

Fall 2008

The Doctrine of Specialty and Federal Criminal Prosecutions

Roberto Iraola

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Roberto Iraola, *The Doctrine of Specialty and Federal Criminal Prosecutions*, 43 Val. U. L. Rev. 89 (2008).
Available at: <https://scholar.valpo.edu/vulr/vol43/iss1/2>

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



THE DOCTRINE OF SPECIALTY AND FEDERAL CRIMINAL PROSECUTIONS

Roberto Iraola*

Under the doctrine of specialty, recognized by the Supreme Court over a century ago in *United States v. Rauscher*,¹ an extradited fugitive is subject to prosecution only for those offenses for which he or she was surrendered.² This doctrine or rule “fundamentally bears on treaty obligations between states; the principle operates to ensure that the receiving state does not abuse the extradition processes of the extraditing state.”³

As federal case law on the application of the doctrine of specialty has evolved, the limitation it imposes has been routinely incorporated in extradition treaties⁴ and recognized by statute,⁵ and has been tested

* Roberto Iraola, J.D. 1983, Catholic University Law School, Trial Attorney, U.S. Department of Justice, Office of International Affairs. The views expressed herein are those of the author and do not necessarily represent the views of the U.S. Department of Justice or the United States.

¹ 119 U.S. 407 (1886).

² *Id.* In *Rauscher*, Great Britain surrendered a fugitive to the United States so that he could be prosecuted for murder. *Id.* Rather than try him for murder, however, the United States prosecuted him for assaulting and inflicting cruel and unusual punishment on the victim, a lesser included offense of murder which was not listed in the extradition treaty. *Id.* at 432. In vacating the conviction, the Court in *Rauscher* held:

[A] person who has been brought within the jurisdiction of the court, by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.

Id. at 430. Applying the principle of comity, the Court ruled that the treaty contained an implied specialty clause. *Id.* at 420. Thus, the decision has been interpreted to hold “that when an extradition treaty is silent on the issue of specialty, the doctrine will be implied into the treaty’s terms as long as the record indicates that the two countries that made the treaty would follow the rules of comity in the absence of a treaty.” Timothy McMichael, Note, *Born to Run: The Supreme Court of Washington’s Misapplication of the Doctrine of Specialty in State v. Pang*, 74 WASH. L. REV. 191, 198 (1999).

³ *Van Cauwenberghe v. Biard*, 486 U.S. 517, 525 (1988); see *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994) (“The doctrine is based on principles of international comity: to protect its own citizens in prosecutions abroad, the United States guarantees that it will honor limitations placed on prosecutions in the United States.”).

⁴ See, e.g., *United States v. Knowles*, 2007 WL 1246026, at *2 (S.D. Fla. 2007) (“The extradition treaty between the United States and the Bahamas incorporates the doctrine.”). See generally Speedy Rice & Renee Luke, *U.S. Courts, The Death Penalty, and the Doctrine of Specialty: Enforcement in the Heart of Darkness*, 2 SANTA CLARA L. REV. 1061, 1065 (2002) (“[*Rauscher’s* holding] is typically integrated into extradition treaties.”).

⁵ See 18 U.S.C. § 3186 (2000) (“The Secretary of State may order the person committed . . . to be delivered to any authorized agent of such foreign government, to be

when evidence is introduced at trial or a jury instruction is given relating to an offense or offenses for which extradition⁶ was denied or not sought, and also, when evidence of such offenses is considered by the court at sentencing.⁷ Additionally, questions concerning the application of this doctrine have arisen when, in turning over a fugitive, the requested country has made reference in its surrender decree to the limitation on the maximum sentence which may be imposed.

This Article, which is divided into three parts, examines the developing federal case law with respect to these questions.⁸ First, this Article considers whether a fugitive has the right under an extradition treaty to assert a violation of the rule of specialty, or whether this is a right reserved to the rendering country. Next, the Article examines how courts have addressed challenges to the government's mode of proof and theory of criminal liability when these affect offenses for which extradition was either denied or not sought. Finally, this Article discusses the consideration of criminal offenses at sentencing outside those for which extradition was granted, and also addresses attempts by the state that surrenders the fugitive to limit the maximum sentence which may be imposed on such fugitive if ultimately convicted of the offense(s) for which extradition was granted.

I. STANDING TO RAISE RULE OF SPECIALTY

It is not uncommon for a defendant who has been extradited to the United States to attempt to have the charge(s) against him dismissed, or to otherwise limit the scope of the government's evidence at trial, by invoking the rule of specialty. The first question presented when considering such a challenge revolves around the defendant's standing

tried for the offense of which charged." See also *Benitez v. Garcia*, 419 F. Supp. 2d 1234, 1246 (S.D. Cal. 2004), *aff'd*, 459 F.3d 640 (9th Cir. 2007) ("Following *Rauscher*, many treaties . . . were drafted to specifically incorporate the specialty doctrine. The United States also adopted the doctrine in 18 U.S.C. § 3186 . . ."); *Rice & Luke*, *supra* note 4, at 1065 ("The doctrine is now implicitly recognized by federal statute.").

