

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

FILED

2004 APR 29 A 8:55

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IN RE: Letter Rogatory from Slovak Republic)
for Assistance in the Criminal Matter)
of Vladimir Fruni)

U.S. DISTRICT COURT
BRIDGEPORT, CONN
No. 3:04mc228 (JCH)

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APPLICATION FOR ORDER PURSUANT TO TITLE 28, UNITED STATES CODE, SECTION 1782

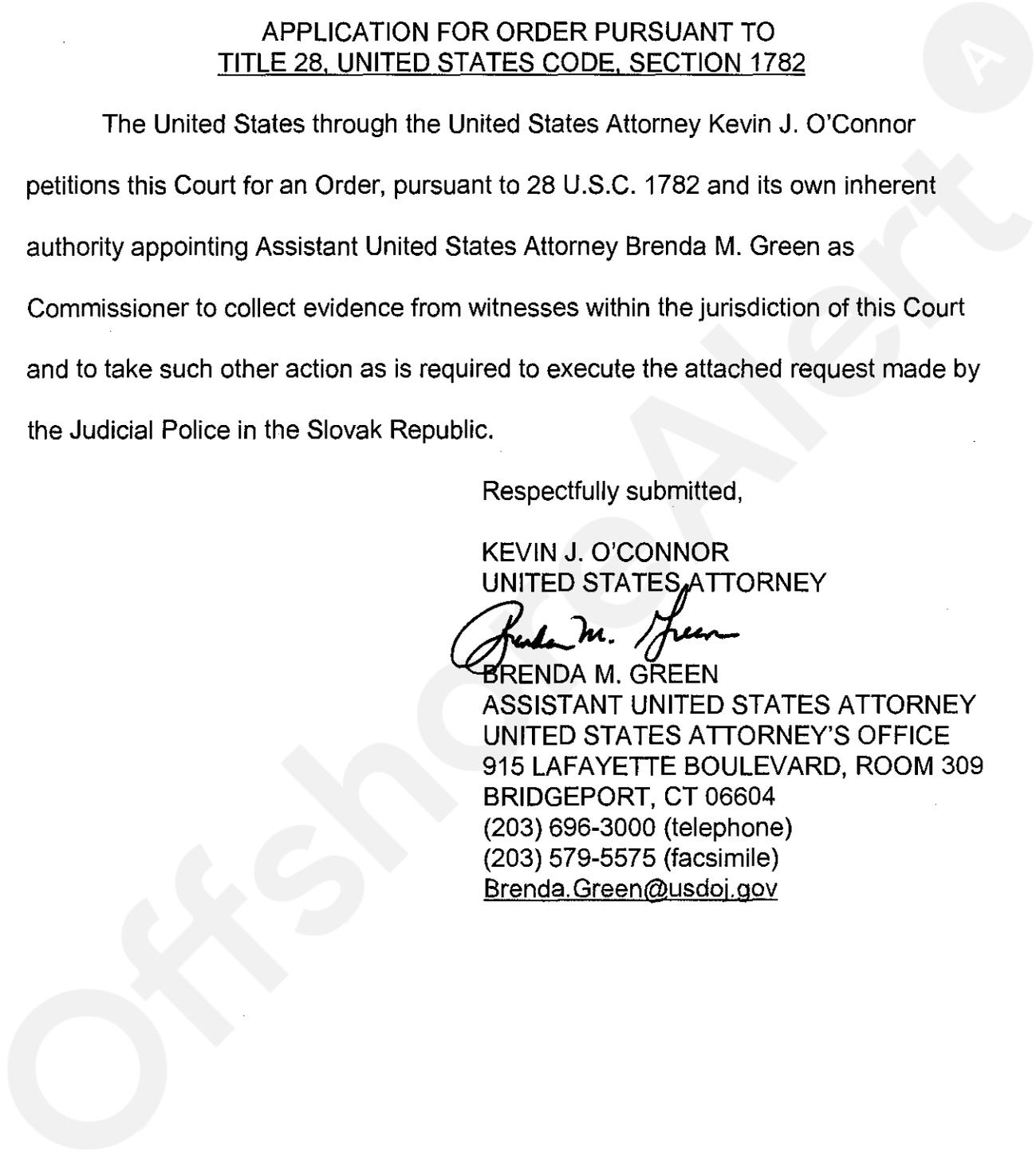
The United States through the United States Attorney Kevin J. O'Connor petitions this Court for an Order, pursuant to 28 U.S.C. 1782 and its own inherent authority appointing Assistant United States Attorney Brenda M. Green as Commissioner to collect evidence from witnesses within the jurisdiction of this Court and to take such other action as is required to execute the attached request made by the Judicial Police in the Slovak Republic.

