New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 254—NO. 69
FRIDAY, OCTOBER 9, 2015

Outside Counsel

Expert Analysis

Extradited Defendant Denied Standing To Enforce Sentencing Agreement

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In *United States v. Suarez*, a panel of the U.S. Court of Appeals for the Second Circuit recently held that a Colombian cocaine trafficker lacks "prudential standing" to invoke the doctrine of specialty to challenge a prison sentence he contends violates an agreement concerning his extradition from Colombia to the United States.[1] The decision represents the first time the Second Circuit has decided whether an individual extradited to the United States to face criminal charges has a right to invoke the doctrine of specialty in a U.S. court. In so holding, the Second Circuit has chosen sides in a longstanding split in the federal circuits.

The Second Circuit's decision is problematic in two respects. First, the decision is difficult to reconcile with the Supreme Court's 1886 decision in *United States v. Rauscher*,[2] which, despite its age, is good law, and grants standing to a criminal defendant to assert a challenge under the doctrine of specialty. The Second Circuit did not even cite *Rauscher*. Second, the Second Circuit's application of the prudential standing doctrine to deny a challenge under the doctrine of specialty is unprecedented in the U.S. courts.

The Doctrine of Specialty

In its basic form, the doctrine of specialty provides that a criminal defendant extradited from one country to another may be tried only for the offenses for which he or she has been surrendered.[3] U.S. courts lack personal jurisdiction to try an extradited defendant on any other charges.[4]

The doctrine is explicitly memorialized in most, if not all, U.S. extradition treaties. It is also a principle of customary international law, and therefore applicable when defendants are extradited to the United States in the absence of a treaty.[5]

In addition to limiting the charges on which an extradited defendant may be prosecuted, an extension of the doctrine has been applied to give effect to conditions on extradition imposed with regard to sentencing.[6] Such conditions can include, for example, that the United States not sentence the defendant to death or to life in prison. Sometimes the sentencing condition is asserted unilaterally by the surrendering government; at other times there is an agreement between the United States and the surrendering government, set forth in diplomatic correspondence, concerning the sentence. In *Suarez*, there was such an agreement between the United States and Colombia.

The federal circuits have long been divided on whether an extradited defendant has a right to enforce an agreement between the surrendering nation and the United States. In some circuits, the defendant has the right to contest a breach of such an agreement unless the surrendering nation affirmatively consents to the deviation from the terms of surrender.[7] Other circuits deny the defendant a right to challenge a breach of such an agreement unless the surrendering nation first lodges a protest.[8]

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Until its decision in *Suarez*, the Second Circuit had not adopted a position. With *Suarez*, the court appears to have joined the circuits in the latter camp.

'United States v. Rauscher'

Rauscher is the cornerstone of the doctrine of specialty in U.S. jurisprudence.[9] William Rauscher was indicted in the Southern District of New York for a murder committed on a ship in U.S. waters.[10] He fled to Great Britain, and the United States requested that the British government surrender him pursuant to the extradition provision of the Webster-Ashburton Treaty of 1842. He was extradited to the United States to stand trial on the murder charge. Once in U.S. custody, however, he was not prosecuted for murder but for a different offense, the infliction of cruel and unusual punishment upon the man he was alleged to have murdered. Rauscher was convicted, and appealed on the ground that under the doctrine of specialty, the United States had no jurisdiction to prosecute him for any crime other than that for which Great Britain had surrendered him.

The Supreme Court vacated the conviction. The court held that the doctrine of specialty was implicit within the treaty, and that as a result the district court lacked jurisdiction to try Rauscher for any crime other than murder. This was so even though Great Britain had not lodged a protest regarding his prosecution. Thus, *Rauscher* stands for the principle that a defendant extradited to the United States has standing to invoke the doctrine of specialty, even in the absence of a protest by the surrendering government.

