statement foreshadowed the Court's decision a decade later in Ohio v. Roberts, 448 U.S. 56 (1980), in which the Court finally discerned a "general approach" to the problem of determining the constitutional validity of hearsay exceptions. *Id.* at 65; *see infra* text accompanying footnotes 90-93.

its piecemeal approach to confrontation and hearsay. In *Ohio v. Roberts,*[85] the Supreme Court defined the "rule of necessity" that qualifies a defendant's confrontation guarantee.[86] In *Roberts,* a woman's pretrial testimony as a defense witness for her boyfriend was offered at his trial, where she failed to appear, to rebut the boyfriend's assertions that he was innocent of stealing from the woman's parents.[87] The Court held that, because defense counsel's direct examination of the woman at the pretrial hearing took the form of cross-examination, including leading questions and challenges to her veracity, her testimony was admissible under the confrontation clause.[88]

Beyond this decision on witness examination, the *Roberts* decision is vital because of the "general approach"[89] it provides prosecutors to win admission of prior statement hearsay over confrontation clause objection. Even in cases in which the prior statement was taken subject to cross-examination, the *Roberts* Court said the sixth amendment requires the prosecutor either to produce the witness at trial or to demonstrate the witness' unavailability.[90] When unavailability is established, *Roberts* conditions admission of the statement wholly on the prosecutor's further showing that it bears adequate "indicia of reliability" to warrant its submission to the jury.[91] The prosecutor may establish this reliability in one of two ways according to *Roberts:* (1) by showing that the statement falls within a firmly rooted hearsay exception from which reliability may be inferred without more support; or (2) by iden-

85. 448 U.S. 56 (1980).

86. *Id.* at 65.

87. *Id.* at 58-60.

88. *Id.* at 70-73. In *Roberts,* the Court declined to decide: (1) whether the Ohio Supreme Court, which affirmed reversal of the defendant's conviction, properly disregarded the United States Supreme Court's statements in *Green* suggesting that the mere opportunity to cross-examine at a preliminary hearing rendered the prior testimony admissible, and (2) whether de minimis questioning by defense counsel is sufficient for admission. *Id.* at 70.

89. *Id.* at 65.

90. *Id.* Specifically, the Court said:

> In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. . . . [O]nce a witness is shown to be unavailable . . .:
>
> "The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant,' and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. . . .' "

Id. at 65-66 (citing Dutton v. Evans, 400 U.S. 74 (1970) and California v. Green, 399 U.S. 149 (1970)).

91. *Id.* at 66.

tifying particularized guarantees of trustworthiness[92] such as specific facts that demonstrate the statement's truth.[93]

In addition to providing this general approach, *Roberts* served to resolve the recurring question[94] of how effective a defense counsel's cross-examination must be at a prior court proceeding to satisfy confrontation requirements at trial. The Court held that normally no inquiry into effectiveness is required for testimony to be admitted.[95] Where adequate opportunity for cross-examination existed, and where defense counsel availed the defendant of that opportunity, the *Roberts* Court held that the sixth amendment confrontation requirement is satisfied.[96]

c. *Post*-Roberts *Case Law*

In *United States v. Inadi*,[97] and in *Bourjaily v. United States*,[98] the Supreme Court reaffirmed and further developed the approach to unavailability and reliability indicia explicated in *Roberts*. In *Inadi*, the Court made clear that a showing of the declarant's unavailability is not required for admission of a co-conspirator's statement, because the statement derives its reliability from the context in which it was made, the context being while the conspiracy was in progress.[99] This context, the Court explained, is what makes a co-conspirator's statement "irreplaceable" as substantive evidence.[100] In contrast, the Court observed that unavailability is intrinsic to admission of former testimony because it is not the best evidence, but only a weaker substitute for live testimony.[101] Thus, the *Inadi* Court stated that

92. *Id.*

93. C. FISHMAN & L. BARRACATO, EVIDENCE 5-104 (1988).

94. *See, e.g.*, California v. Green, 399 U.S. 149, 165-66 (1970) (discussing the quality of prior cross-examination required in context of *Mattox* and *Pointer*); *see also* United States v. Owens, 484 U.S. 554, 558-59 (1988) (discussing the quality of cross-examination required at trial; citing Kentucky v. Stincer, 482 U.S. 730 (1987) and Delaware v. Fensterer, 474 U.S. 15 (1985); and reaffirming that "[T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " (quoting *Stincer*, 484 U.S. at 739; emphasis in original)).

95. *Roberts*, 448 U.S. at 73 n.12. The one exception noted by the Court was when defense counsel has been found ineffective prior to trial. *Id.*

96. *Id.*

97. 475 U.S. 387 (1986).

98. 483 U.S. 171 (1987).

99. *Inadi*, 475 U.S. at 395-96. FED. R. EVID. 801(d)(2)(E) governs admission of a co-conspirator's statements in federal proceedings.

100. *Inadi*, 475 U.S. at 396.

101. *Id.* at 394.

the reliability of former testimony rests in part on the similarities between prior judicial proceedings and trial proceedings.[102]

In *Bourjaily,* the Supreme Court went a step further regarding co-conspirators' statements to absolve trial courts of making any inquiry into the reliability of such statements before admitting them.[103] The Court provided no such waiver for the former testimony exception; rather, it affirmed *Roberts*' general directive that no independent inquiry into reliability is required when the statement falls within a firmly rooted hearsay exception.[104] Further, *Bourjaily* "suggested that 'firmly rooted' means firmly rooted in history and common law," as opposed to legislation, and implied that "a reliability inquiry is required where an evidentiary rule is broader in scope than its common law antecedent."[105] To date, the Supreme Court has not expressly stated whether the hearsay exception for former testimony, including deposition testimony allowed under rule 804(b)(1), is firmly enough rooted in common law to warrant dispensing with an independent inquiry into the reliability of the former testimony.

3. *The Literal Right to Face-to-Face Encounter:* Coy v. Iowa

The Supreme Court has consistently emphasized that the confrontation clause reflects a preference for the accused to confront his accuser face-to-face at trial.[106] The Court has also acknowledged that this preference may be waived under certain conditions, however, such as when the accuser is unavailable despite the government's good faith efforts to produce him at trial.[107] What remains unclear from the Court's decisions is whether physical confrontation, as opposed to only cross-examination by defense counsel, is a prerequisite at *pretrial* hearings in order for testimony taken there to be constitutionally admissible at a subsequent trial where the accuser is absent.[108] Assuming that a right to physical encounter does extend to pretrial

102. *Id.* at 395.

103. Bourjaily v. United States, 483 U.S. 171, 182 (1987).

104. *Id.*

105. C. FISHMAN & L. BARRACATO, *supra* note 93, at 5-103.

106. *See* Ohio v. Roberts, 448 U.S. 56, 63, 65 (1980) and cases cited therein; *see also* Coy v. Iowa, 108 S. Ct. 2798, 2800-03 (1988), and cases cited therein.

107. *Roberts,* 448 U.S. at 65. *See supra* text accompanying notes 90-93.

108. *See, e.g.,* California v. Green, 399 U.S. 149, 165 (1970). There, the Court enumerated the reliability indicia supporting admission of former testimony: (1) that the witness was under oath; (2) that the defendant *was represented by counsel;* and (3) that the proceeding was before a court equipped to record it. *Id.; see supra* text accompanying note 83. The Court adopted these reliability indicia wholesale in *Roberts. Roberts,* 448 U.S. at 69. In neither *Green* nor *Roberts* did the Court indicate that the defendant's own presence at the preliminary hearing was a prerequisite to admission of the former testimony at trial. This was also true in Kentucky v. Stincer, 482 U.S. 730 (1987), in which the defendant was excluded from a pretrial

proceedings, a further question remains whether this right is also amenable to waiver in certain exigent cases.

The Supreme Court's decision in *Coy v. Iowa*[109] provides some limited guidance regarding these questions. In *Coy,* the Court invalidated a statute designed to allow children who are victims of sex crimes to avoid facing their alleged abusers at trial.[110] The Court held that the mere legislative presumption that children would suffer trauma from encountering the accused[111] was not sufficient to overcome what Justice Antonin Scalia called the "irreducible" literal meaning of the confrontation clause that the defendant possesses a right to a face-to-face encounter at trial.[112] In so holding, the Court reiterated that the rights the confrontation clause confers on defendants are not necessarily absolute, but the Court deferred the question whether any exceptions exist to physical confrontation of available declarants for later consideration.[113]

The statute reviewed in *Coy,* which allowed the use of a screen to separate accuser and accused,[114] had the potential effect of preventing altogether physical confrontation between accuser and accused.[115] Use of such a screen could result in an accuser never being forced to face an accused, although available to do so, either prior to trial, at trial, or ever. *Coy* did not address the potential for such overall denial of physical confrontation, but confined itself to the right to physical encounter of available witnesses at trial.[116] However, the *Coy* decision posited hypothetically that if this trial

witness competency hearing at which he was represented by counsel. *Id.* at 732-33. The *Stincer* Court rejected the defendant's claim that his exclusion violated his right to confrontation, in part because the defendant was permitted to physically confront and cross-examine the witnesses at trial, *id.* at 744, but also because his counsel attended and participated in the pretrial hearing. *Id.* at 740.

109. 108 S. Ct. 2798 (1988).

110. *Id.* at 2799 & n.1. "The State suggests that the confrontation interest at stake here was outweighed by the necessity of protecting victims of sexual abuse." *Id.* at 2802.

111. "The State maintains that [public policy] necessity is established here by the statute, which creates a legislatively imposed presumption of trauma." *Id.* at 2803.

112. *Id.*

113. *Id.* at 2802-03.

114. *Id.* at 2799 & n.1. The screen blocked the child from seeing the defendant but allowed the defendant to see the child. *Id.*

115. Presumably, the victims and the defendants in *Coy* did not encounter each other at any time between the attack and the trial, although this is not stated in the Supreme Court opinion.