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY



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MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR ORDER

This memorandum is submitted in support of the application of the United States for an order requiring persons within the jurisdiction of this Court to provide testimony and evidence requested by Judicial Police for use in a criminal proceeding in Slovak Republic and appointing a commissioner to collect it. The application is based upon the attached letter rogatory.

As set forth in the letter rogatory, the Judicial Police have commenced a criminal investigation in the Slovak Republic. The Regional Office of the Judicial Police in the Slovak Republic is investigating a fraud case. From August 19, 1997 until February 4, 2002 Vladimir Fruni, Chairman of the Board of Directors of Horizont Slovakia, Joint Stock Co., and an associate of B.M.G. Investment, LLC in Kosice, Slovakia, defrauded clients by offering partnership agreements and loan contracts with extremely high interest rates without the approval of the National Bank of Slovakia. He did this in connection with Frantisek Matik, Vice Chairman of the Board of Directors, Marian Sebescak, and other unnamed board members. They attracted clients by using false advertisement methods through several forms of media. They accepted deposits from

their clients and offered bogus loan contracts and dormant partnership contracts with unrealistic appreciation values. Consequently, they concluded 69,358 dormant partnership contracts and 11,259 loan contracts, with no fewer than 122,072 B.M.G. clients. This cause B.M.G. clients a detriment in the amount of \$372,510,072.76. Furthermore, they concluded 64,269 contracts with approximately 47,446 clients of Horizont Slovakia. This caused Horizont Slovakia clients a detriment in the amount of \$138,529,317.57.

This Court, pursuant to its statutory and inherent authority, may (1) order that persons within this district shall provide the evidence requested for use in a proceeding in a foreign country, (2) appoint a person to gather such evidence, and (3) establish the procedure pursuant to which the evidence requested shall be produced.

1. Authority to grant a foreign request for assistance

Title 28, Section 1782, provides in pertinent part that:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign . . . tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign . . . tribunal or upon the application of any interested person

Section 1782 was enacted:

. . . to improve United States judicial procedures for . . . obtaining evidence in the United States in connection with proceedings before foreign and international tribunals

Sen. Rep. No. 1580, 88th Cong., 2d Sess. 1 (1964), reprinted in 1964 U.S. Code Cong. & Admin. News 3782 [hereinafter 1964 U.S.C.C.A.N.]. By enacting Section 1782,

Congress reaffirmed the inherent authority of district courts to grant foreign judicial assistance. In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 648 F. Supp. 464 (S.D.Fla. 1986), aff'd, 848 F.2d 1151, 1154 (11th Cir. 1988), cert. denied, 488 U.S. 1005 (1989) [hereinafter Trinidad and Tobago]. More significantly, its enactment reflected Congress' desire to **increase** the power of district courts to respond to foreign requests for judicial assistance. In re Letters Rogatory from the Tokyo District, Tokyo, Japan, 539 F.2d 1216, 1218 (9th Cir. 1976) [hereinafter Japan I]. In sum, Section 1782 is a Congressional invitation to district courts to affirmatively act to execute foreign requests for judicial assistance.

a. Source of the foreign request for assistance

Foreign requests for judicial assistance may be made by a foreign court or tribunal, including an investigating magistrate or juge d'instruction. In re Letter of Request from the Government of France, 139 F.R.D. 588, 590-591 (S.D.N.Y. 1991) [hereinafter France]; In re Letter of Request for Judicial Assistance from the Tribunal Civil de Port-Au-Prince, Republic of Haiti, 669 F. Supp. 403, 405-406 (S.D.Fla. 1987) [hereinafter Haiti]. Foreign requests may also be made by "any interested person," such as a foreign legal affairs minister or public prosecutor. In re: Letters Rogatory from the Tokyo District Prosecutor's Office, Tokyo, Japan, 16 F.3d 1016 (9th Cir. 1994) [hereinafter Japan II]; In re Letter of Request from the Crown Prosecution Service of the United Kingdom, 870 F.2d 686, 690 (D.C. Cir. 1989) [hereinafter United Kingdom]; Trinidad and Tobago, 648 F.Supp. at 466-67.

