New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 239—NO. 2 THURSDAY, JANUARY 3, 2008 ALM

OUTSIDE COUNSEL

BY JACQUES SEMMELMAN

The Doctrine of Specialty in Criminal Cases

Criminal defense attorneys sometimes represent individuals brought to the U.S. from foreign countries to stand trial on criminal charges. Extradition, deportation, irregular rendition, and even abduction by U.S. agents are among the methods used by U.S. law enforcement to bring such persons to this country.

Under some circumstances, the defendant may have judicially enforceable rights under the doctrine of "specialty."

This article explores the fundamental principles of this doctrine, which lies at the intersection of U.S. foreign relations law and criminal law.

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.[1] The doctrine, which applies in state as well as federal courts, is one of personal jurisdiction, and is therefore waivable.[2]

Under certain conditions, an extension of the doctrine makes the court's sentencing authority subject to any limitations on sentence imposed in the surrendering government's extradition decree.

Applicability of Doctrine

The doctrine of specialty applies when the defendant has been extradited from a foreign country. Extradition is an international process whereby a defendant is transferred by the government of one country to that of another country to stand trial on criminal charges or to serve a sentence.

Most commonly, extradition occurs pursuant to treaty. In such cases, it is important to scrutinize the language of the applicable treaty, as rights under specialty clauses vary.

Occasionally, extradition is effected pursuant to international comity. The doctrine of specialty is part of customary international law and, therefore, applies where extradition has been effected pursuant to international comity.[3]

Typically, the requesting government asks for the defendant's extradition on specific charges. If the surrendering government agrees to extradite the defendant, it might choose to extradite on all of the requested charges or only on some. It might also impose limitations on punishment, such as a proscription on imposing the death penalty, or on the imposition of a sentence in excess of a specified number of years.

In general, the doctrine of specialty does not apply if the defendant has been brought to the United States via means other than extradition.[4] For example, it does not apply if the defendant has been irregularly rendered by agents of a foreign country.[5] Nor does the doctrine apply if the defendant has been abducted abroad by U.S. agents and brought to the United States.

Scope of the Doctrine

As originally formulated by the Supreme Court in 1886 in *United States v. Rauscher*,[6] the doctrine of specialty limits the court's jurisdiction over the defendant, allowing the court to enter judgment only on charges encompassed by the extradition treaty and included in the foreign government's extradition decree. The doctrine has evolved considerably since then.

In the U.S. Court of Appeals for the Second Circuit, the test for whether charges other than those set forth in the extradition decree violate the doctrine of specialty is whether the surrendering nation has objected, or "would" object, to the charges.[7] An unambiguous refusal to extradite for a particular charge, or an express objection by the surrendering government to the additional charges, suffices to establish a violation of the doctrine of specialty.

In the absence of an express objection or an explicit refusal to extradite on a particular charge, the analysis is more complex. In the Second Circuit, if a charge is contained in the extradition request, and the surrendering nation grants extradition without expressly excluding the charge, the court will presume that the surrendering nation intended to extradite on the charge.[8]

What if the charge is not included in the extradition request, but is added post-extradition, via superseding or standalone indictment? In the Second Circuit, if the additional charge is not a "separate offense" from those set forth in the extradition decree, the court presumes that the surrendering nation would not object to the charge. In this context, "separate offense" does not refer to a distinct criminal act, but rather to a charge that is not "of the same character" as any of the charges for which extradition was granted. The presumption can be rebutted by showing that the surrendering nation "would" object to the additional charge. This is a fact-specific determination that often revolves around the terms of the extradition decree, as well as the related diplomatic correspondence exchanged between the United States and the surrendering government.

In *United States v. Paroutian*,[9] the United States requested extradition of an individual from Lebanon, based on an indictment issued in the U.S. District Court for the Southern District of New York that charged him with conspiracy to import heroin. Lebanon granted the extradition request. Following extradition, the United States tried him on a different indictment, based on other facts and issued in the U.S. District Court for the Eastern District of New York, that charged him with "receipt and concealment" of heroin. The Second Circuit held that this did not violate the doctrine of specialty. The court observed that, while prosecution for a "totally unrelated" offense would violate the doctrine, the surrendering government, having consented to extradition on heroin importation charges, would not consider these other heroin charges to constitute a "separate offense," and therefore would not find the prosecution objectionable.