116. *Id.* at 2800-03. Justice Scalia, writing for the Court, makes oblique reference to "the asserted right to face-to-face confrontation at some point in the proceedings other than the trial itself." *Id.* at 2802-03. In making this reference, he cites to the Court's decision in Kentucky v. Stincer, 482 U.S. 730 (1987). *See supra* note 108. This reference appears to indicate a right asserted by the defendant in the *Stincer* case, but rejected by the Court in that case, that the defendant bore an absolute right to be present at a pretrial witness competency hearing

right to physical confrontation were amenable to exceptions, these exceptions would be allowed only on important public policy grounds.[117] Thus, the *Coy* Court admitted, without specifics, the general requirement that an accused must physically encounter all available witnesses may yield to certain policy concerns.[118] This concession by the Court, that the right to physical encounter may not be absolute, could logically extend to witnesses testifying at pretrial hearings who will be unavailable for trial.[119] *Coy* left unresolved the question of which, if any, public policy reasons are sufficiently grave to warrant waiving the defendant's right to physical confrontation.[120]

II. CHANGED RULES, MIXED SIGNALS: CONGRESSIONAL ACTION ON RULE 15 AND THE FORMER TESTIMONY EXCEPTION

A. Amendment of Rule 15 and Adoption of Component Rule 804(b)(1)

Congress believed that the Supreme Court's decision in *California v. Green*[121] resolved all doubt about the constitutionality of amending Federal Rule of Criminal Procedure 15 to permit prosecutors to take and use the depositions of inculpatory witnesses.[122] Congress also depended on *Green*

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because it was a crucial phase of his trial. *Stincer*, 482 U.S. at 735. Because the defendant in *Stincer* did confront his accusers at trial, however, Justice Scalia's reference in the *Coy* opinion seems inapposite to the question of whether a defendant may be denied physical confrontation of witnesses who are unavailable at trial.

117. *Coy*, 107 S. Ct. at 2803. Justice O'Connor, writing in concurrence for herself and Justice White, fully approved future use of "something other than face-to-face confrontation if that procedure was necessary to further an important public policy." *Id.* at 2805. Justice Blackmun and Chief Justice Rehnquist, though dissenting from the majority's rejection of the Iowa statute, appeared to agree strongly with this proposition. *See, e.g., id.* at 2806.

118. *See supra* note 117 and accompanying text.

119. This is true because the *Roberts* decision requires that former testimony of unavailable declarants be found independently reliable before it may be admitted at trial. *See supra* text accompanying notes 90-93. The focus of this reliability inquiry is whether the accused was afforded adequate opportunity for cross-examination and whether facts exist that corroborate the statement, and not whether the defendant is physically present at the pretrial hearing. *See id.; see also supra* text accompanying note 88.

120. Several federal circuit courts have concluded that grand jury testimony may be admissible at trial if it is sufficiently corroborated by circumstantial evidence supporting its veracity. *See infra* note 325. Generally, defendants do not appear at grand jury proceedings; thus, a grand jury witness' testimony is conceivably admissible at trial even though that witness is unavailable at trial and has never encountered the defendant. *Id.*

121. 399 U.S. 149 (1970).

122. FED. R. CRIM. P. 15 advisory committee's note (Note on 1974 Amendment) states:

> Because neither the [Supreme] Court nor the standing committee [on rules of practice and procedure] gave reasons for rejecting the government deposition proposal [in 1970], it is not possible to know why they were not approved. To the extent that the rejection was based upon doubts as to the constitutionality of such a proposal, those doubts now seem resolved by *California v. Green.*

when codifying Federal Rule of Evidence 804(b)(1).[123] Section (e) of rule 15 implicitly incorporates rule 804(b)(1) by allowing use of a deposition at trial only when it is otherwise admissible under the rules of evidence.[124]

B. *The Anomaly of the Presence Requirement for Prosecution Depositions*

Congress included in rule 15(b) the express requirement that the government produce the defendant at the deposition and keep such defendant in the witness' presence throughout the examination.[125] No similar requirement appears in rule 804(b)(1). Rule 804, as originally proposed to Congress by the Supreme Court, actually would have allowed for the admission of former testimony from a prior proceeding at which the instant defendant was not present to confront the witness, but where only another defendant "with motive and interest similar" to the instant defendant afforded confrontation.[126] While rule 804(b)(1) as adopted by Congress permits such substi-

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Id.

123. *See* FED. R. EVID. 804 advisory committee's note:

> The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. . . . Testimony given at a preliminary hearing was held in *California v. Green* to satisfy confrontation requirements in this respect.

Id. (citation omitted).

124. FED. R. CRIM. P. 15(e) provides that at trial, part or all of the deposition, "so far as otherwise admissible under the rules of evidence," may be used as substantive evidence if the witness is unavailable as defined by FED. R. EVID. 804(a). *Id.*

125. FED. R. CRIM. P. 15(b).

126. *See* FED. R. EVID. 804 advisory committee's note (Notes of Committee on the Judiciary, House Report No. 93-650) ("Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person 'with motive and interest similar' to his had an opportunity to examine the witness"); *see also id.* (Notes of Advisory Committee on Proposed Rules) which states that:

> Unlike the rule [804(b)(1)], . . . three [state evidence codes: California, Kansas, and New Jersey] provide . . . that former testimony is not admissible if . . . the accused was not a party to the prior hearing. . . . *Mattox v. United States* held that the [confrontation] right was not violated by the Government's use, on a retrial of the same case, of testimony given at the first trial by two witnesses since deceased. The decision leaves open the questions . . . (3) whether the accused must himself have been a party to the earlier proceeding or whether a similarly situated person will serve the purpose. Professor Falknor [in *Former Testimony and the Uniform Rules: A Comment*, 38 N.Y.U. L. REV. 651, 659-60 (1963)] concluded that, if dying declaration untested by cross-examination is constitutionally admissible, former testimony tested by the cross-examination of one similarly situated does not offend against confrontation.

Id. (citation omitted).

tution of parties in civil cases, it prohibits substitution in criminal cases.[127] Congress' stated reason for changing the proposal, however, was not to ensure a face-to-face encounter between witness and defendant at the prior proceeding. Rather, Congress considered it generally unfair to impose upon a criminal defendant the onus of someone else's handling of a witness at another defendant's trial.[128]

Thus, rule 15(e), which governs admission of depositions at trial by its implicit incorporation of rule 804(b)(1), appears to comport more closely with the tenor of *Green* and prior Supreme Court holdings than does the presence requirement of rule 15(b).[129] These holdings, of which Congress was aware when adopting rule 15,[130] suggest that independent indicia of a deposition's reliability, such as those derived from vigorous cross-examination by defense counsel during the deposition, may substitute completely for the defendant's constitutional right to physically confront the deponent.[131]

Rule 15's presence requirement also stands in contrast to the provision in rule 15(d) that a deposition shall be taken and filed in the manner provided in civil actions.[132] Federal Rule of Civil Procedure 31(a) provides that any party may take testimony by deposition upon written questions.[133] When amending rule 15, Congress did not alter section (d) to preclude written deposition of prosecution witnesses, and the amendment's legislative history does not address such an eventuality.[134] Thus, as one authority has noted,

127. *Id.* (Notes of Committee on The Judiciary, House Report No. 93-650) ("The sole exception to this . . . is when a party's *predecessor in interest* in a civil action or proceeding had an opportunity and similar motive to examine the witness." (emphasis added)).

128. *Id.*

129. *See, e.g.*, the cases cited in California v. Green, 399 U.S. 149, 165-66 (1970), including Barber v. Page, 390 U.S. 719, 725-26 (1968); Pointer v. Texas, 380 U.S. 400, 407 (1965); *see also* Dutton v. Evans, 400 U.S. 74 (1970); Douglas v. Alabama, 380 U.S. 415, 418 (1965); *see supra* note 84.

130. *See* FED. R. EVID. Article VIII advisory committee's note (Note on Confrontation and Due Process).

131. *See supra* notes 82-83 and accompanying text; *see also* 2 C. WRIGHT, *supra* note 17, § 244, at 20 (analyzing rule 15(b)'s presence requirement and stating that the confrontation clause does not always require physical confrontation, even though "the justification for using a deposition at a criminal trial as evidence against the defendant is much stronger if defendant has been present or if he has waived his right to be present" at the deposition).

132. The advisory committee's notes to the original rule state that the procedure prescribed in section (d) "is similar to that in civil cases, Rules 28-31, Federal Rules of Civil Procedure." FED. R. CRIM. P. 15 advisory committee's note (Notes of Advisory Committee on Rules). Section (d) also provides that the "scope and manner" of examination at the deposition "shall be such as would be allowed in the trial itself." FED. R. CRIM. P. 15(d).

133. FED. R. CIV. P. 31(a).

134. *See* 2 C. WRIGHT, *supra* note 17, § 242 at 18-19 n.7 (noting that before its amendment, rule 15(d) provided for the defendant to take written depositions, and stating that nothing in the 1975 amendment "indicates a desire to prevent depositions on written questions.").

"it would seem that a deposition on written questions, as authorized by Civil Rule 31, would be permissible" under amended rule 15.[135] The importance of this recognition is that written depositions by their design do not contemplate physical confrontation between the deponent and the deposing parties.

Congress' reason for putting the express presence requirement in amended rule 15 is not apparent from either the advisory committee's notes or related legislative history.[136] Congress possibly intended to afford the accused an *additional* protection beyond those provided by rule 804(b)(1) and the confrontation clause, even though the presence requirement might preclude the preservation of testimony in many cases where witnesses are abroad.[137] Equally possible, however, is that Congress simply did not contemplate transnational prosecutions and overlooked the practical problems of keeping a jailed felon in custody in locations where there is no authority for pretrial detention. Neither rule 15 nor its legislative history even mentions the eventuality of a foreign situs for the deposition.[138]

III. The Unique Problems of Prosecution Depositions Abroad

A. Prosecution Depositions Under Confrontation Clause Challenge

1. Facial Constitutionality

The federal judiciary first addressed the use by prosecutors of foreign-obtained depositions in criminal trials in *United States v. King.*[139] In *King,* four defendants were charged with conspiracy to import heroin from Thailand for distribution in the United States.[140] Key to the government's case was the testimony of two unindicted co-conspirators imprisoned in Japan.[141] The trial court ordered the prisoners' depositions under 18 U.S.C. § 3503, the precursor and near duplicate of rule 15 applicable to organized crime

135. *Id.* at 18.

136. *See, e.g.,* the legislative history of the Organized Crime Control Act § 601, 18 U.S.C. § 3503(b) (1970) (a precursor to rule 15 permitting government depositions of unavailable witnesses in organized crime cases); *see infra* note 142; *see also* 2 C. WRIGHT, *supra* note 17, § 244, at 20 (explaining that the original rule 15 was silent on the defendant's right to be present, and that the presence requirement was included in § 3503 in 1970 and incorporated into the amended rule 15 in 1975).