b. Purpose for the foreign request for assistance

Foreign requests for judicial assistance must be for the purpose of securing evidence "for use in a proceeding in a foreign . . . tribunal." This includes evidence needed in proceedings before investigating magistrates as well as in proceedings before conventional courts. 1964 U.S.C.C.A.N. at 3788; Haiti, 669 F. Supp at 405-406. Section 1782 contemplates that district courts will facilitate evidence gathering prior to litigation; Congress amended Section 1782 to eliminate the need for a "pending" proceeding with the intention of expanding the availability of U.S. judicial procedures for obtaining evidence in the United States in connection with proceedings before foreign tribunals. Even so, where no proceeding before a foreign tribunal is currently pending, district courts should consider whether a proceeding can reasonably be expected to commence. As Judge (now Justice) Ginsburg explained:

[T]o guard against abuse of section 1782, the district court must insist on reliable indications of the likelihood that proceedings will be instituted within a reasonable time.

United Kingdom, 870 F.2d at 692.¹

¹ The several circuit courts that have focused on the proximity to a proceeding before a foreign tribunal that should exist before a district court provides assistance under Section 1782 have produced no single standard. In re Request for International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil, 936 F.2d 702, 707 (2d Cir. 1991) [hereinafter Brazil] (proceeding must be "imminent"); United Kingdom, 870 F.2d at 690 (proceeding must be "reasonably contemplated"); Trinidad and Tobago, 848 F.2d at 1154-56 (proceeding must be "very likely to occur"). See also Japan I, 539 F.2d at 1218 (assistance requested "for use in completion of the investigation and in future trials").

The Department of Justice disagrees with the Second Circuit position that the proceeding in the foreign jurisdiction must be "imminent" before a district court may grant judicial assistance. Nonetheless, such is the law in that circuit and Assistants filing for commissioner appointments within that circuit must so apprise district courts. Whether, in support of

2. Authority to appoint a commissioner

Section 1782 further provides in pertinent part that:

The district court . . . may direct that the testimony or statement [of a person who resides or is found within the district] be given or the document or other thing be produced, before a person appointed by the court.

A district court customarily appoints or "commissions" a person ("commissioner") to collect evidence on behalf of the district court and authorizes the commissioner to submit the evidence collected to the requesting foreign court or authority. With requests for assistance in criminal matters, a district court typically appoints an Assistant United States Attorney as commissioner. However, a district court also may commission a foreign authority together with (or in lieu of) an Assistant United States Attorney. See, e.g., In re Letter of Request from the Supreme Court of Hong Kong, 138 F.R.D. 27, 29 (S.D.N.Y. 1991) [hereinafter Hong Kong].

Application to a district court for appointment of a commissioner to execute a foreign request for judicial assistance is handled ex parte. United Kingdom, 870 F.2d at 688; Japan I, 539 F.2d at 1219.

3. Authority to establish the evidence-collecting procedure

Section 1782 further provides in pertinent part that:

To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal

commissioner appointments, the Second Circuit's standard should be brought to the attention of district courts in other circuits (and, if so, whether it should be otherwise distinguished) is left to the discretion of the Assistants and the rules governing their circuits and districts.

Rules of Civil Procedure.

A district court empowers a commissioner to collect the evidence using the procedure prescribed by the court. A district court has "complete discretion in prescribing the procedure to be followed." 1964 U.S.C.C.A.N. at 3789. When a district court's order fails to specify a procedure by which a commissioner is to collect the evidence, the Federal Rules of Civil Procedure apply. Japan II, 16 F.3d 1016; Hong Kong, 138 F.R.D. at 32. However, as Section 1782 makes clear, when a district court does specify a procedure other than one in accordance with the Federal Rules of Civil Procedure, the alternative procedure shall apply. France, 139 F.R.D. at 590-591.

a. Commissioner's subpoena

If a district court so orders, a commissioner may use the attached form, entitled commissioner's subpoena, to obtain the requested evidence. See, e.g., United States v. Erato, 2 F.3d 11, 12-13 (2d Cir. 1993) (incorporating in pertinent part the district court's order directing the use of commissioner's subpoenas). The commissioner's subpoena is a creation of neither the Federal Rules of Criminal Procedure nor the Federal Rules of Civil Procedure, but is an order of the district court for the production of evidence in accordance with Section 1782. See 28 U.S.C. 1651. Upon authorization by a district court, a commissioner may issue such commissioner's subpoenas as are necessary to execute the request in the relevant district.

b. Notice of evidence taking

If a district court so orders, a commissioner may collect the evidence in accordance with procedures -- including those involving notice -- requested by the

requesting court or authority.² In the absence of a request for a specific procedure, a district court can assume that the requesting court or authority has provided such notice as the foreign law requires, or that the foreign law does not require notice and the requesting court or authority does not consider notice to be necessary or useful. In sum, if the requesting state has not requested notice, no notice need be provided. Accordingly, to the extent that a request does not ask for specific notice procedures, a district court should authorize a commissioner to take the evidence without notice to any party other than the recipient of the commissioner's subpoena.