⁶ *Terlinden v. Ames*, 184 U.S. 270 (1902). Extradition involves "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." *Id.* at 289.

⁷ *United States v. Ditommaso*, 817 F.2d 201, 212 (2d Cir. 1987). Courts "have narrowly construed the doctrine of specialty by limiting *Rauscher's* holding to cases involving a formal extradition pursuant to [a] treaty." *Id.*; see *United States v. Trujillo*, 871 F. Supp. 215, 219 (D. Del. 1994) ("It seems clear to the Court that the Doctrine of Specialty applies to *extradited* individuals. In this case, [defendant] was not extradited.").

⁸ See *United States v. Abello-Silva*, 948 F.2d 1168, 1174 (9th Cir. 1991) ("Unless otherwise directed by treaty or statute, [courts] will look to United States precedent to understand and apply the specialty doctrine.").

to raise this claim, an issue about which the courts are not in agreement.⁹ The Tenth Circuit, for example, has held that a defendant has an unqualified right to raise a specialty claim.¹⁰ The Second,¹¹ Third,¹² and Seventh¹³ Circuits, on the other hand, have held that only the parties to the extradition treaty may raise such a claim.¹⁴ The Eighth,¹⁵ Ninth,¹⁶

⁹ See Rice & Luke, *supra* note 4, at 1081 (“Standing decisions fall into three categories: (1) cases holding that an extradited defendant has unlimited standing to raise a violation of the doctrine of specialty claim; (2) cases holding that an extradited defendant has limited standing; and (3) cases holding that an extradited defendant has no standing whatsoever.”); Jacques Semmelman, *The Doctrine of Specialty in the Federal Courts: Making Sense of United States v. Rauscher*, 34 VA. J. INT’L L. 71, 137–40 (1993) (discussing conflict).

¹⁰ See *United States v. Levy*, 905 F.2d 326, 328 n.1 (10th Cir. 1990) (relying on *Rauscher* for the proposition that defendant had “standing to raise [a doctrine of specialty challenge]”). See generally John J. Barrett III, Note, *The Doctrine of Specialty: A Traditional Approach to the Issue of Standing*, 29 CASE W. RES. J. INT’L L. 299, 302 (1997) (“In the Tenth [C]ircuit, individuals have the right to assert violations of specialty regardless [of] whether the requested sovereign can raise a violation of the doctrine.”).

¹¹ See *Shapiro v. Ferrandina*, 478 F.2d 894, 906 (2d Cir. 1973) (“As a matter of international law, the principle of specialty has been viewed as a privilege of the asylum state, designed to protect its dignity and interests, rather than a right accruing to the accused.”); *United States v. Nosov*, 153 F. Supp. 2d 477, 480 (S.D.N.Y. 2001) (“Decisions from the Second Circuit—the binding authority for this court—suggest that a defendant would not have standing to invoke the rule of specialty.”). *But see* *United States v. Cuevas*, 496 F.3d 256, 262 (2d Cir. 2007) (“This Court has not 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.”); *Antwi v. United States*, 349 F.Supp. 2d 663, 669 (S.D.N.Y. 2004) (“The Second Circuit has not decided whether defendants have standing to raise claims based on alleged violations of extradition treaty provisions relating to the principles of specialty and dual criminality.”) (footnote omitted). See also *United States v. Martonak*, 187 F. Supp. 2d 117, 122 (S.D.N.Y. 2002) (finding that defendant had standing to raise specialty claim to the extent that the surrendering country did not contend otherwise).

¹² See *United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 168 (3d Cir. 1997) (“Had [petitioner] brought suit invoking the [extradition] treaty or the Rule of Specialty, she would lack standing.”).

¹³ See *United States v. Munoz-Solarte*, 28 F.3d 1217, 1994 WL 375334 at *2 (7th Cir. 1994) (“Even if their extraditions violated the doctrines of specialty . . . [defendants] lack standing to object to these violations.”); *United States v. Burke*, 425 F. 3d 400, 408 (7th Cir. 2005) (“[Extradition treaties] create rules for the relations between nations.”). See also *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990) (“It is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved.”).

¹⁴ See Kenneth E. Levitt, Note, *International Extradition, the Principle of Specialty, and Effective Treaty Enforcement*, 76 MINN. L. REV. 1017, 1033 (1992) (“Courts which deny defendants standing reason that because the principle of specialty exists to protect only the surrendering state, only the surrendering state may insist on strict adherence to specialty.”).