The Second Circuit later superseded the "totally unrelated" standard in favor of a standard that looks to whether the new charges are "of the same character" as the charges for which extradition was granted. In *Fiocconi v. Attorney General*,[10] the defendants were extradited on an indictment issued in the U.S. District Court for the District of Massachusetts that charged them with conspiracy to import heroin. Following extradition, they were prosecuted in the Southern District of New York on numerous counts of conspiracy to distribute heroin, as well as for possession and distribution of heroin. The Second Circuit held that these additional charges were "of the same character" as the charges in the extradition decree and would therefore not

Jacques Semmelman *is a partner at Curtis, Mallet-Prevost, Colt & Mosle, where he handles commercial litigation and arbitration, white-collar criminal defense and enforcement proceedings.*

be viewed by the surrendering government as objectionable. Absent an affirmative protest by that government, the charges did not violate the doctrine of specialty.

Under the *Fiocconi* standard, which remains the standard in the Second Circuit, it has been held that enlarging the time period of a conspiracy does not violate the doctrine of specialty.[11] Similarly, adding counts based upon additional victims of a securities fraud scheme does not violate the doctrine.[12]

Limitations on Punishment

Under certain conditions, U.S. courts construe the doctrine of specialty as mandating compliance with limitations on punishment expressly set forth in the foreign extradition decree, such as a prohibition on imposing the death penalty or a term of incarceration that exceeds a specified number of years.[13] Such a limitation must be set forth explicitly in the foreign extradition decree. It is not sufficient, for example, that the foreign country has a statute that only permits extradition of its nationals on condition that they not receive certain punishments. If the extradition decree does not reiterate those limitations, they will not be recognized by U.S. courts.[14]

In addition to requiring that the limitation on punishment be set forth explicitly in the extradition decree, courts generally require either a treaty provision that binds the United States to respect such a limitation, or evidence that the United States agreed to abide by the limitation.[15]

• ***Evidentiary and Sentencing Guidelines Issues.*** Defendants have attempted to invoke the doctrine of specialty to exclude evidence at trial, and to prevent conduct not encompassed by the extradition decree from being used to enhance the U.S. Sentencing Guidelines calculation.

Courts have rejected defense arguments that the doctrine of specialty limits the scope of evidence admissible at trial.[16] Courts have admitted evidence of crimes, for which extradition was requested and denied, to prove intent, the existence and scope of a conspiracy, and to establish RICO predicate offenses.[17]

The Second Circuit has not decided whether courts may allow enhancements under the U.S. Sentencing Guidelines based on conduct not encompassed by the extradition decree.[18] One Southern District decision refused to impose a Sentencing Guidelines enhancement based on conduct for which extradition had expressly been denied.[19]

Circuits Split Over 'Standing'

Frequently, the government tries to block the defendant's assertion of rights under the doctrine of specialty, by claiming the defendant lacks "standing" to invoke the doctrine. This issue has resulted in a split in the federal circuits.

In the U.S. Court of Appeals for the Eighth, Ninth, Tenth, and Eleventh circuits, the defendant is said to have "standing" to invoke the doctrine unless the surrendering government affirmatively consents to prosecution on the additional charges.[20] In the Third, Fifth, and Seventh circuits, the defendant is said to have "standing" to invoke the doctrine only if the surrendering government affirmatively protests the additional charges.[21] The First, Fourth, Sixth, and District of Columbia circuits have sidestepped the issue, usually by assuming arguendo the defendant has standing, and then denying relief on the merits.[22]

The Second Circuit has never decided the "standing" issue. District courts within the Second Circuit have reached inconsistent results, although the most recent decisions have held that the defendant has "standing" to invoke the doctrine unless the surrendering government affirmatively consents to the additional charges.[23]

Compounding the confusion, the government often supports its objection to standing with language from cases that hold that a defendant facing extradition out of the United States lacks standing to assert rights under the doctrine. A U.S. court cannot possibly enforce a defendant's specialty rights following extradition to a foreign country, and some courts have said that such a defendant lacks "standing" to raise the doctrine in an extradition proceeding in a U.S. court.[24] That does not, however, support the conclusion that a defendant who has been extradited to the United States also lacks standing to assert specialty rights. The government's oft-made argument to that effect is fallacious.