137. *See supra* notes 19-20 and accompanying text.

138. 18 U.S.C. § 3503(f) states that a government deposition taken for use in a criminal proceeding may be used if, at the time of trial, the witness is outside the United States. Rule 15 substitutes the requirement that the deposition may be used if the witness is unavailable as defined by FED. R. EVID. 804(a).

139. 552 F.2d 833 (9th Cir. 1976), *cert. denied,* 430 U.S. 966 (1977).

140. *Id.* at 836-38.

141. *Id.*

cases.[142] Although the *King* depositions were conducted by an American consulate using customary procedures, and the defendants and their counsel were present until the defendants voluntarily left,[143] *King* is significant because the defendants challenged section 3503 as facially unconstitutional based on confrontation and due process grounds.[144] In response, the United States Court of Appeals for the Ninth Circuit[145] analyzed the constitutional underpinnings of section 3503, an analytical framework wholly applicable to rule 15.[146]

In *King,* the Ninth Circuit found that the Supreme Court's *California v. Green* decision[147] compelled that a deposition taken under section 3503 generally satisfied the procedural safeguards required by the confrontation clause.[148] The *King* panel asserted that while the Supreme Court had never expressly authorized the use of an absent witness' deposition in lieu of trial testimony, section 3503's procedures provided the jury with a satisfactory basis for truth evaluation consistent with practical considerations for the administration of justice.[149]

2. *Adequate Cross-Examination*

Subsequent court opinions on foreign depositions have resolved several more particularized constitutional questions involving prosecution deposi-

142. *Id.* Section 3503, adopted as part of the 1970 Organized Crime Control Act, is virtually identical to rule 15, with the principal difference being that section 3503 is limited to cases in which the Attorney General certifies that the defendant is an organized crime suspect. *See* FED. R. CRIM. P. 15 advisory committee's note (Note on 1974 Amendment). Section 3503 was drafted by the same advisory committee on federal criminal rules that for 25 years had proposed generally authorizing government depositions, efforts which culminated in passage of rule 15. *Id.*

143. *King,* 552 F.2d at 838, 841. The depositions in *King* were also videotaped, allowing the trial jury to observe witness demeanor. *Id.* at 841.

144. *Id.* at 838.

145. The panel included then Judge Anthony Kennedy. *Id.* at 835.

146. *See supra* note 142.

147. *King,* 552 F.2d at 840. The Ninth Circuit also relied on the Supreme Court's decision in Mancusi v. Stubbs, 408 U.S. 204 (1972), in which the Court held that a witness residing abroad was sufficiently beyond state process power as to be unavailable for purposes of the hearsay exception for former testimony. *Mancusi,* 408 U.S. at 212. *Mancusi* also held that the absent witness' testimony at the defendant's trial a decade earlier bore sufficient indicia of reliability, stemming from defense counsel's adequate opportunity for cross-examination at that time, to warrant its admission at the defendant's later habeas corpus proceeding. *Id.* at 213-16; *see King,* 552 F. 2d at 838-39.

148. *King,* 552 F.2d at 840. The panel also noted that both the Second and Seventh Circuits already had considered and rejected confrontation clause challenges to the use at trial of domestically taken section 3503 depositions. *Id.* at 839 (citing United States v. Ricketson, 498 F.2d 367 (7th Cir. 1974), *cert. denied,* 419 U.S. 965 (1974), and United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972), *cert. denied,* 410 U.S. 984 (1973)).

149. *Id.* at 840-41.

tions taken in foreign countries. The United States Court of Appeals for the Second Circuit considered the adequacy of cross-examination in *United States v. Casamento.*[150] In *Casamento,* thirty-five defendants faced charges of drug trafficking and money laundering related to a transnational Mafioso network that imported heroin to the United States and accumulated the proceeds in pizza parlors in New York City.[151] The trial court ordered the deposition of a prosecution witness in Switzerland pursuant to section 3503,[152] but the holding is clearly applicable to rule 15.[153] Specifically, the Second Circuit held that a Swiss magistrate's decision to limit the defense's cross-examination of the prosecution deponent to the same amount of time the prosecution had used for direct examination did not violate the confrontation rights of the multiple defendants involved in the deposition.[154]

3. Face-to-Face Confrontation and the Presence Requirement

In another foreign deposition case, *United States v. Kelly,*[155] the United States Court of Appeals for the Third Circuit considered whether the confrontation clause required exclusion from evidence of a foreign-obtained prosecution deposition at which defendant Kelly was not physically present.[156] Kelly was among twenty-seven people charged with conspiracy and importation of methamphetamine into the United States from Europe.[157] Several material witnesses who were Belgian citizens agreed to allow prosecutors to depose them in Belgium, and the trial court allowed this under rule 15, on the condition that the prosecution take along Kelly and another in-custody defendant named Gifford.[158] Belgian authorities refused to accept the incarcerated defendants, however, so the trial court permitted telephone hookups to allow the defendants to take part in the depositions and ordered

150. 887 F.2d 1141 (2d Cir. 1989), *cert. denied,* 110 S. Ct. 1138 (1990).

151. *Id.* at 1148-49.

152. *See id.* at 1172-75.

153. *See supra* note 142.

154. *Casamento,* 887 F.2d at 1172-74. The Second Circuit also affirmed the trial court's holding that a deponent's imprisonment in Switzerland rendered him unavailable to testify at trial. *Id.* at 1174. The court further held, citing its decision in *Salim,* that the deponent's promise to the Swiss magistrate to testify truthfully satisfied the "oath or affirmation" requirements of Federal Rule of Evidence 603. *Id.* at 1175; *see infra* note 209 and accompanying text.

155. 892 F.2d 255 (3d Cir. 1989), *cert. denied,* 110 S. Ct. 3243 (1990).

156. *Id.* at 261.

157. *Id.* at 256-58.

158. *Id.* at 258, 260.

them videotaped.[159] The depositions were conducted at the American Embassy and followed normal procedures in all other respects.[160]

On appeal of his subsequent conviction to the Third Circuit, Kelly argued, based on *Coy v. Iowa,* that the deposition of living, inculpating fact witnesses who were not co-conspirators, were not incriminating themselves, and were not in fear of death when speaking, was not a class of testimony permitted at trial by the confrontation clause without the witnesses' presence there.[161] Kelly also argued that his physical absence from the depositions deprived him of a meaningful role in cross-examining the deponents, further impinging his confrontation right.[162]

The Third Circuit rejected these arguments, extracting from the Supreme Court's decisions in *Ohio v. Roberts* and *Bourjaily v. United States* the following rule: Because the confrontation clause and hearsay rule protect similar values, an out-of-court statement is presumed to have sufficient indicia of reliability if it falls within an established hearsay exception that is firmly rooted in American jurisprudence.[163] The court then held that the former testimony exception is firmly rooted, and found that the Belgian depositions were taken in compliance with this exception as set forth in evidence rule 804(b)(1).[164] The court concluded that Kelly's ability to listen to the depositions and talk with counsel by phone cured his deprival of face-to-face confrontation.[165]

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159. *Id.* at 260.

160. *Id.* The trial court noted that the Belgian depositions were conducted by an American special master, who placed each witness under the oath normally given in United States courts, and reported that no limits were placed on the scope or nature of defense counsel's cross-examination. United States v. Gifford, 684 F. Supp. 125, 127 (E.D. Pa. 1988), *aff'd,* United States v. Kelly, 892 F.2d 255; United States v. Gifford, 892 F.2d 263 (3d Cir. 1989), *cert. denied,* 110 S. Ct. 3243 (1990) (related cases). The court further noted that the defendants were permitted to listen to the proceeding, that they repeatedly conferred privately with counsel over phones located outside the hearing room, and that the deposition was videotaped and later viewed by the jury at trial. *Id.*

161. *Kelly,* 892 F.2d at 261. These arguments presumably refer to the hearsay exceptions and exclusions for co-conspirators' statements (*see* FED. R. EVID. 801(d)(2)(E)), statements against interest (*see* FED. R. EVID. 804(b)(3)), and "dying declarations" (*see* FED. R. EVID. 804(b)(2)). All of these exceptions arguably qualify as firmly rooted hearsay exceptions that automatically satisfy the confrontation clause under Bourjaily v. United States. *See supra* text accompanying notes 104-05; *see also* Kelly, 892 F.2d at 262 n.4 (discussing Ohio v. Roberts, 448 U.S. 56, 66 n.8 (1980), which lists authority for several well-established hearsay exceptions).

162. *Kelly,* 892 F.2d at 262.

163. *Id.* at 261.

164. *Id.* at 262.

165. *Id.* at 262-63. The *Kelly* case was decided some 18 months after United States v. Salim, 855 F.2d 944 (2d Cir. 1988), and relies on *Salim* as support for its holding that: (1) FED. R. EVID. 804(b)(1) is a firmly rooted hearsay exception and compliance with it automati-

B. Statutory Challenges to Prosecution Depositions Taken Abroad

1. The Presence Requirement

In *United States v. Kelly,* defendant Kelly did not claim that his physical absence from the Belgian depositions violated rule 15; however, Kelly's co-defendant Gifford did make this argument.[166] In a brief separate opinion in *United States v. Gifford,*[167] the Third Circuit rejected the contention that the prosecution's inability to present Gifford in Belgium, and the consequent violation of rule 15(b)'s presence requirement, warranted reversal of Gifford's conviction.[168] The court reasoned that, in light of the defendants' telephonic participation in the proceeding, a strict reading of the presence requirement would defeat the overall purpose of rule 15 to preserve essential testimony in the interest of justice.[169]

2. Witness Unavailability

A number of other federal court decisions considering prosecution depositions taken abroad are instructive for their approach and their precedent on an array of evidential and procedural issues likely to arise in any foreign rule 15 case. Several of these decisions focused on when a trial court may consider a witness unavailable, a matter intrinsic to the application of rule 15.[170] The issue of witness unavailability first arose in the Second Circuit's *United States v. Sindona*[171] decision.

Sindona involved the testimony of four bank employees in Italy whose statements supported charges of bank fraud against a financier.[172] On appeal, the Second Circuit affirmed the trial court's decision to order the depositions.[173] The court held that the trial court had discretion to accept the

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cally satisfies the confrontation clause; and (2) restricted cross-examination procedures in foreign depositions may satisfy confrontation clause requirements. *See id.* at 262 n.6, 263.