¹⁵ See *United States v. Thirion*, 813 F.2d 146, 151 n.5 (8th Cir. 1987) (“The government’s argument that [defendant] lacked standing to complain of a violation of the treaty is without merit.”).

and Eleventh¹⁷ Circuits have taken a middle ground and held that a defendant may raise the issue if the sending state would have standing to raise the claim as well.¹⁸ Finally, the First,¹⁹ Fourth,²⁰ Fifth,²¹ Sixth,²² and District of Columbia Circuits²³ have recognized the split but have not expressed an opinion. As a practical matter, even in circuits that have rejected the argument that a defendant has standing to raise a rule of specialty challenge, or that have not expressed an opinion, courts

¹⁶ See *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994) (“An extradited person may raise whatever objections the extraditing country is entitled to raise.”).

¹⁷ See *United States v. Puentes*, 50 F.3d 1567, 1572 (11th Cir. 1995) (“We hold that a criminal defendant has standing to allege a violation of the principle of specialty. We limit, however, the defendant’s challenges under the principle of specialty to only those objections that the rendering country might have brought.”).

¹⁸ The district court in *United States v. Bowe*, 841 F. Supp. 1160, 1165 (S.D. Fla. 1993), *aff’d* 229 F.3d 1183 (11th Cir. 2000), explained the test this way:

[A]lthough a defendant has standing to assert those objections which could be asserted by the extraditing state, he is merely serving as a surrogate for the state, and an objection by the extraditing state itself would clearly be owed greater deference in the determination of whether that state considered the rule to have been violated.

Id. at 1165; see Eric P. Wempen, Note, *United States v. Puentes: Re-Examining Extradition Law and the Specialty Doctrine*, 1 J. INT’L LEGAL STUD. 151, 167 (1995) (“[T]his approach assumes that the surrendering nation’s silence amounts to an objection which is expressed by the defendant.”). See also Rice & Luke, *supra* note 4, at 1082 (“Although this position expressly limits the rights of the extradited defendants, these courts justify such a limitation because it preserves the contractual, and hence diplomatic, relationship between the two countries.”).

¹⁹ See *United States v. Saccoccia*, 58 F.3d 754, 767, n.6 (1st Cir. 1995) (“We need not probe the matter of standing . . .”).

²⁰ See *United States v. Davis*, 954 F.2d 182, 186 (4th Cir. 1992) (“This court has not yet addressed the issue and, on the facts of this case, we decline to do so.”).

²¹ See *United States v. Angleton*, 2006 WL 2828657, at *4 n.12 (5th Cir. 2006) (“It is still an open question in this circuit whether a criminal defendant has standing to assert the rule of specialty.”); *United States v. LeBaron*, 156 F.3d 621, 627 (5th Cir. 1998) (“Whether [defendant] has standing to raise the doctrine of specialty is an undecided issue in this circuit.”); *United States v. Miro*, 29 F.3d 194, 200 n.5 (5th Cir. 1994) (while considering a challenge under the rule of specialty, the court questioned whether defendant had standing to raise the issue since Spain had not objected). *But see* *United States v. Quirox*, 2005 WL 1427692, at *3 n.1 (5th Cir. 2005) (“This Court’s decision in *U.S. v. Kaufman*, 874 F.2d 242, 243 (5th Cir. 1989), precludes a criminal defendant from arguing the Specialty Doctrine when the asylum state[] . . . has failed to raise an objection to the proceeding.”).

²² See *United States v. Garrido-Santana*, 360 F.3d 565, 578 n.10 (6th Cir. 2004) (“This circuit has not expressly decided whether an extradited individual has standing to seek the enforcement of th[e] [specialty] rule.”). See also *Demjanjuk v. Petrovsky*, 776 F.2d 571, 584 (6th Cir. 1985) (Recognizing that “[t]he right to insist on [the] application of the principle of specialty belongs to the requested state, not to the individual whose extradition is requested[,]” but addressing merits of claim), *vacated on other grounds*, 10 F.3d 338 (6th Cir. 1993).

²³ See *United States v. Sensi*, 879 F.2d 888, 892 n.1 (D.C. Cir. 1989) (acknowledging conflict but declining to take a position because defendant’s arguments lacked merit).

often will review such claims.²⁴ Therefore, we now turn to a discussion of rule of specialty challenges in the context of the scope of proof at trial, the government's theory of liability, and sentencing.

II. SPECIALTY AND THE SCOPE OF PROOF AT TRIAL

The rule of specialty does not affect the scope of proof at trial with respect to the charges for which a requested state grants extradition,²⁵ nor the giving of jury instructions on theories of criminal liability related to offenses for which extradition was granted or denied.²⁶ Cases addressing these issues are discussed below.