Rauscher remains good law. In 1992, in *United States v. Alvarez-Machain*, the Supreme Court cited *Rauscher* and noted its continued validity.[11] In *Alvarez-Machain*, the court held that the doctrine of specialty did not confer rights upon a criminal defendant brought to the United States by forcible abduction, as opposed to by extradition. In 2013, the U.S. Court of Appeals for the Seventh Circuit noted that *Rauscher* "though old remains good law today."[12] The U.S. Courts of Appeals for the First, Eighth, Ninth, Tenth and Eleventh Circuits also hold, based on Rauscher, that an extradited defendant has standing to enforce the doctrine of specialty, even absent a protest by the surrendering government.[13]

> The Second Circuit's application of the prudential standing doctrine to deny a challenge under the doctrine of specialty is unprecedented in the U.S. courts.

'United States v. Suarez'

In *Suarez*, the United States had requested the defendant's extradition from Colombia to face narcotics conspiracy charges in the Southern District of New York.[14] The Colombian Ministry of Justice issued a resolution ordering Yesid Rios Suarez's extradition on the condition that the U.S. government provide an assurance that Suarez, if convicted, would not face a sentence of life imprisonment. The U.S. government provided such an assurance in a diplomatic note, which stated: "the Government of the United States assures the Government of Colombia that a sentence of life imprisonment will not be sought or imposed."[15] Colombia extradited Suarez to the United States.

Suarez pleaded guilty in the Southern District to narcotics conspiracy. He was 46 years old. The government asked the district court to sentence him to a term of 54 years.

The district court acknowledged that a sentence of 54 years was "effectively a life sentence" for Suarez, but concluded that the sentence did not violate the diplomatic agreement. In reaching that conclusion, the district court relied on two Second Circuit cases, *United States v. Baez*[16] and *United States v. Lopez-Imitalo*.[17] Both cases involved extradition from Colombia, in which the U.S. government had provided diplomatic assurances that the prosecution would not seek a life sentence, and that if one were imposed by the court, the prosecution would request that the court commute the sentence to a term of years.

In *Baez*, following extradition and the defendant's conviction, the government asked for a sentence of a term of years, but the court sentenced the defendant to life in prison. The government asked the court to reconsider and impose a term of years, which the court declined to do. In *Lopez-Imitalo*, the government asked the court to sentence the 54-year-old defendant to 60 years in prison. The court sentenced him to 40 years. In each case, the defendant argued that the government had breached its commitment not to seek a life sentence.

The Second Circuit affirmed each sentence. In each case, the court assumed arguendo that the defendant had standing to challenge the sentence under the doctrine of specialty, and addressed the merits. In each case, the court held that the government had complied with its commitments, as it had not literally requested a life sentence but

rather a term of years. Moreover, in *Baez*, the government had asked the court (unsuccessfully) to commute the sentence to a term of years. The government had thus complied with its commitments. In *Lopez-Imitalo*, the Second Circuit observed that "[h]ad the respective governments intended the Diplomatic Note to be an assurance that the U.S. government would not request a determinate sentence exceeding [the defendant's] expected lifespan, they could have drafted the note to say that."[18]

The diplomatic agreement in *Suarez* was broader than that in the earlier two cases. In those cases, the U.S. government had agreed not to seek a life sentence. In *Suarez*, the U.S. government agreed that a life sentence would not be sought or imposed. Nevertheless, the district court in *Suarez* reasoned that, in light of the two earlier decisions, the Colombian government understood that under U.S. law a sentence of a term of years, however lengthy, is not deemed a sentence of life imprisonment. Thus, imposing a 54-year sentence upon the 46-year-old Suarez did not violate the agreement or the doctrine of specialty.

Suarez appealed to the Second Circuit. On appeal, the parties did not address standing (which the district court had not addressed, and which therefore did not appear to be at issue), but focused on whether the United States had breached its diplomatic promise that a life sentence would not be sought or imposed.[19] The majority (Parker and Wesley, JJ.) affirmed the sentence, but—in contrast to *Baez* and *Lopez-Imitalo*—did not reach the merits of whether the sentence violated the agreement.[20]

The majority began by observing that the court had "never 'conclusively decided whether a defendant has standing to challenge his sentence on the ground that it violates the terms of the treaty or decree authorizing his extradition,' or whether the right to object is held solely by the extraditing nation."[21]