166. *Id.* at 262 n.5.

167. 892 F.2d 263 (3d Cir. 1989), *cert. denied,* 110 S. Ct. 3243 (1990).

168. *Id.* at 264-65.

169. *Id.*; *see also Kelly,* 892 F.2d at 262 n.5. Note that the Third Circuit's decision in *Gifford* concerning rule 15(b)'s presence requirement issue also relies squarely on the Second Circuit's decision of this issue in United States v. Salim, 855 F.2d 944 (2d Cir. 1988). *Gifford,* 892 F.2d at 264-65.

170. *See supra* notes 46, 48, 57-58 and accompanying text.

171. 636 F.2d 792 (2d Cir. 1980), *cert. denied,* 451 U.S. 912 (1981).

172. *Id.* at 802-03. The trial court found that the witnesses were not subject to subpoena and were waffling on the eve of trial about whether they would attend. On this basis, the judge ordered rule 15 depositions be taken pursuant to an international legal assistance treaty request to Italian authorities. *Id.* The witnesses confirmed at their depositions that they were unwilling to travel to the United States. When this fact was reported orally to the trial court, the judge admitted the depositions over defense objections. *Id.* at 803.

173. *Id.*

prosecutor's oral representations regarding a witness' prospective unavailability and need not require affidavits or other proof of unavailability in ruling on a rule 15 motion before trial.[174] The court also held that *Roberts* requires only good faith efforts by the government to procure the witness' presence, such as attempts to persuade witnesses to attend and offers to pay their expenses, as a predicate to a finding of unavailability.[175] Finally, the court held that a lower court's decision is not reversible absent a clear abuse of discretion as to whether the circumstances supporting the government's rule 15 motion are sufficiently exceptional.[176]

One year after *Sindona,* the Third Circuit, in *United States v. Steele,*[177] held that *Roberts* required the government to establish at trial its good-faith efforts to procure an unavailable witness as a prerequisite to admission of its rule 15 deposition of that witness.[178] On an ancillary issue, the court held that while rule 15 depositions are not to be used as discovery tools,[179] the prosecution was permitted, when it was unable to gain access to a foreign witness before a deposition, to make a lesser showing of the proposed deposition's materiality to the case than might otherwise be permitted on a rule 15 motion.[180] The Third Circuit also rebuffed the defendant's threshold argument that a court may not issue a treaty-based request for judicial assistance, or a letter rogatory, to enable the government to take a rule 15 deposition abroad.[181]

In 1984, in *United States v. Johnpoll,*[182] the Second Circuit faced a new twist to the witness unavailability question. In *Johnpoll,* prosecutors sought the testimony of four Swiss business persons who were willing to testify at the trial of an American investment banker, provided they were compensated for travel expenses and time away from work, with one of them asking in excess of $500 per day.[183] Prosecutors argued that the government was authorized[184] to compensate the witnesses at only $105 per day, and was

174. *Id.* at 804.

175. *Id.*

176. *Id.*

177. 685 F.2d 793 (3d Cir.), *cert. denied,* 459 U.S. 908 (1982).

178. *Id.* at 808.

179. *Id.* at 809; *see also* FED. R. CRIM. P. 15 advisory committee's note (Note on 1974 Amendment).

180. *Steele,* 685 F.2d at 809.

181. *Id.* at 808-09. The court observed that rule 15(d) directs that depositions be governed by the Federal Rules of Civil Procedure, and that FED. R. CIV. P. 28(b)(3) directs "the taking of depositions in foreign countries 'pursuant to a letter rogatory.' " *Id.* at 809.

182. 739 F.2d 702 (2d Cir. 1984), *cert. denied,* 469 U.S. 1075 (1984).

183. *Id.* at 709. The banker faced charges stemming from the transport and sale of stolen securities. *Id.* at 704.

184. The government was authorized by 28 U.S.C. § 1821 (1984).

prevented from negotiating directly with the witnesses under the terms of the United States-Swiss mutual assistance treaty.[185] The trial judge allowed the depositions, which the defendant Johnpoll then refused to attend because he faced an arrest warrant in Switzerland.[186]

On appeal of his conviction, Johnpoll argued that the prosecution's financial constraints did not qualify as exceptional circumstances warranting the rule 15 depositions.[187] Johnpoll also challenged the depositions as violating his confrontation rights.[188] The Second Circuit found that the court had not abused its discretion in finding exceptional circumstances.[189] The court noted that the deponents had not been amenable to compulsory process, that their testimony was pivotal to Johnpoll's conviction, and that the payment of witnesses' fees beyond established limits would set a harmful precedent that would spawn both escalating demands from foreign witnesses and defense charges that the United States was purchasing witness testimony.[190] The court also held that witness unavailability had been adequately shown and that Johnpoll had waived his confrontation clause challenge when he had opted not to attend the depositions.[191]

In 1986, *United States v. Kehm*[192] provided yet another new twist to the issue of witness unavailability. In *Kehm*, a rule 15 deposition that the defense took in the Bahamas ultimately was offered by the government at trial as inculpatory evidence.[193] On appeal of his conviction, the defendant argued that the prosecution's failure to make any effort to produce the witness, who had refused to come to the trial, precluded a finding of unavailability and thus rendered the deposition improperly admitted.[194] In response, the United States Court of Appeals for the Seventh Circuit noted that, while

185. *Johnpoll*, 739 F.2d at 709 & n.9.

186. *Id.* at 707-08. Prosecutors countered by securing the Swiss magistrate's agreement to allow for full cross-examination by Johnpoll's retained Swiss counsel, and for an open phone line for Johnpoll's use during the deposition. *Id.* at 708. Ultimately, however, Johnpoll did not monitor the depositions because his lawyers refused to attend after stating their opposition to the proceedings. *Id.*

187. *Id.* at 708.

188. *Id.*

189. *Id.* at 708-09.

190. *Id.* at 709-10.

191. *Id.*

192. 799 F.2d 354 (7th Cir. 1986).

193. *Id.* at 359.

194. *Id.* at 360. The defendant, a drug smuggling lawyer, sought and was granted rule 15 authority to depose a witness in the Bahamas based on the witness' affidavit that he would not appear at trial. *Id.* at 359. When the witness did not testify as expected, the defendant did not offer his statement at trial. *Id.* After the defendant's conviction, he procured another affidavit in which the witness asserted he was never unavailable to the government to testify. *Id.* On appeal, the defendant based his argument on this second affidavit. *Id.* at 359-60.

prosecutors are prohibited from omitting efforts to produce a witness just because their chance of success is not certain, prosecutors are not obliged to engage in pointless gestures.[195] The court held that because no agreement existed with the Bahamas to compel the witness to attend, and because the witness was unlikely to have testified at trial particularly if compelled, prosecutors had no duty to pursue the witness after his first refusal to appear.[196]

3. *Fear of Prosecution Abroad*

Implicit in the Second Circuit's holding in *Johnpoll* is the notion that a defendant's fear of arrest when travelling abroad to a prosecution deposition, whether warranted or not, is not cause to exempt a defendant from rule 15(b) or section 3503(b). These rules state that defendants who fail to appear at a deposition after notice waive their right to object at trial to the taking of the deposition and its use in evidence. In 1985 in *United States v. Sines,*[197] the Ninth Circuit echoed the Second Circuit's *Johnpoll* decision regarding fear of foreign prosecution.[198] In *Sines,* the defendant feared arrest in Thailand on narcotics trafficking charges should he attend the deposition of the prosecution's witness in that country. The prosecution witness was imprisoned in Thailand after being caught trafficking illegal drugs for the defendant.[199] The court held that this "Hobson's choice" precluded neither the taking of a rule 15 deposition nor waiver of defendants' rights to object at trial when defendants opt not to attend.[200] On a further question of whether admission of the deposition at trial violated the defendant's confrontation right, the court asserted that the deposition testimony met the Supreme Court's indicia of reliability test.[201] Specifically, the court observed that the deponent had testified under oath, that Sine's attorney had skillfully cross-examined the deponent, and that the deposition was videotaped to permit the jury to observe the deponent's demeanor.[202] The court stated that these factors, rather than the trial court's perceptions of the inherent reliability of the deponent, determine whether testimony bears sufficient indicia of reliability.[203]

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195. *Id.* at 360-61.
196. *Id.* at 361.
197. 761 F.2d 1434 (9th Cir. 1985).
198. *Id.* at 1441.
199. *Id.* at 1436, 1441.
200. *Id.* at 1441.
201. *Id.* at 1441-42.
202. *Id.*
203. *Id.* at 1442.

4. Oath and Affirmation

Federal courts have resolved several more procedural questions posed by rule 15 depositions from abroad, including irregularities in administering an oath or affirmation to deponents, as required by Federal Rule of Evidence 603.[204] Such an issue was first decided in 1985 by the United States District Court for the Southern District of New York in *United States v. Badalamenti.*[205] In *Badalamenti,* the court held that the failure of four prosecution witnesses to take the oath during their deposition in Switzerland was not fatal to the admission of their statements at trial.[206] The court reasoned that because the witnesses had asserted their veracity before the Swiss magistrate conducting the depositions, these assertions satisfied federal evidence rules on oath or affirmation.[207]

The Second Circuit reached the same conclusion in 1989 in *United States v. Casamento.*[208] The *Casamento* court stated that the depositions at issue were sufficiently reliable to be admitted because of the deponents' promises to tell the truth and their respectful attitude toward the presiding Swiss magistrate.[209]

5. Deposition on Written Questions

A final rule 15 decision worthy of note is *United States v. Trout,*[210] in which the United States District Court for the Northern District of California considered the use of written depositions in criminal proceedings. In *Trout,* the court granted a *defense* motion to take a rule 15 deposition upon written questions from a witness in Brazil, a country which prohibits oral

204. FED. R. EVID. 603 states that "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." FED. R. CIV. P. 30(c), which is implicitly incorporated by FED. R. CRIM. P. 15(d) to govern deposition taking, provides in pertinent part that "[t]he officer before whom the deposition is to be taken shall put the witness on oath."

205. No. 84 Crim. 236 (S.D.N.Y. Nov. 8, 1985) (WESTLAW, U.S. Dist. Ct. database).

206. *Id.*

207. *Id.* The court found that Swiss law prohibited swearing in the witnesses because they were criminal defendants, and that the substitute affirmations satisfied the "oath or affirmation" requirements of FED. R. EVID. 603 and FED. R. CIV. P. 30. *Id.*

208. 887 F.2d 1141, 1174-75 (2d Cir. 1989), *cert. denied,* 110 S. Ct. 1138 (1990). For the facts of *Casamento, see supra* text accompanying notes 150-52.