A. Evidence of Offenses for Which Extradition Was Denied as Predicate Acts or to Prove Participation in a Charged Conspiracy

In *United States v. Saccoccia*,²⁷ the defendant was extradited from Switzerland on an indictment charging him with participating in a Racketeer Influenced and Corrupt Organizations Act ("RICO") conspiracy, failing to file currency transaction reports ("CTRs"), illegally structuring monetary transactions in order to avoid transaction reporting requirements, using property derived from unlawful activities while engaging in transactions affecting interstate commerce, money laundering, and Travel Act violations.²⁸ The Swiss authorities granted the extradition request on all charges, except for sixty-seven counts which pertained to the failure to file CTRs and the illegal structuring of monetary transactions in order to avoid currency transaction reporting

²⁴ See, e.g., *LeBaron*, 156 F.3d at 627 ("We need not decide this issue because, even assuming *arguendo* that [defendant] has standing to challenge jurisdiction, we find that prosecution on the four counts did not violate the doctrine."); *United States v. Nosov*, 153 F. Supp. 2d 477, 480 (S.D.N.Y. 2001) ("The court, however, need not consider th[e] issue [of standing] in great detail, because even if [defendant] had standing, his argument would fail."). But see *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) ("Standing to sue is part of the common understanding of what it takes to make a justiciable case.").

²⁵ See, e.g., *United States v. Alvarez-Moreno*, 874 F.2d 1402, 1414 (11th Cir. 1989) ("When a grand jury indicts a defendant, and the defendant is tried for the precise offense contained in the extradition order, the doctrine of specialty does not purport to regulate the scope of proof admissible in the judicial forum of the requisitioning state."). See also *United States v. Munoz-Solarte*, 28 F.3d 1217, 1994 WL 375334, at *2 (7th Cir. 1994). If the defendant was arrested under a provisional arrest warrant, the doctrine of specialty does not require that the charges underlying such request be identical to those for which the defendant is later tried. *Id.*

²⁶ See, e.g., *Gallo-Chamorro v. United States*, 233 F.3d 1298 (11th Cir. 2000); *United States v. Gallo-Chamorro*, 48 F.3d 502 (11th Cir. 1995); *United States v. Thirion*, 813 F.2d 146 (8th Cir. 1987).

²⁷ 58 F.3d 754 (1st Cir. 1995).

²⁸ *Id.* at 764-65.

requirements.²⁹ After his surrender, a superseding indictment was returned against the defendant for charges which closely paralleled those in the original indictment.³⁰ The United States provided the superseding indictment to the Swiss authorities and they agreed that the defendant's extradition had been granted with respect to the facts charging him with participating in a RICO conspiracy.³¹

On appeal, following his convictions under the RICO and Travel Act counts, the defendant argued that these convictions could not stand because, in violation of the rule of specialty, the CTR offenses for which he had not been extradited had served as predicate acts for these offenses.³² Rejecting this contention, the United States Court of Appeals for the Second Circuit began its analysis noting that, as a general proposition, it was difficult to envision "a violation of the principle of specialty where the requesting nation prosecute[d] the returned fugitive for the exact crimes on which the surrendering nation granted extradition."³³ In this case, the court observed, the Swiss authorities had "twice approved [defendant]'s extradition on counts that prominently featured CTR offenses as predicates."³⁴ Furthermore, the indictment under which the defendant ultimately was tried removed all references to CTR offenses, and the jury was instructed that it should not consider whether the defendant had committed any CTR offenses.³⁵

The rule of specialty also has been interpreted not to foreclose the admission of evidence relating to offenses for which extradition was

²⁹ *Id.* at 765.

³⁰ *Id.* at 765 n.5.

³¹ *Id.* at 765.

³² *Id.* at 767-68.

³³ *Id.* at 768.

³⁴ *Id.* The court in *Saccoccia* reasoned:

This approval—to which we must pay the substantial deference that is due to a surrendering court's resolution of questions pertaining to extraditability[]—strongly suggests that the RICO and Travel Act counts, despite their mention of predicates which, standing alone, would not support extradition, are compatible with the criminal laws of both jurisdictions. Though a Swiss official may informally have fretted about the prospect of a RICO or Travel Act conviction based on nonextraditable predicates, we are reluctant to conclude on this gossamer showing that the [Swiss Federal Tribunal] did not know and appreciate the clearly expressed contents of the indictment when it sanctioned extradition.

Id. (citation omitted).

³⁵ *Id.*; accord *United States v. Moss*, 344 F. Supp. 2d 1142, 1147-48 (W.D. Tenn. 2004) (denying the defense's motion to dismiss counts in the indictment charging RICO substantive and conspiracy charges, as well as forfeiture, because they were based on money laundering charges for which Costa Rican authorities had denied extradition, reasoning that under *Saccoccia*, these offenses could be used as predicate acts).

denied when the defendant had been extradited on a narcotics conspiracy charge. In *United States v. Bowe*,³⁶ for example, the defendant was extradited from the Bahamas on one count of a thirteen-count indictment charging him with participating in a narcotics conspiracy.³⁷ Prior to the start of the trial, the district court dismissed the twelve counts for which the Bahamas had not granted extradition, and the defendant was convicted of the conspiracy count.³⁸