4. The Present Request

Based upon the facts set forth in the letter rogatory from Judicial Police Slovak Republic, the request is clearly one contemplated by Congress when, in enacting Section 1782, it expanded the authority of federal courts to assist foreign tribunals.

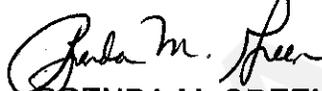
Congress intended that the United States set an example to other nations by making judicial assistance generously available. Trinidad and Tobago , 848 F.2d at 1153-54. Accordingly, the government asks this Court, in the interests of comity, to

² Historically, United States authorities have executed requests for judicial assistance in criminal matters without notification to actual or potential targets of investigations, or even to parties in proceedings, in order to protect against compromising foreign investigations and proceedings. Moreover, United States authorities customarily rely on the requesting courts and authorities to provide such notice directly to the relevant parties as foreign law requires. Finally, requesting courts and authorities routinely request that United States executing authorities follow particular, stated notice procedures when such procedures are necessary or useful under the foreign law or practice. For example, foreign requests frequently ask (1) that a person to be interviewed (generally a defendant or suspect) be given notice of applicable testimonial privileges (e.g., against self-incrimination) at the time of the interview and (2) that a defendant and defense counsel be permitted to be present during the taking of testimony of a witness and be given sufficient notice to make arrangements.

issue the attached order under Section 1782 granting assistance for a proceeding in Slovak Republic, appointing Assistant United States Attorney Brenda M. Green as commissioner, and authorizing her to take the actions necessary, including the issuance of commissioner's subpoenas, to collect the evidence requested and to adopt such procedures in the receipt of the evidence as are consistent with the intended use thereof in Slovak Republic.

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY



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*Application Granted,
Satisfied,
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JCH
U.S. DISTRICT COURT
BRIDGEPORT, CONN
P 2:45*

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UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

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2004 MAY 18 A 11: 15

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ORDER

Upon application of the United States, and upon review of the letter rogatory of April 27, 2004 from Judicial Police in the Slovak Republic seeking evidence for use in a judicial proceeding in [country] and the Court having fully considered this matter,

IT IS HEREBY ORDERED, pursuant to the authority conferred by 28 U.S.C. § 1782 and this Court's inherent authority, that Assistant United States Attorney Brenda M. Green is appointed as a Commissioner of this Court and is hereby directed to execute the letter rogatory as follows:

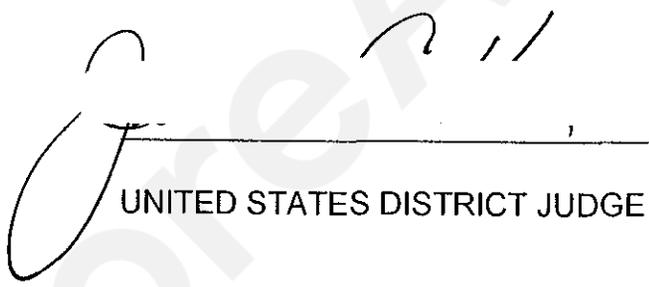
1. Take such steps as are necessary, including issuance of commissioner's subpoenas to be served on persons within the jurisdiction of this Court, to collect the evidence requested;
2. Provide notice with respect to the collection of evidence to those persons identified in the request as parties to whom notice should be given (and no notice to any other party shall be required);
3. Adopt procedures to collect the evidence requested consistent with its use as evidence in a proceeding before a tribunal in the United States of America, which procedures may be specified in the request or provided by the requesting court or

authority or by a representative of United States of America;

4. Seek such further orders of this Court as may be necessary to execute this request; and

5. Certify and submit the evidence collected to the Office of International Affairs, Criminal Division, United States Department of Justice, or as otherwise directed by that office for transmission to the requesting court or authority.

IT IS FURTHER ORDERED that, in collecting the evidence requested, the Commissioner may be accompanied by persons whose presence or participation is authorized by the Commissioner, including, without limitation, special agents of the Federal Bureau of Investigation ("FBI") and/or representatives of the United States of America.



UNITED STATES DISTRICT JUDGE

Dated: May 17, 2004