209. *Casamento,* 887 F.2d at 1175. In making this decision, the court relied on the Second Circuit's decision 18 months earlier in United States v. Salim, 855 F.2d 944 (2d Cir. 1988). *See Casamento,* 887 F.2d at 1175. *Salim* in turn relied upon the district court's decision in United States v. Badalamenti, No. 84 Crim. 236 (S.D.N.Y. Nov. 8, 1985) (WESTLAW, U.S. Dist. Ct. database), for its holding that a deponent's promise to a foreign judge to tell the truth when testifying satisfied FED. R. EVID. 603. *See Salim,* 855 F.2d at 952.

210. 633 F. Supp. 150 (N.D. Cal. 1985).

deposition of its citizens for use in American courts.[211] The prosecution objected to this motion on the grounds that deposition via written questions would not afford the government adequate opportunity for cross-examination and would thus be inadmissible under rule 804(b)(1).[212] The court rejected this contention, pointing to rule 15's implicit incorporation of Federal Rule of Civil Procedure 31(a), which allows for written depositions, and concluded that the written cross-examination provided for there, albeit "less robust" than oral questioning, was not sufficiently prejudicial to the prosecution to defeat the defense motion.[213]

IV. *UNITED STATES V. SALIM:* DECISIVE GUIDANCE FOR FEDERAL PROSECUTIONS BASED ON DEPOSITIONS FROM ABROAD

In *United States v. Salim,*[214] the United States Court of Appeals for the Second Circuit encountered foreign-imposed deposition procedures far more divergent from American norms than courts had considered in any previous rule 15 cases. Because the court nonetheless sanctioned these procedures, they provide a benchmark for assessing the acceptability of all future foreign depositions.

A. The Salim *Facts: A Procedural Benchmark for Foreign Depositions*

Knowledge of the circumstances that gave rise to the procedures used in *Salim* is vital to understanding the outcome of the case. The rule 15 deponent in *Salim,* Bebe Soraia Rouhani, was an illiterate mother of eight whom police stopped, with her infant child, at a Paris airport. The woman was en route from Pakistan to New York carrying nine pounds of heroin in her false-bottom luggage.[215] Rouhani immediately described the defendant in the case, Mohamid Salim, as the instigator of her drug trafficking.[216] Rouhani's information enabled United States Customs Service agents at Kennedy Airport to arrest Salim, after a chase, while he awaited Rouhani's incoming flight.[217] In Salim's pockets, the Customs agents found a photo-

211. *Id.* at 151.

212. *Id.* at 152.

213. *Id.* The court also noted that the fruit of such written questioning might also be admitted under residual rule 804(b)(5) if it bore the "circumstantial guarantees of trustworthiness" called for by that rule. *Id.* at 153.

214. 855 F.2d 944 (2d Cir. 1988).

215. *Id.* at 947; Brief for Appellee at 3, United States v. Salim, 855 F.2d 944 (2d Cir. 1988) (No. 87-1402).

216. *Salim,* 855 F.2d at 947.

217. *Id.*

copy of Rouhani's passport.[218] On the way to jail, Salim offered the agents $20,000 to let him escape.[219]

American authorities detained Salim in New York pending trial.[220] French authorities detained and prosecuted Rouhani, thereby preventing her attendance at Salim's trial in federal court in New York.[221] As a result, the American trial judge[222] granted the prosecution's rule 15 motion to depose Rouhani in France, and prosecutors arranged this deposition with a French court by letter rogatory.[223]

Salim could not attend Rouhani's deposition, however, because no treaty existed empowering police to keep Salim in custody in France.[224] The French magistrate rejected the procedures suggested by prosecutors to overcome Salim's absence, including the use of videotaping and open phone lines inside the French courtroom, as contrary to French law.[225] The French magistrate also barred defense counsel from the courtroom during Rouhani's deposition on the grounds that, without Salim present, the attorney lacked standing in the proceeding.[226] To avoid preferential treatment, the American prosecutor voluntarily absented himself.[227] In addition, the French magistrate required both parties to submit their questions in writing because French law permitted only a judge to question a witness.[228] French law also required that Rouhani be provided with the questions in advance.[229] Finally, French law required the magistrate to keep a handwritten summary of the proceeding.[230] The French magistrate agreed to permit an American

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. The trial judge was the Honorable Jack B. Weinstein, chief judge for the U.S. District Court for the Eastern District of New York. His opinion in *Salim* is reported at 664 F. Supp. 682 (E.D.N.Y. 1987). Judge Weinstein was among the original drafters of the Federal Rules of Evidence and served as a member of the Advisory Committee on the rules. *See Preface* to J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES at vi-vii (1989).

223. *Salim*, 855 F.2d at 947.

224. *Salim*, 664 F. Supp. at 685.

225. *Salim*, 855 F.2d at 947.

226. *Salim*, 664 F. Supp. at 686. Judge Weinstein granted the prosecution's Rule 15 motion based on the assumption that both defense and government counsel would attend the deposition. *Id.* at 685.

227. *Salim*, 855 F.2d at 947.

228. *Id.*

229. *Id.* The prosecution submitted written questions to the magistrate in French and English; the defense provided them only in English. *Id.*

230. *Id.*

court stenographer to attend the deposition only as an accommodation to the American court.[231]

Through English and Farsi language translators, the stenographer recorded the questions and Rouhani's replies.[232] Rouhani then left the courtroom, and the attorneys entered to hear the stenographer read back her responses.[233] Defense counsel submitted follow-up queries, and the French magistrate repeated the questioning procedure.[234] Salim, accompanied by an Urdu translator, was available by phone in New York throughout the deposition, but his lawyer did not call for consultation on the questions and responses.[235] After two days, the magistrate recessed the deposition and the parties returned to New York, where the stenographer prepared a transcript of the proceeding, which defense counsel reviewed with Salim.[236] The prosecution and defense attorneys then returned to France for additional questioning, and this time defense counsel read Rouhani's responses to Salim by phone.[237] The deposition resulted in a 145-page transcript, which the trial judge redacted as needed after ruling on objections.[238] Ultimately, Rouhani answered all the questions posed by the American attorneys.[239]

At trial, the judge emphatically cautioned the jurors on the difficulties of weighing the deponent's veracity given their inability to view her demeanor firsthand.[240] The judge also instructed them that while Salim had a constitutional right to confront Rouhani, this right was not violated although he did not physically confront her.[241] The judge's law clerks then read the redacted transcript to the jury.[242] Subsequently, the stenographer who had recorded the deposition in France testified about the procedures used and the deponent's distraught demeanor during the deposition.[243] The jury convicted

231. *Id.* at 948.

232. *Id.* at 947-48.

233. *Id.*

234. *Id.* at 948.

235. *Id.*

236. *Id.*; Brief for Appellee at 9, United States v. Salim, 855 F.2d 944 (2d Cir. 1988) (No. 87-1402).

237. *Salim*, 855 F.2d at 948.

238. United States v. Salim, 664 F. Supp. 682, 686-87 (E.D.N.Y. 1987).

239. *Salim*, 855 F.2d at 948. Both interpreters certified that their translations were verbatim. *Id.* at 953.

240. *Id.* at 948.

241. *Salim*, 664 F. Supp. at 686. Judge Weinstein also advised the jury on evaluating witnesses with "a motive to curry favor" with the government. *Id.*

242. *Id.*

243. *Salim*, 855 F.2d at 948. The stenographer testified that some conversations between Rouhani and her lawyer, and several comments by the lawyer to the magistrate, were not recorded because they were in French. *Id.* The latter were reported for the record from the

Salim after four days of trial,[244] and the judge sentenced him to 12 years in prison.[245] On appeal, Salim challenged both the taking and the admission of Rouhani's deposition on grounds covering rule 15, rule 804(b)(1), and the confrontation clause.[246]

B. The Salim *Opinion: Applying the Rule of Necessity to Prosecution Depositions Taken Abroad*

1. The Court's Rule 15 Analysis

a. The Presence Requirement

Salim challenged the prosecution's failure to present him at Rouhani's deposition in France as a contravention of the presence requirement set forth in rule 15(b).[247] The Second Circuit acknowledged that existing case law applied the presence requirement strictly in domestic settings.[248] The court took into account the French court's refusal, however, to permit Salim's participation in Rouhani's deposition by either videotape or telephone.[249] Based on this refusal, the court chose to rely on Congress' more general intent that rule 15 allow courts the discretion to preserve evidence in the interests of justice.[250] Reasoning that it was obliged to apply rule 15 to effectuate this purpose, the *Salim* court juxtaposed the sovereign right of foreign nations to refuse to acquiesce to American deposition procedures against the prosecution's diligent efforts to gain such acquiescence.[251] On balance, the court held that the foreign court's refusal to follow American rules of procedure should not automatically and invariably prevent prosecution efforts to gather evidence abroad.[252] The court directed that prosecutors must attempt to secure the defendant's physical presence at a foreign deposition even via some form of live broadcast, if necessary.[253] Failing that, the court

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magistrate's summary and reflected the few instances in which Rouhani exercised her right under French law to answer through her attorney or not at all. *Id.*

244. *Id.*

245. *See* Mehler, *supra* note 31, at 2, col. 2.

246. *Salim*, 855 F.2d at 949.

247. *Id.*

248. *Id.* (citing United States v. Benfield, 593 F.2d 815 (8th Cir. 1979) as an example). In *Benfield*, the trial court permitted the rule 15 deposition of a traumatized kidnap victim for use against an accused accessory to the kidnapping while the accused watched by closed-circuit monitor from another room; the witness was unaware that the accused was watching. *Benfield*, 593 F.2d at 817. The Eighth Circuit reversed the accused's conviction on confrontation clause grounds. *Id.* at 821.

249. *Salim*, 855 F.2d at 949-50.

250. *Id.*

251. *Id.*

252. *Id.* at 950.