On appeal, the defendant argued that his conviction should be reversed because, in violation of the rule of specialty, the government had introduced evidence relating to the counts for which extradition had been denied to prove the conspiracy charge.³⁹ The United States Court of Appeals for the Eleventh Circuit was not persuaded. The court first noted that the rule of specialty “d[id] not affect the scope of proof admissible at trial for the charges for which extradition was granted,” nor did it “alter the forum country’s evidentiary rules[.]”⁴⁰ The court then reasoned that since the defendant had been charged and convicted of only the conspiracy count, “for which the Bahamian government approved his extradition, the prosecution’s sweeping evidentiary case [ha]d not violate[d] the doctrine of specialty.”⁴¹

B. Evidence Not Presented in Support of Extradition Request for Conspiracy Charge

United States v. Puentes illustrates the principle that courts will not interpret the rule of specialty in a manner that restricts the government’s proof at trial with respect to a charged conspiracy offense for which extradition was granted when the scope of the evidence exceeds that which was presented to the requested state.⁴² In *Puentes*, Uruguay granted the defendant’s extradition under four counts of an indictment, one of which charged the defendant with conspiracy to import cocaine

³⁶ 221 F.3d 1183 (11th Cir. 2000).

³⁷ *Id.* at 1187.

³⁸ *Id.*

³⁹ *Id.* at 1191.

⁴⁰ *Id.* (citations omitted).

⁴¹ *Id.* at 1192; accord *United States v. Alvarez-Moreno*, 874 F.2d 1402, 1413–14 (11th Cir. 1989) (evidence of money laundering was admissible to prove drug conspiracy for which extradition was granted); *United States v. Flores*, 538 F.2d 939, 944 (2d Cir. 1976) (evidence of defendant’s acts and statements of co-conspirators were admissible to prove conspiracy charge for which defendant was extradited, even though they predated period fixed for conspiracy in surrender decree); *United States v. Knowles*, 2007 WL 1246026, at *3 (S.D. Fla. 2007) (evidence of trafficking offenses which occurred during conspiracy, for which an extradition request was denied, was not barred by rule of specialty to establish conspiracy offense for which extradition was granted).

⁴² 50 F.3d 1567 (11th Cir. 1995).

from 1982 to November 29, 1988.⁴³ After the defendant's surrender, the grand jury returned a superseding indictment which increased the period of the conspiracy count to three years, from November 29, 1988, to December 13, 1991.⁴⁴ Summarily rejecting the defendant's contention that his conviction had to be reversed because his prosecution, under the revised conspiracy charge in the superseding indictment, had violated the rule of specialty, the Eleventh Circuit ruled that extending the duration of the conspiracy merely broadened the scope of proof that the government could submit in support of the charge for which the defendant's extradition had been granted.⁴⁵

Similarly, in *United States v. Abello-Silva*,⁴⁶ the defendant was extradited from Colombia on the basis of a two-count indictment charging him with conspiracy to import cocaine and marijuana and conspiracy to possess with intent to distribute these drugs.⁴⁷ After the defendant was extradited to the United States, the grand jury returned a superseding indictment which charged the defendant with the identical offenses for which he had been extradited, but added more facts depicting his illegal activities.⁴⁸ The defendant was convicted of both counts and challenged his conviction on appeal, alleging in part that his trial under the superseding indictment had violated the rule of specialty.⁴⁹ In rejecting the defendant's contention, the Tenth Circuit noted that the doctrine of specialty is aimed at "parallel offenses and not parallel facts."⁵⁰ Furthermore, the court observed, the doctrine "specifically recognizes the possibility, for strategic reasons, that the evidence introduced at trial was withheld from the extradition request[]" because "[t]he specialty principle is not a vehicle for discovery."⁵¹

In a similar vein, in *United States v. Monsalve*,⁵² the defendant was extradited from Canada on the basis of a one-count indictment charging him with conspiracy to export five kilograms or more of cocaine.⁵³ The evidence presented to the Canadian authorities in support of the request, and upon which the Canadian authorities relied, consisted of a shipment

⁴³ *Id.* at 1569.

⁴⁴ *Id.* at 1569-70.

⁴⁵ *Id.* at 1576 ("[W]e do not believe that the superseding indictment materially altered the substance of the offense for which Puentes has been extradited. Count IV of the superseding indictment merely . . . extended the conspiratorial period for three years.").

⁴⁶ 948 F.2d 1168 (10th Cir. 1991).

⁴⁷ *Id.* at 1171.

⁴⁸ *Id.* at 1172.

⁴⁹ *Id.* at 1171-72.

⁵⁰ *Id.* at 1174.

⁵¹ *Id.*

⁵² 173 F.3d 847, 1999 WL 132238 (2d Cir. 1999).