The court distinguished between constitutional (Article III) standing and prudential standing. The test for constitutional standing is whether the defendant has sustained a cognizable injury-in-fact. In the absence of constitutional standing, a federal court lacks subject matter jurisdiction over the dispute. Suarez unquestionably had constitutional standing; he would suffer a palpable injury-in-fact by virtue of the length of his prison sentence if he was correct that the 54-year sentence violated the agreement and the doctrine of specialty.[22]

The issue of prudential standing had not been briefed in 'Suarez,' as the parties had no forewarning that the Second Circuit intended to import case law from the commercial context and apply it to international extradition for the first time.

Instead of simply relying upon *Baez* and *Lopez-Imitalo* and concluding that a term of years is not the same as life in prison, the majority affirmed the sentence on an entirely different, and unprecedented, ground. The majority sua sponte raised the issue whether Suarez had "prudential standing," i.e., whether, despite the existence of federal court jurisdiction, the court should nevertheless place "prudential limits on its exercise."[23]

Prudential standing "bars litigants from asserting the right or legal interests of others in order to obtain relief from injury to themselves."[24] For that concept, the Second Circuit reached far outside the realm of international extradition, and relied on its decisions in *Rajamin v. Deutsche Bank*[25] and *Hillside Metro Assocs. v. JP Morgan Chase Bank*,[26] which arose out of the financial crisis of 2008-2009. Both cases involved mortgagors who sought to invalidate the assignment of their mortgages by their lenders to third parties. In each case, the court held that while the mortgagors sustained injury-in-fact by virtue of the assignments and eventual foreclosures, they lacked prudential standing to challenge the assignments because they were not parties to the assignment agreements and therefore had no rights under them, even as third-party beneficiaries.

The Second Circuit's reliance on these cases is surprising and difficult to understand. Both cases involved commercial disputes, bearing no relation to the law of international extradition. The Second Circuit had never applied prudential standing in an extradition case; nor had any other circuit done so.[27] The issue of prudential standing had not been briefed in *Suarez*, as the parties had no forewarning that the Second Circuit intended to import case law from the commercial context and apply it to international extradition for the first time.

Setting aside whether lack of prudential standing is an appropriate basis for denying an extradited defendant's rights under the doctrine of specialty, the Second Circuit had a responsibility to address the binding Supreme Court decision in *Rauscher*. While *Rauscher*

does not expressly speak of "prudential standing," it stands for the principle that the defendant has whatever standing is necessary to enforce the doctrine of specialty in a U.S. court. The Suarez majority reached its decision without even citing — much less reconciling — *Rauscher*.

Suarez is arguably distinguishable from *Rauscher* in that in *Suarez*, the court disallowed enforcement of an agreement regarding sentencing (which is not covered by the extradition treaty), while in *Rauscher* the court allowed enforcement of a limitation on the charges (which the Rauscher court held was implicit in the 1842 treaty, and which is explicit in virtually all extradition treaties in effect today). But that distinction, if it was the basis for deviation from *Rauscher*, should have been noted and explained by the Second Circuit.

Conclusion

The majority's application of the doctrine of prudential standing to deny the defendant the right to invoke the doctrine of specialty and enforce the diplomatic agreement is unprecedented and difficult to justify. And the court's failure even to cite *Rauscher* is inexplicable.

At a minimum, *Suarez* should be strictly limited to its facts, and applied (if at all) only to diplomatic agreements not covered by the extradition treaty. To the extent a treaty obligation (such as a limitation on charges) is implicated, *Suarez* should not be applied, and *Rauscher* should continue to govern.