253. *Id.*

said that a deposition should be ordered, though the trial court should satisfy itself that defense counsel will be given an opportunity to cross-examine the witness commensurate with the accused's right under the confrontation clause.[254]

As part of its analysis of the presence requirement, the *Salim* court relied generally on the Supreme Court's decisions in *Bourjaily v. United States*[255] and *Coy v. Iowa*[256] to support its holding that physical confrontation of prosecution witnesses is not always constitutionally required, at least for out-of-court statements.[257] The Court pronounced this holding in one sentence, without explanation or specific reference to supporting authority in *Coy* or *Bourjaily*. This sentence comprised the extent of the *Salim* court's constitutional assessment of the presence requirement.[258]

b. The "Manner" of the Deposition

Salim also challenged the *manner* of Rouhani's deposition as violative of rule 15(d), which governs how depositions are to be taken.[259] The court also found this challenge, which focused on the circumstances of the deposition, to be unavailing.[260] Specifically, Salim objected to Rouhani's deposition because the French magistrate had required all questions to be in writing and because the presiding magistrate was a foreigner.[261]

To resolve this challenge, the court looked directly to the civil deposition procedures incorporated by rule 15.[262] Federal Rule of Civil Procedure 31(a) allows for depositions by written questions. Based on this provision, the court held that the defense attorney's inability to cross-examine orally, while posing difficulties, did not contravene rule 15(d).[263] The court then observed that the advisory committee on the Federal Rules of Civil Proce-

254. *Id.*
255. 483 U.S. 171 (1987).
256. 108 S. Ct. 2798 (1988).
257. *Salim*, 855 F.2d at 949.
258. *Id.*; *see infra* text accompanying notes 328-32.
259. *Salim*, 855 F.2d at 950. Section (d), entitled "How Taken," instructs that "a deposition shall be taken . . . in the manner provided in civil actions . . . provided that . . . the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself." FED. R. CRIM. P. 15(d). The Court approached this challenge by first dissecting the convoluted provision to identify what Salim was *not* asserting. *Salim*, 855 F.2d at 951. The court found that Salim was not claiming that the questions posed at the deposition sought irrelevant information, were improperly phrased, or elicited hearsay, opinion, or speculation from the witness. *Id.* For this reason, the court held that Salim's challenge did not concern the "scope and manner" of examination. *Id.*
260. *Salim*, 855 F.2d at 951-52.
261. *Id.*
262. *Id.*
263. *Id.* at 951.

dure specifically contemplated that foreign depositions would be conducted by foreign judges, and that foreign courts would follow their usual procedures for taking testimony when executing a letter rogatory for judicial assistance from a United States court.[264] The court also found that the French magistrate fully complied with French procedure in taking Rouhani's deposition.[265] Accordingly, the court held that defense counsel's exclusion from the courtroom, as well as Rouhani's consultation with her attorney before answering some deposition questions, did not contravene rule 15.[266]

2. *The Court's Rule 804(b)(1) Analysis*

a. *Testimony as a Witness Under Oath or Affirmation*

Salim challenged admission at trial of Rouhani's deposition on several evidential grounds,[267] including the French magistrate's failure to place her under oath.[268] The court noted that Federal Rule of Evidence 804(b)(1) governs former testimony "given as a witness," and that witnesses are required, under evidence rule 603, to attest to their veracity by oath or affirmation.[269]

Citing the district court's decision in *United States v. Badalamenti*,[270] the *Salim* court found that Rouhani's affirmation to the magistrate that she would tell the truth was sufficient to satisfy rule 603.[271] Alternatively, the court supported its decision based on Federal Rule of Civil Procedure 28(b)'s specific instruction that deposition testimony taken pursuant to letter rogatory need not be excluded merely because it is not taken under oath.[272]

b. *Testimony Taken in Compliance with Law*

The court also analyzed Salim's claims in light of Federal Rule of Evidence 804(b)(1)'s requirement that deposition testimony be "taken in com-

264. *Id.* at 951-52 (quoting FED. R. CIV. P. 28 advisory committee's note (1963)).
265. *Id.* at 952.
266. *Id.*
267. Salim did not contest, and it appears indisputable, that Rouhani was properly deemed an unavailable declarant under evidence rule 804(a). *See id.* at 952. The prosecution attempted to have her produced but the French court refused. United States v. Salim, 664 F. Supp. 682, 686 (E.D.N.Y. 1987). This allowed the court to consider admitting her deposition under 804(b)(1). *Id.*
268. *Salim*, 855 F.2d at 952.
269. *Id.* at 953; *see supra* note 204.
270. No. 84 Crim. 236, slip op. (S.D.N.Y. Nov. 8, 1985) (WESTLAW, U.S. Dist. Ct. database).
271. *Salim*, 855 F.2d at 952.
272. *Id.*

pliance with law."[273] In *Salim,* this evidentiary requirement directed the court back to rule 15 on criminal depositions, which in turn led the court, via rule 15(d), back to the broad provisions of civil procedure rules 28 and 31.[274] From this melee of rules, the court distilled the following direction: That a deposition taken abroad under foreign law but in conformity with the civil deposition rules is in compliance with law for purposes of the former testimony exception.[275]

Such an accepting view of foreign deposition procedures, the court reasoned, was supported by general principles of international comity.[276] Those principles of comity, the court asserted, require American courts to show due respect for foreign procedures except in those cases where the procedures are so unfair or prone to bias or inaccuracy as to render testimony inherently unreliable.[277] The French judicial system, the court noted, while different from the American, is equally interested in both impartiality and in obtaining accurate testimony.[278] Accordingly, the court held that Rouhani's deposition had been taken in compliance with law.[279]

c. *Opportunity to Develop Testimony by Cross-Examination*

Not surprisingly, the thrust of Salim's challenge under rule 804(b)(1) concerned the conditions under which his attorney conducted cross-examination.[280] The court rejected Salim's assertions that his attorney was denied adequate opportunity for cross-examination because he could not view the witness' demeanor and could not develop a spontaneous line of questioning.[281]

In considering Salim's claim, the court readily acknowledged that the need for written questions made the defense counsel's task more difficult.[282] Nonetheless, relying on *Ohio v. Roberts*[283] and its progeny, the *Salim* court found that Rouhani's questioning constituted cross-examination as a matter

273. *Id.* at 953. The requirement is so written because the rule is designed to govern both civil and criminal proceedings. *See* FED. R. EVID. 804(b)(1), *supra* note 57.

274. *Salim,* 855 F.2d at 953.

275. *Id.*

276. *Id.* The court noted the recent direction by the Supreme Court that " 'any sovereign interest expressed by a foreign state' " warrants respect "so long as that interest is compatible with our own sovereign interests." *Id.* (quoting Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 543-44 nn.27-28, 546 (1987)).

277. *Id.*

278. *Id.* at 952.

279. *Id.* at 953.

280. *Id.*

281. *Id.*

282. *Id.*

283. 448 U.S. 56 (1980).

of form because it was replete with leading questions, the primary tool of cross-examination.[284] The court further found that defense counsel's repeated opportunities to pose follow-up questions after reviewing Rouhani's earlier responses cured the lack of spontaneity.[285] In addition, the court noted Salim's availability to his lawyer by telephone throughout the proceeding, and the defense's uncommon opportunity during the week-long recess to analyze the transcript in detail for misstatements or inaccuracies.[286] Overall, the court held, these opportunities compensated amply for both Salim's absence from the hearing and the strictures imposed by French law.[287]

3. *The Court's Confrontation Clause Analysis*

Having examined the elements of rule 804(b)(1), the court turned to the Supreme Court's decision in *Ohio v. Roberts* for its general approach to assessing hearsay under the confrontation clause.[288] In applying the *Roberts* approach, the court found several indicia of reliability in the circumstances surrounding Rouhani's deposition.[289] These indicia included Rouhani's affirmation to tell the truth, defense counsel's opportunity for cross-examination, and the control exercised by a judicial authority over the conduct of judicial proceedings.[290]

In obvious reference to the Supreme Court's opinion in *California v. Green,*[291] the court characterized the indicia it had identified as illustrative of the classic reliability indicia that allay a court's concerns about the absence at trial of a hearsay declarant.[292] The court then advanced a further indication of reliability warranting use of Rouhani's deposition: the court found that Rouhani's testimony was corroborated on certain points by other evidence introduced at trial.[293] While the court did not elaborate on the details of this corroborating evidence, such evidence included Salim's flight from customs officials at the airport, his offer of a bribe while en route to jail, and, particularly, his possession of a copy of Rouhani's passport while waiting for her plane.[294] Guided by these factors, the court concluded that no

284. *Salim,* 855 F.2d at 954 (quoting Ohio v. Roberts, 448 U.S. 56, 70-71 (1980)); *see supra* note 88 and accompanying text.
285. *Salim,* 855 F.2d at 954.
286. *Id.*
287. *Id.*
288. *Id.* at 954-55.
289. *Id.* at 955.
290. *Id.*
291. 399 U.S. 149 (1970).
292. *Salim,* 855 F.2d at 955.
293. *Id.*
294. *See id.* at 947.

constitutional infirmity existed in the lower court's admission of Rouhani's former testimony at Salim's trial.[295]

V. THE *SALIM* APPROACH: A BELLWETHER IN A SHRINKING WORLD

The Second Circuit's resolution of Salim's challenges appears to turn on three factors interwoven throughout the case: (1) the necessity and importance of obtaining Rouhani's testimony, without which the prosecution could not have convicted Salim on the primary conspiracy charge;[296] (2) the prosecution's diligent efforts to arrange a deposition employing the full complement of American procedures; and (3) the French magistrate's compliance with French law in imposing the deposition procedures actually used. These factors seemed to motivate the court's willingness to stretch the usual dimensions of rules 15 and 804(b)(1) regarding the necessity of an oath and the form and quality of cross-examination. These factors also seem to contribute to the court's decision to dispense with rule 15's presence requirement when the prosecution's reach for essential evidence exceeded its legal authority to keep Salim in custody. Finally, these factors appear to spur the court's use of the confrontation clause's "rule of necessity"[297] to dispense with face-to-face confrontation and to temper the need for strong similarities between the deposition proceeding and the trial, from which former testimony hearsay derives a measure of its reliability. Overall, with obvious regard for the extreme nature of the facts before it, the *Salim* court concluded that despite considerable concern about possible abuses of foreign methods of examining witnesses, it was not persuaded by the challenges presented in Salim's case.[298]

The *Salim* Court began its opinion with the admonition that judicial assessments of unconventional foreign examination methods are best conducted case-by-case.[299] Whatever disclaimer this statement may intend, the *Salim* decision pointedly determined a series of procedural, evidential and constitutional issues that form the gamut of pitfalls confronting prosecutors pursuing oral evidence from abroad. In making these decisions, the *Salim* court pioneered a juridical trail already followed by the United States Court

295. *Id.* at 955.