A defendant who has come to the United States via extradition is certainly entitled to raise the doctrine of specialty as a defense. The Supreme Court said so in 1886,[25] and has never overruled its holding. The issues are, what substantive rights does the defendant enjoy under the doctrine, and under what circumstances can those rights be invoked by the defendant? The rubric of "standing" is not helpful in analyzing these issues. Courts should decide these issues on the merits.

A good example of a court's making short shrift of the government's "standing" objection may be found in Judge Michael Mukasey's decision in *United States v. Martonak*.[26] In concluding that the defendant had standing to invoke the doctrine of specialty, the court reasoned that the lynchpin of "standing" is "injury in fact." Because the defendant "indisputably would suffer an injury of the most direct sort if he were to be sentenced to jail for a crime that the [surrendering government] did not agree he should face upon extradition," and in the absence of express consent by the surrendering government, the defendant had standing to invoke the doctrine.

Doctrine in State Courts

The doctrine of specialty applies in the state courts. The rationale is that, whether as a matter of treaty (the supreme law of the land) or as a matter of customary international law (federal common law), the doctrine binds the states.[27]

• ***Appellate Review of a Denial of a Motion to Dismiss on Specialty Grounds.*** In the federal system, the usual procedural route is to move before trial to dismiss on specialty grounds. Failure to make a timely motion could result in a finding of waiver. If the motion to dismiss is denied, the specialty issue can be reviewed post-conviction by the Court of Appeals. The Second Circuit has held that interlocutory review is not available.[28]

In the New York State court system, a denial of a motion to dismiss on specialty grounds may be reviewed immediately through an Article 78 proceeding.[29] A denial of a motion to dismiss can also be reviewed later, via direct post-judgment appeal, and can be reviewed collaterally in the federal court system via habeas corpus.

Conclusion

The doctrine of specialty may confer significant rights on a defendant who has been extradited to the United States via treaty or comity. Counsel must proceed carefully to ensure that the defendant's rights are protected.