1. *United States v. Suarez*, 791 F.3d 363, 366-67 (2d Cir. 2015).
2. *United States v. Rauscher*, 119 U.S. 407, 425-26 (1886).
3. Restatement (Third) of Foreign Relations Law of the United States §477 (1987); *United States v. Levy*, 25 F.3d 146, 159 (2d Cir. 1994). For a detailed discussion of the doctrine of specialty, see Jacques Semmelman, "The Doctrine of Specialty in Criminal Cases," NYLJ, Jan. 3, 2008.
4. See *United States v. Levy*, 947 F.2d 1032, 1034 (2d Cir. 1991); *United States v. Vreeken*, 803 F.2d 1085, 1088 (10th Cir. 1986), cert. denied, 479 U.S. 1067 (1987); *United States v. Davis*, 954 F.2d 182, 186-87 (4th Cir. 1992). Because a defense of lack of personal jurisdiction can be waived, a criminal defendant who does not promptly object to the court's jurisdiction on grounds of specialty waives the right to do so. See *Vreeken*, 803 F.2d at 1088.
5. See *Fiocconi v. Attorney Gen. of United States*, 462 F.2d 475, 479-480 (2d Cir.), cert. denied, 409 U.S. 1059 (1972); Restatement (Third) of the Foreign Relations Law of the United States §477 (1987).
6. See, e.g., *United States v. Cuevas*, 496 F.3d 256, 262 (2d Cir. 2007).
7. See *United States v. Stokes*, 726 F.3d 880, 889 (7th Cir. 2013) (collecting cases).
8. See, e.g., *United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 168 (3d Cir. 1997); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990); *United States v. Kaufman*, 858 F.2d 994, 1008 (5th Cir. 1988).
9. For an analysis of the Rauscher decision in its historical context, see Jacques Semmelman, "The Doctrine of Specialty in the Federal Courts: Making Sense of *United States v. Rauscher*," 34 Va. J. Int'l L. 71 (1993).
10. *Rauscher*, 119 U.S. at 408.
11. *United States v. Alvarez-Machain*, 504 U.S. 655, 659 (1992). See also Jacques Semmelman, "Case Comment, International Decisions: *United States v. Alvarez-Machain*," 86 Am. J. Int'l L. 811 (1992).
12. *Stokes*, 726 F.3d at 889.
13. Id. (collecting cases).
14. *Suarez*, 791 F.3d at 365.
15. Id.
16. *United States v. Baez,* 349 F.3d 90 (2d Cir. 2003) (per curiam).
17. *United States v. Lopez-Imitalo*, 305 Fed. Appx. 818 (2d Cir. 2009).
18. 305 Fed. Appx. at 819.
19. The Suarez briefs are available through PACER. See Docket No. 28 (Brief and Special Appx. for Defendant-Appellant, Oct. 17, 2014), Docket No. 52 (Brief of United States), Docket No. 72-1 (Reply Brief of Defendant-Appellant).
20. In a concurring opinion, Judge Amalya L. Kearse agreed that the sentence should be affirmed, but noted that the majority did not need to reach the issue of prudential standing because the appeal should have been disposed of under the reasoning of *Baez* and *Lopez-Imitalo*, i.e., that any specified term of years, however lengthy, is not deemed a "life sentence." *Suarez*, 791 F.3d at 368 (Kearse, J., concurring).
21. *Suarez*, 791 F.3d at 366 (quoting *Cuevas*, 496 F.3d at 262).
22. See, e.g., *United States v. Martonak*, 187 F.Supp.2d 117, 122 (S.D.N.Y. 2002) (observing that the defendant would suffer "injury of the most direct sort if he were sentenced to jail" in violation of the rule of specialty, and thus had standing to assert the claim).
23. *Suarez*, 791 F.3d at 366 (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004)).
24. Id. (quoting *Rajamin v. Deutsche Bank Nat. Trust*, 757 F.3d 79, 86 (2d Cir. 2014)).
25. 757 F.3d 79, 86 (2d Cir. 2014).
26. 747 F.3d 44 (2d Cir. 2014), cert. denied, 135 S. Ct. 1399 (2015).
27. In *United States v. Fusco*, 560 Fed. Appx. 43, 45 (2d Cir. 2014), where the defendant challenged his conviction and sentence under the doctrine of specialty, the Second Circuit noted that it "need not resolve whether Fusco has prudential standing to challenge his prosecution and sentencing on the grounds that they violate the terms of the Extradition Treaty or the rule of specialty, because his argument plainly fails on the merits."