296. Salim was charged with, and convicted of, conspiracy to distribute, and to possess with intent to distribute heroin (21 U.S.C. §§ 841(b)(1)(A)(i), 846 (1988)) and of offering a bribe to a U.S. Customs agent (18 U.S.C. §§ 201(b), 3623 (1988)). *See* United States v. Salim, 664 F. Supp. 682, 684 (E.D.N.Y. 1987). The district court stated that the prosecution had made a "showing of the critical nature of [Rouhani's] testimony." *Id.* at 685.

297. *See supra* text accompanying notes 62-63.

298. *Salim*, 855 F.2d at 950.

299. *Id.* at 946.

of Appeals for the Third Circuit in its *Gifford* and *Kelly* decisions[300] and one that other courts will certainly heed. Analysis of the *Salim* court's procedural, evidential, and constitutional determinations reveals that each is supported by Supreme Court precedent, by congressional intent, and by practical considerations of fairness and justice.

A. The Rule 15 Disposition

1. Reading the Presence Requirement Out of Rule 15

By far the most controversial choice the *Salim* court made was its decision to construe as nonbinding the unequivocal requirement in rule 15(b) that prosecutors produce in-custody defendants at depositions and keep them in the presence of the witness throughout the examination.[301] Such judicial finesse is troubling, and it will likely be anathema to strict statutory constructionists. The presence requirement of rule 15 stands explicit and separate from the provisions governing the taking and use of deposition testimony contained in sections (d) and (e) of the rule.

Nevertheless, the Federal Rules of Evidence subsumed by rule 15 do not require a face-to-face encounter as a prerequisite to the admission of deposition testimony.[302] Further, the legislative history of the evidence rules indicates that they were not intended to require physical confrontation.[303] Civil procedure rule 31, also employed by rule 15, permits either party to take depositions on written questions, potentially affording no physical confrontation. The focus of both the evidence and civil procedure rules is cross-examination. Thus, by incorporating these rules, rule 15 poses an internal contradiction by imposing a condition on the deposition — the defendant's physical presence — that is otherwise required neither for a deposition's taking nor for its admission at trial.

Viewed in this light, rule 15's presence requirement functions as an extraneous pretrial procedural appendage.[304] The *Salim* court recognized the presence requirement's ultimate irrelevancy, as shown by the court's holding that the testing of the deposition under the confrontation clause and under the evidence rules are independent inquiries best addressed separately at trial.[305] Because Federal Rule of Evidence 804 and the confrontation clause are the intended standards for measuring the admissibility of former testi-

300. *See supra* notes 165, 169.

301. *Salim*, 855 F.2d at 949-50.

302. *See supra* notes 125-28 and accompanying text.

303. *Id.*

304. Rule 15 is a pretrial provision categorized under "Arraignment and Preparation for Trial" in the federal criminal rules. *See* FED. R. CRIM. P. 15.

305. *Salim*, 855 F.2d at 950.

mony, the *Salim* court's distinction between preservation of testimony and its eventual admission seems appropriate.

Whether a court may properly construe a pre-trial provision such as the presence requirement to eliminate its application is another question. Arguably, rule 15's presence requirement should be applied no more absolutely than the constitutional right to physically confront all those who give evidence at trial. *Coy v. Iowa* states that this constitutional right *may* be waivable when necessary to further an important public policy.[306] Even as a purely statutory matter, however, the need to gather pivotal testimony abroad provides an overarching reason for waiving the presence requirement when factors beyond the government's control preclude it from transporting the defendant. These factors include the prosecution's domestic-bound jurisdiction to detain in-custody defendants or the host nation's refusal to allow the defendant to appear. In particular, such legal barriers to presenting the defendant at a foreign deposition, which, in essence, render the defendant legally unavailable for physical confrontation, provide a sound basis for waiving a condition imposed by pre-trial rule 15. The *Salim* court did not waive the presence requirement lightly, but did so only in the face of exigent factors wholly beyond the prosecution's control.

Finally, the *Salim* court's directive that prosecutors must attempt to secure the defendant's presence at the foreign deposition in some form, including live broadcast, indicates the court's awareness, and perhaps hope, that television technology may eventually obviate the problem of face-to-face confrontation over vast distances. Considering, however, that such technology is likely to remain beyond the reach of most federal courts for some time, the *Salim* court's choice to waive the presence requirement is a pragmatic compromise.

2. *Focusing on Preservation of Testimony as the Crux of Rule 15*

The *Salim* court employed the same graduated analysis it had applied to the presence requirement in making its determination that the circumstances of Rouhani's deposition did not contravene the requirements of rule 15(d). Specifically, the court observed that rule 15's primary concentration is on preservation of testimony and that admissibility of hearsay is a secondary concern. The court reasoned that because American judges cannot always know in advance what procedures a foreign court actually will impose, judges should permit the parties to take depositions and consider any procedural problems after they can examine the transcript and the circumstances

306. *See supra* notes 113, 117-19 and accompanying text.

under which the deposition was conducted.[307] The *Salim* court's view seems wholly consistent with the intentions of the advisory committee on rule 15. The committee directed courts to decide whether to order a rule 15 deposition based on the particular circumstances of each case.[308] The advisory committee further instructed that preservation of evidence for *use* at trial was the principal objective in drafting rule 15.[309] The committee's choice of the phrase "use at trial" does not seem intended to mean admission at trial, but rather consideration for admission. This intent is apparent from the committee's admonition that a deposition, once taken, is not automatically admissible, but may be used only if it is otherwise admissible under the rules of evidence, specifically rule 804(b)(1).[310] In short, rule 15 was not intended to replace evidence rule 804.

B. The Rule 804(b)(1) Disposition

1. Paying Due Deference to Foreign Law

The *Salim* court's determination that depositions taken abroad in conformity with both foreign law and American civil procedure rules satisfy rule 804(b)(1), the hearsay exception for former testimony, cuts a broad swath for future international prosecutions. However, the court's wide-ranging viewpoint correctly places the ambit of the American justice system in necessary perspective. The *Salim* court recognized that America has no monopoly on fairness under law, while remaining mindful of basic sixth amendment protections. As the trial judge in *Salim* noted, " '[t]he French administration of justice, far more than the Anglo-American, has become a model abroad.' "[311] Other model systems have emanated from nations as diverse as Austria and Japan. Such systems govern a major portion of the globe. In an era in which the scope of crime far exceeds the reach of working United States treaty arrangements with other nations, a measured reliance on the integrity of foreign judicial systems seems a temperate compromise, particularly when American counsel are permitted active participation in the foreign proceedings.

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307. *See Salim*, 855 F.2d at 950.

308. FED. R. CRIM. P. 15 advisory committee's note (Note on 1974 Amendment).

309. *Id.*

310. *Id.* (Note of Committee on the Judiciary, House Report No. 94-247). Elsewhere, the advisory committee noted that "factors which determine the use of the deposition" include the likely future unavailability of the witness, the possibility that the witness will be coerced before trial, and the agreement of the parties that the deposition should be used. *Id.* (Note on 1974 Amendment).

311. United States v. Salim, 664 F. Supp. 682, 688 (E.D.N.Y. 1987) (quoting H. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND AND FRANCE 254-69 (1975)).

2. *Taking the Broad View of Cross-Examination*

The *Salim* court recognized that the Supreme Court has defined the requisite *opportunity* for cross-examination afforded to defendants by Federal Rule of Evidence 804(b)(1) in terms of the constitutional right to confrontation.[312] In holding that the cross-examination afforded to Salim's lawyer was constitutionally adequate, the *Salim* court relied on the principle forged in *Ohio v. Roberts,* and further developed in subsequent Supreme Court cases,[313] that the confrontation clause generally is satisfied when the defense is given a full and fair opportunity to probe testimony through cross-examination, regardless of the results.[314] One may argue that none of these Supreme Court cases contemplated cross-examination based on written questions in criminal proceedings and that this method quells a key element of spontaneity in such proceedings. In addition, the Supreme Court has yet to address the propriety of a foreign judge conducting such questioning.[315]

The *Salim* court appears correct, however, in holding that defense counsel was accorded essentially a full and fair opportunity to cross-examine under the terms of the sixth amendment as defined by the Supreme Court.[316] Salim's attorney extensively probed Rouhani's testimony, and any reasons

312. United States v. Salim, 855 F.2d 944, 953-54 (2d Cir. 1988).

313. *Id.* at 954 (quoting *Roberts,* 448 U.S. 56, 70-71 (1980)); *see supra* notes 94-96 and accompanying text.

314. In addition to *Roberts,* the court relies specifically on Delaware v. Fensterer, 474 U.S. 15, 20, 22 (1985) (per curiam). *See Salim,* 855 F.2d at 953-54. *Fensterer* involved an FBI expert witness who opined at trial that a cat leash offered as a murder weapon bore hairs apparently torn from the victim's head. On cross-examination, however, the witness could not recall specifically which means he had used previously to reach this conclusion. *Fensterer,* 474 U.S. at 16-17. The Court summarily held that the expert's lack of recall did not preclude adequate confrontation. *Id.* at 18.

Fensterer then held that "the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose . . . infirmities [in testimony] through cross-examination." *Id.* at 22. The objective of this opportunity is to "call to the attention of the factfinder the reasons for giving [the testimony] scant weight." *Id.* The Court held, however, that the confrontation clause guarantees only an opportunity to cross-examine, "not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 20. The Supreme Court relied on its holding in *Roberts,* 488 U.S. at 73 n.12, that no inquiry into the effectiveness of cross-examination is required by the confrontation clause, even when the opportunity for cross-examination occurs only at a preliminary hearing.

These views have been fully reaffirmed in two cases since *Fensterer:* United States v. Owens, 484 U.S. 554 (1988) and Kentucky v. Stincer, 482 U.S. 730 (1987).

315. *Salim,* 664 F. Supp. at 691.