⁵³ *Id.* at *1.

of approximately twenty-seven kilograms of cocaine.⁵⁴ At trial and subsequently at sentencing, however, the government presented evidence linking the defendant to the exportation of approximately 113 kilograms of cocaine.⁵⁵ On appeal, the defendant argued that his conviction violated the rule of specialty because the evidence presented to the Canadian authorities had been limited to the exportation of no more than twenty-seven kilograms of cocaine.⁵⁶ In rejecting this contention, the Second Circuit ruled that the defendant had been “convicted of exactly the same offense that was charged in the indictment[, and] the fact that more evidence was presented at trial and during sentencing than was presented to the Canadian authorities [wa]s irrelevant.”⁵⁷

Finally, in *Antwi v. United States*,⁵⁸ the defendant was extradited from Ghana on the basis of an indictment charging him with one count of conspiracy to distribute and possess with intent to distribute heroin and cocaine and counts of distribution and possession with intent to distribute heroin.⁵⁹ The defendant was convicted only of the conspiracy count and, following the affirmance of his conviction on appeal, filed a petition for a writ of habeas corpus arguing that his detention was illegal because the affidavit which had been submitted in support of his extradition suggested that he was responsible for about \$100,000 in heroin sales but, in eliciting his conviction, the government had presented more evidence at trial.⁶⁰ The district court denied the petition finding that the doctrine of specialty “d[id] not prohibit the requesting state from proving in court that the defendant’s commission of the crime for which he was extradited was more serious than evidence indicated at the time of extradition.”⁶¹

C. *Theory of Criminal Liability*

Courts have consistently recognized the limitations inherent in the application of the doctrine of specialty when it comes to the government’s theory of criminal liability at the time the jury is charged.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at *2.

⁵⁷ *Id.*; cf. *United States v. Archbold-NewBall*, 554 F.2d 665, 684–85 (5th Cir. 1977) (rule of specialty did not bar use in United States of evidence obtained in Martinique to prove conspiracy offense for which defendants were charged and extradited).

⁵⁸ 349 F. Supp. 2d 663 (S.D.N.Y. 2004).

⁵⁹ *Id.* at 666.

⁶⁰ *Id.* at 673.

⁶¹ *Id.*

For example, in *Gallo-Chamorro v. United States*,⁶² the defendant was extradited from Colombia under an indictment charging him with one count of importation of cocaine, one count of conspiracy to distribute cocaine, and three counts of distribution of cocaine.⁶³ The decree granting the defendant's extradition indicated that he could not be prosecuted as an aider and abettor under 18 U.S.C. § 2.⁶⁴ At the close of the evidence, the government requested a *Pinkerton* instruction⁶⁵ with respect to the importation count.⁶⁶ The defendant objected on the grounds that he had been extradited as a principal and that the instruction sought by the government represented "a 'constructive theory of liability' to which Colombia would have objected."⁶⁷ The district court rejected the defendant's argument, ultimately giving a *Pinkerton* instruction with respect to the importation count as well as three distribution counts.⁶⁸ The defendant was found guilty of the importation and distribution counts, but was acquitted of the conspiracy count.⁶⁹ Following his sentence on these counts, the defendant appealed, arguing that the district court's decision to give a *Pinkerton* instruction was reversible error because the theory of vicarious liability embodied in that instruction was no different than that of 18 U.S.C. § 2, for which he had not been extradited.⁷⁰

On appeal, the United States Court of Appeals for the Eleventh Circuit ruled that criminal liability under 18 U.S.C. § 2 was not synonymous with co-conspirator liability under *Pinkerton*.⁷¹ The court

⁶² 48 F.3d 502, 503 (11th Cir. 1995).

⁶³ *Id.*

⁶⁴ *Id.* Section 2 states:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 (2000).

⁶⁵ *Pinkerton v. United States*, 328 U.S. 640 (1946). This jury instruction is rooted in the holding of *Pinkerton*, in which the Supreme Court ruled that a conspirator could be guilty of a substantive offense committed by a co-conspirator, even though he did nothing more than join the conspiracy, if the offense was reasonably foreseeable and was committed in furtherance of the conspiracy. *Id.* at 647-48.

⁶⁶ *Gallo-Chamorro*, 48 F.3d at 504 n.2. The importation count in the indictment indicated that someone, other than the defendant, had actually transported the cocaine into the United States. *Id.*

⁶⁷ *Id.* at 504.

⁶⁸ *Id.* at 504-05.

⁶⁹ *Id.* at 505.

⁷⁰ *Id.*

⁷¹ *Id.* at 506-07.

reasoned that “*Pinkerton* liability, which requires the defendant’s participation in a conspiracy, is much narrower in scope than aiding and abetting.”⁷² Consequently, there was no violation of the rule of specialty, and the district court had not erred in giving the *Pinkerton* instruction to the jury.⁷³

After the denial of his appeal, the defendant filed a habeas petition requesting that his sentence be vacated, presenting a variant of the argument that he had made on direct appeal regarding the district court’s decision to give a *Pinkerton* instruction.⁷⁴ Specifically, the defendant argued in his petition that the *Pinkerton* instruction had violated the specialty doctrine, not because it was analogous to the vicarious liability found in 18 U.S.C. § 2, but because Colombia had rejected his extradition on the count of the indictment charging him with conspiracy to import cocaine.⁷⁵ On appeal, following the denial of that petition, the Eleventh Circuit again rejected his challenge, holding that the *Pinkerton* instruction had not violated the rule of specialty because, in this case, that instruction only enabled the government to “establish the defendant’s membership in a conspiracy as an evidentiary fact to prove guilt in the related substantive offenses.”⁷⁶