1. Restatement (Third) of the Foreign Relations Law of the United States §477 (1987); *United States v. Levy,* 25 F.3d 146, 159 (2d Cir. 1994).
2. *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).
3. Restatement (Third) of the Foreign Relations Law of the United States §477 (1987); *Fiocconi v. Attorney General,* 462 F.2d 475, 479-80 (2d Cir.), cert. denied, 409 U.S. 1059 (1972). But see *United States v. Lehder-Rivas*, 668 F. Supp. 1523, 1528 n.6 (M.D. Fla. 1987).
4. But see *United States v. DiTommaso,* 817 F.2d 201, 212 (2d Cir. 1987) (specialty could apply in a deportation case if "the Department of State or the deporting country suggests that the defendant can or should be tried in the United States only for specified offenses."); *United States v. Sturtz,* 648 F.Supp. 817, 819 (SDNY 1986) ("it is unnecessary to reach the merits of whether the doctrine of specialty applies when a fugitive is expelled by the asylum state, because here the doctrine, even if applicable, would have no effect.").
5. "Irregular rendition" refers to the seizure of a defendant by agents of one country and delivery to agents of another without resort to the legal processes of the country in which the seizure occurs.
6. 119 U.S. 407 (1886).
7. *Fiocconi v. Attorney General,* 462 F.2d 475, 481 (2d Cir.), cert. denied, 409 U.S. 1059 (1972).
8. *United States v. Campbell,* 300 F.3d 202, 209-10 (2d Cir. 2002), cert. denied, 538 U.S. 1049 (2003).
9. 299 F.2d 486 (2d Cir. 1962).
10. 462 F.2d 475 (2d Cir. 1972).
11. *United States v. Rossi*, 545 F.2d 814, 815 (2d Cir. 1976), cert. denied, 430 U.S. 907 (1977).
12. *United States v. Sturtz,* 648 F. Supp. 817, 819 (SDNY 1986).
13. See *United States v. Campbell,* 300 F.3d 202, 211-12 (2d Cir. 2002), cert. denied, 538 U.S. 1049 (2003); *United States v. Jurado-Rodriguez,* 907 F. Supp. 568, 578-79 (EDNY 1995); cf. *United States v. Baez,* 349 F.3d 90, 92-93 (2d Cir. 2003).
14. *United States v. Feliz,* 201 Fed. Appx. 814, 816 (2d Cir. Oct. 25, 2006) (unpublished summary order), cert. denied, 127 S.Ct. 1323 (2007).
15. *United States v. Cuevas,* 402 F. Supp. 2d 504, 506-07 (SDNY 2005), aff'd in relevant part, 496 F.3d 256 (2d Cir. 2007); *United States v. Banks*, 464 F.3d 184, 191-92 (2d Cir. 2006), cert. denied, 2007 U.S. LEXIS 10938 (Oct. 1, 2007). See also *Benitez v. Garcia,* 495 F.3d 640, 644 (9th Cir. 2007).
16. *United States v. Flores*, 538 F.2d 939, 944 (2d Cir. 1976).
17. See *United States v. Alvarez-Moreno,* 874 F.2d 1402, 1413-14 (11th Cir. 1989), cert. denied, 494 U.S. 1092 (1990).
18. See *United States v. Orlandez-Gamboa,* 185 Fed. Appx. 86, 87 (2d Cir. June 13, 2006) (unpublished summary order), cert. denied, 127 S.Ct. 447 (2006).
19. *United States v. Bakhtiar,* 964 F.Supp. 112, 117 (SDNY 1997).
20. See, e.g., *Leighnor v. Turner,* 884 F.2d 385, 388 (8th Cir. 1989).
21. See, e.g., *United States ex rel. Saroop v. Garcia,* 109 F.3d 165, 168 (3d Cir. 1997).
22. See, e.g., *United States v. Saccoccia,* 58 F.3d 754, 767 (1st Cir. 1995), cert. denied, 517 U.S. 1005 (1996); *United States v. Davis*, 954 F.2d 182, 186 (4th Cir. 1991).
23. Compare *United States ex rel. Cabrera v. Warden,* 629 F.Supp. 699, 701 (SDNY 1986) (defendant lacks standing); and *United States v. Nosov,* 153 F.Supp.2d 477, 480 (SDNY 2001) (defendant "would" lack standing if court were to reach the issue); with *United States v. Martonak,* 187 F.Supp.2d 117, 122 (SDNY 2002) (defendant has standing).
24. See, e.g., *Demjanjuk v. Petrovsky,* 776 F.2d 571, 583-84 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986).
25. See *United States v. Rauscher,* 119 U.S. 407 (1886).
26. 187 F.Supp.2d 117, 121-22 (SDNY 2002).
27. See *People v. Liebowitz,* 140 Misc. 2d 820, 822, 531 N.Y.S.2d 719, 721-22 (County Court, Nassau County 1988), later proceeding sub nom. *Liebowitz v. Harrington,* 152 A.D.2d 737, 544 N.Y.S.2d 189 (2d Dept. 1989).
28. *United States v. Levy,* 947 F.2d 1032, 1034 (2d Cir. 1991). See also *United States v. Andonian,* 29 F.3d 1432, 1434 (9th Cir. 1994), cert. denied, 513 U.S. 1128 (1995).
29. *Liebowitz v. Harrington,* 152 A.D.2d 737, 544 N.Y.S.2d 189 (2d Dept. 1989).