316. *Salim,* 855 F.2d at 954. On the issue of the written questions, the *Salim* court drew a somewhat weak analogy to a situation resolved by Ohio v. Roberts. *Id.* In *Roberts,* defense counsel's direct examination of a defense witness at a pretrial hearing was held to constitute cross-examination as "a matter of form" because it "was replete with leading questions." *Roberts,* 448 U.S. at 70-71 (emphasis omitted); *see supra* text accompanying note 88. The counsel in *Roberts,* however, posed the questions himself orally, not in writing from outside the room

that emerged for giving it scant weight were presented to the jury through the transcript at trial. Moreover, while Salim's attorney was absent from the French courtroom, his questions were put to Rouhani by a judge motivated by a duty to assess Rouhani's own criminal culpability. The *Salim* court noted that the jury could discern Rouhani's veracity in part from the transcript itself and, further, from the court reporter's comments about her demeanor.[317]

C. *The Confrontation Clause Disposition*

1. *Applying* Ohio v. Roberts' *"General Approach" to Foreign Depositions*

The *Salim* court identified four independent indications that Rouhani's deposition testimony was reliable inculpatory evidence: (1) it was taken under affirmation; (2) subject to cross-examination; (3) in a proceeding before a judge; and (4) corroborated by other facts in the case.[318] Under *Ohio v. Roberts,* these factors appear to be more than sufficient to support the court's holding that admission of Rouhani's deposition did not violate Salim's sixth amendment right. In particular, the independent corroboration compels a finding that Rouhani's testimony bore guarantees of trustworthiness sufficient to justify its presentation to the jury, despite the jury's inability to scrutinize her demeanor at trial.

2. *Misunderstanding* Bourjaily v. United States

Apart from this fact-based finding of constitutionality, however, the *Salim* court made a disturbing legal deduction. The court determined that when former testimony, such as Rouhani's deposition, qualifies for admission under Federal Rule of Evidence 804(b)(1), Supreme Court case law, and specifically *Bourjaily v. United States,* instructs that this testimony automatically satisfies the confrontation clause.[319] The court based this assertion on the theory that the former testimony exception is one of the most firmly rooted exceptions to the hearsay rule.[320] No doubt this is true as a general proposition. But as already shown, the exception's firm roots do not appear to reach to the expansive deposition provision of rule 804(b)(1).[321]

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through a foreign judge. Nonetheless, no question existed as to defense counsel's intent to cross-examine Rouhani.

317. *Salim,* 855 F.2d at 954.

318. *Id.* at 955.

319. *Id.*

320. *Id.* at 954-55.

321. *See supra* note 54 and text accompanying notes 54-58.

To date, the Supreme Court has not expressly stated whether the hearsay exception for former testimony, including the deposition provision of 804(b)(1), is firmly rooted enough to warrant dispensing with an independent inquiry into the testimony's reliability. As noted, the *Bourjaily* decision determined only that the hearsay exception for co-conspirators' statements deserved firmly rooted status.[322] The *Roberts* Court indicated that the former testimony exception is firmly rooted to the extent that it allows into evidence prior *trial* testimony by a witness who was cross-examined.[323] The conclusion follows that admission of a past trial's transcript would not generally require a separate reliability test. Given the *Inadi* Court's assessment that the reliability of former testimony derives partially from the strong similarities between the prior judicial proceeding and the trial, however, it seems antithetical not to require at trial some showing that a rule 15 deposition, or a preliminary hearing, fostered, at least procedurally, a reliable accounting by the witness. The Supreme Court's decision in *California v. Green* provides guidelines for making such a showing of reliability. Specifically, in *Green,* the Supreme Court expressed concern that the declarant was under oath, that the defendant had counsel with ample opportunity to cross-examine, and that the hearing was conducted before a judicial tribunal equipped to record the proceeding.[324] Thus, considering *Green, Roberts,* and *Inadi* in tandem, and remembering rule 804(b)(1)'s express requirement that a defendant have the opportunity and similar motive to develop testimony through questioning, it seems apparent that a prosecutor proffering rule 15 evidence can fairly expect some independent inquiry into the reliability of the deposition.[325]

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322. *See supra* text accompanying notes 103-04.

323. *See* Ohio v. Roberts, 448 U.S. 56, 66 & n.8. (1980) (stating "that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection' " (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)), and citing Mancusi v. Stubbs, 408 U.S. 204, 213-16 (1972), for its holding on "cross-examined prior-trial testimony" (and also including the hearsay exceptions for dying declarations and business and public records)); *see also* C. FISHMAN & L. BARRACATO, *supra* note 93, at 5-103.

324. *See supra* text accompanying note 83.

325. Before and since *Roberts,* several federal circuit courts have concluded that grand jury testimony, even though completely untested by cross-examination, may be admissible if it is sufficiently corroborated by "circumstantial evidence supporting its veracity." United States v. Feldman, 761 F.2d 380, 387 (7th Cir. 1985); *see also* United States ex rel. Haywood v. Wolff, 658 F.2d 455, 462-63 (7th Cir.), *cert. denied,* 454 U.S. 1088 (1981); United States v. West, 574 F.2d 1131, 1136-37 (4th Cir. 1978); United States v. Garner, 574 F.2d 1141, 1144 (4th Cir.), *cert. denied sub nom.* McKethan v. United States, 439 U.S. 936 (1978).

Recently, the Eleventh Circuit ruled that, although grand jury testimony falls outside rule 804(b)(1) because it lacks cross-examination, it may nonetheless be admissible under the residual hearsay exception of rule 804(b)(5) if it bears "circumstantial guarantees of trustwor-

The need for such an inquiry is further indicated by the restrictive common-law approach to the use of depositions at criminal trials, which permitted depositions to be read at trial only when the deponent was dead, insane, too sick to attend, or absent by connivance of the defendant, and only when the deposition was taken in the presence of the defendant.[326] *Bourjaily* implies that the scope of a hearsay exception's common law antecedent should weigh heavily in assessing whether the exception is firmly rooted.[327]

3. Glossing Over the Defendant's Right to Face-to-Face Confrontation

Of final concern is the *Salim* court's failure to address directly in its constitutional analysis the fact that Salim was denied face-to-face confrontation with Rouhani at both the deposition and the trial. As noted, the *Salim* court relied, without elaboration, on the *Bourjaily* and *Coy* decisions in holding that physical confrontation of prosecution witnesses is not always constitutionally required, at least for out-of-court statements.[328] *Bourjaily*, however, involved strictly the hearsay exception for co-conspirators' statements, which are admissible as substantive evidence regardless of the declarant's availability for confrontation.[329] *Coy* dealt strictly with face-to-face confrontation of *non-hearsay* witnesses *present* at trial.[330] Neither Supreme Court case addressed the issue before the court in *Salim:* whether an accused bears

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thiness" equivalent to those of cross-examined former testimony or the other three categories of statements covered by rule 804(b): dying declarations (FED. R. EVID. 804(b)(2)); statements against interest (FED. R. EVID. 804(b)(3)); and statements of personal or family history (FED. R. EVID. 804(b)(4)). United States v. Fernandez, 892 F.2d 976, 982 (11th Cir. 1989). The Court noted that grand jury testimony, because of the circumstances under which it is taken, would need to be "extraordinarily trustworthy" to warrant admission. Still, it declined to adopt a per se ban simply because such testimony fell within the rubric of, but did not satisfy, rule 804(b)(1) specifically. *Id.* at 981-82.

326. *See supra* note 54 and accompanying text (discussing West v. Louisiana, 194 U.S. 258, 262 (1904)). These common-law conditions are akin both to the guidelines enumerated in *Green,* and to the requirements of rule 804(b)(1) and rule 15 for admission of deposition testimony. Both *Green* and the rules indicate that the circumstances of a criminal deposition must be accounted for when the deposition is proffered at trial.

Note that the House Judiciary Committee's 1970 report on the then-proposed rule 15 incorporated the United States Justice Department's view that "[t]he grounds for use of depositions in criminal cases as codified in Rule 15(e) are essentially those which were recognized at common law." H.R. REP. NO. 1549, 91st Cong., 2d Sess. 91 (1970), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4007, 4061. This view is stated in a letter dated July 23, 1970, from Will Wilson, Assistant Attorney General, Criminal Division, to House Judiciary Committee Chairman Emanuel Celler, which Celler appended to the House report. The letter cites as authority West v. Louisiana, 194 U.S. 258 (1904).

327. *See supra* note 105 and accompanying text.

328. *See supra* text accompanying notes 257-58.

329. *See supra* text accompanying notes 99-103.

330. *See supra* notes 111-19 and accompanying text.

a right to physically confront, as opposed to simply cross-examine through defense counsel, an accuser testifying at a formal pretrial hearing when the testimony is intended for use at subsequent trial.[331] The *Coy* decision, while holding open the promise that face-to-face encounter may be waived in matters of sufficient public importance, is clearly inclined toward a literal application of this right to face-to-face confrontation.[332] While the legal constraint on detaining American defendants abroad provides excellent grounds for waiving such a right, the issue of its existence and amenability to waiver remains ripe for a thoroughgoing constitutional discussion.

VI. CONCLUSION

In *United States v. Salim,* the Second Circuit charts new territory in several areas of federal criminal law affecting the acquisition and use of inculpatory testimony from witnesses located outside the United States. First, and perhaps of most importance for the short term, the *Salim* decision directs trial courts to order depositions abroad pursuant to Federal Rule of Criminal Procedure 15 based on the reasonable efforts of prosecutors to ensure the use of American deposition procedures. Second, when reasonable efforts fail, *Salim* directs that deposition-taking should proceed under any foreign-imposed circumstances the court believes ultimately will not violate the confrontation clause if the evidence is offered at trial. Third, *Salim* provides that a foreign court's use of deposition procedures divergent from American methods should not form a per se bar to the deposition's admission at trial, provided that the procedures used comply with the host court's law and do not thwart basic fairness or lack inherent reliability. This openness to foreign procedures includes those procedures requiring the deposition to be conducted via written questions with defense counsel absent from the room. Finally, and most strikingly, *Salim* provides that the defendant's absence from a deposition due to the lack of legal authority to detain him abroad is not fatal to the deposition's admission under either rule 15 or the confrontation clause.

Because of these views, *Salim* seems certain to define future debate on the government's burgeoning efforts to secure pivotal testimony from witnesses located beyond United States borders. As the decision indicates, development of technology in simultaneous broadcasting will assist in bridging these borders, thereby easing the need for constitutional compromise in the interests of criminal justice. Adoption of additional international mutual assistance treaties, which provide for joint custody and lend to foreign acceptance

331. *See supra* note 108 and accompanying text.

332. *See supra* text accompanying notes 111-12.

of American procedures, will do the same. In the meantime, *United States v. Salim* lends its well-reasoned guidance to the judicial fray.

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