In support of its ruling, the Eleventh Circuit relied on *United States v. Thirion*.⁷⁷ In *Thirion*, Monaco granted the request by the United States for the defendant’s extradition on counts charging him with mail fraud, wire fraud, and inducing interstate travel to defraud, but not a count charging conspiracy to defraud the United States.⁷⁸ While the defendant was not tried on the conspiracy count, the district court instructed the jury on co-conspirator liability under *Pinkerton* with respect to the substantive counts for which he had been extradited.⁷⁹ Rejecting the defendant’s contention that his convictions could not stand because the doctrine of specialty had foreclosed the giving of a *Pinkerton* instruction, the United States Court of Appeals for the Eighth Circuit first determined that “individual substantive counts need not make reference to coconspirator

⁷² *Id.* at 507. In support for this finding, the court relied on the Supreme Court’s observation in *Nye & Nissen v. United States*, 336 U.S. 613 (1949) that aiding and abetting liability is broader in scope than under *Pinkerton*, because the former “makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy” *Id.* at 507.

⁷³ *Id.* at 506.

⁷⁴ *Gallo-Chamarro v. United States*, 233 F.3d 1298, 1301 (11th Cir. 2000).

⁷⁵ *Id.* at 1306.

⁷⁶ *Id.* (internal quotation marks omitted).

⁷⁷ 813 F.2d 146 (8th Cir. 1987).

⁷⁸ *Id.* at 150 & n.4.

⁷⁹ *Id.* at 151. The substantive counts had charged that defendant was liable as an aider and abettor under 18 U.S.C. § 2 (2000). *Id.*

liability in order for the jury to be so instructed.”⁸⁰ With this footing in place, the court went on to rule that the doctrine of specialty did not prohibit the government from seeking to establish a defendant’s membership in a conspiracy as an “evidentiary fact to prove guilt” in connection with the offenses for which he had been extradited.⁸¹

III. SENTENCING

In the federal system, “[a]s a general proposition, a sentencing judge ‘may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.’”⁸² This wide discretion is reflected in the Federal Rules of Evidence,⁸³ the United States Code,⁸⁴ and the United States

⁸⁰ *Id.* at 152.

⁸¹ *Id.* at 153. *See also* United States v. Zackery, 494 F.3d 644, 648 (8th Cir. 2007) (“As *Pinkerton* liability is an issue of whether the evidence was sufficient to convict the defendant of a substantive offense, whether the indictment charged a separate conspiracy offense is simply irrelevant.”).

⁸² Nichols v. United States, 511 U.S. 738, 747 (1994) (quoting United States v. Tucker, 404 U.S. 443, 446 (1972)). *See generally* Williams v. Oklahoma, 358 U.S. 576, 584 (1959) (“[O]nce the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court . . .”).

The seminal case on sentencing is *Williams v. New York*, 337 U.S. 241 (1949). In *Williams*, Defendant was found guilty of first-degree murder and the jury recommended life imprisonment. *Id.* at 242. The judge imposed a death sentence based on information in a probation report indicating that defendant had committed thirty burglaries in the vicinity of the murder and that he also had been involved in activities indicating he “possessed ‘a morbid sexuality[.]’” *Id.* at 244.

In rejecting defendant’s contention that the judge’s reliance on this information violated his right to due process under the Fourteenth Amendment the Court initially observed that historically, American and English judges at sentencing had been granted “wide discretion in the sources and types of evidence used to . . . determin[e] the kind and extent of punishment to be imposed within limits fixed by law.” *Id.* at 246, 245-46. In this vein, reliance by judges on presentence reports was merely an outgrowth of the “age-old practice of seeking [sentencing] information from out-of-court sources to guide their judgment toward a more enlightened and just sentence.” *Id.* at 250-51. The Court noted that to achieve the goals of reformation and rehabilitation and to insure that the punishment fit the crime, “possession of the fullest information possible concerning the defendant’s life and characteristics[.]” unfettered by the strict rules of evidence, was necessary. *Id.* at 247. Finally, the Court reasoned that under the emerging practice of individualized sentencing, a probation officer was not a defendant’s adversary and that “most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination.” *Id.* at 250.

⁸³ *See* FED. R. EVID. 1101(d)(3) (rules of evidence do not apply at sentencing). *See generally* United States v. Gonzalez-Vazquez, 34 F.3d 19, 25 (1st Cir. 1994) (“In the sentencing phase of a case, the Federal Rules of Evidence do not apply.”).

Sentencing Guidelines.⁸⁵ On a number of occasions, extradited defendants have argued that the rule of specialty bars the court's consideration of evidence or other information relating to the charges for which their extradition was not granted or sought. As demonstrated by the discussion below, courts uniformly have rejected these arguments.

A. *General Application of Sentencing Principles*

In *United States v. Lazarevich*,⁸⁶ the defendant was extradited from the Netherlands on charges that he had made false statements on the passport applications of his two children.⁸⁷ The Dutch authorities denied this aspect of the request seeking extradition based on charges of child abduction because the defendant had already been tried and convicted of similar charges by a court in Belgrade.⁸⁸ The defendant ultimately was convicted of making false statements in connection with the passport application of one of his children, and he appealed his sentence on the ground that the district court's consideration of the abduction charges in enhancing his sentence violated the rule of specialty.⁸⁹

Relying on *Witte v. United States*,⁹⁰ the Ninth Circuit ruled that the district court's consideration of evidence relating to the defendant's abduction of his children to enhance his sentence within the statutory

⁸⁴ See 18 U.S.C. § 3661 (2000) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence.").

⁸⁵ See U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (2007) ("In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character[,] and conduct of the defendant, unless otherwise prohibited by law."); U.S.S.G. § 6A1.3(a) ("In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy."). In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court ruled that the sentencing guidelines, previously mandatory, are now advisory.

⁸⁶ 147 F.3d 1061 (9th Cir. 1998).

⁸⁷ *Id.* at 1062.

⁸⁸ *Id.* at 1063.

⁸⁹ *Id.*

⁹⁰ 515 U.S. 389 (1995). In *Witte*, the district court determined defendant's sentence, for attempted possession of marijuana with intent to distribute it by considering quantities of cocaine that he had imported. *Id.* at 393–94. Subsequently, defendant was indicted for conspiracy to import and attempt to import cocaine, and he contended that the indictment on those charges "constitute[d] a second attempt to punish him criminally for the same cocaine offenses[] . . ." *Id.* at 397. The Supreme Court ruled that the "use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits d[id] not constitute punishment . . ." *Id.* at 399.

limits did not constitute “punishment” for purposes of the rule of specialty.⁹¹ The court rejected the contention that merely because the sentencing had taken place as a result of an extradition, it was removed from the reach of *Witte*, reasoning that the negotiation of the treaty with the Netherlands could not be divorced from its historical background which “include[d] the long-standing practice of United States courts . . . considering relevant, uncharged evidence at sentencing.”⁹²

A similar result was reached by the court in *United States v. Garcia*.⁹³ In *Garcia*, following his extradition from Canada, the defendant pled guilty to a three-count indictment charging him with conspiracy to distribute marijuana, possession of marijuana with the intent to distribute, and using a firearm in connection with the conspiracy.⁹⁴ At the time of sentencing, the district court considered marijuana shipments in which the defendant engaged in addition to those to which he had pled, and also his complicity in the murder of one of his distributors.⁹⁵ Rejecting the defendant’s challenge that consideration of the evidence at sentencing violated the doctrine of specialty, the Eleventh Circuit ruled that the defendant had not been punished for offenses for which he had not been extradited because under the law of the United States, “the consideration of other conduct in the sentencing process is legally and conceptually a part of the punishment for the inducted crimes and within the limits set for those crimes.”⁹⁶

In a similar vein, in *United States v. Garrido-Santana*,⁹⁷ following his conviction for possessing cocaine with intent to distribute, the defendant appealed his sentence, arguing that the district court erred when it applied an enhancement under the sentencing guidelines for obstruction

⁹¹ *Lazarevich*, 147 F.3d at 1063–64.

⁹² *Id.* at 1064; accord *United States v. Fischer*, 2007 WL 927948, at *3 (D. Or. 2007) (“Petitioner argues that the doctrine of specialty was violated because his criminal history was considered in his sentencing, meaning (in petitioner’s view) that he was punished for conduct not specified in the extradition agreement. This argument is rejected.”).

⁹³ 208 F.3d 1258 (11th Cir. 2000), *vacated on other grounds*, 531 U.S. 1062 (2001).

⁹⁴ *Id.* at 1260.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1261. The court observed:

With respect to the doctrine of specialty and U.S. law governing sentencing[,] the doctrine of specialty does not restrict the scope of proof of other crimes that may be considered in the sentencing process. The distinction is thus drawn between proof of other crimes as a matter germane to the determination of punishment for the extradited crime and proof of other crimes in order to exact punishment for those other crimes. Only the latter course is forbidden by the doctrine of specialty.

Id.

⁹⁷ 360 F.3d 565 (6th Cir. 2004).

of justice.⁹⁸ Specifically, the defendant argued that because he had been extradited from the Dominican Republic solely on the cocaine offense, the district court's consideration of the external evidence of his failure to appear, which further enhanced his sentence, constituted punishment in violation of the doctrine of specialty.⁹⁹ The United States Court of Appeals for the Sixth Circuit assumed *arguendo* that the treaty could be interpreted to contain an implicit promise not to punish, as opposed to prosecute, the defendant for any offense for which he had not been extradited.¹⁰⁰ Adopting the reasoning of *Witte* and *Lazaravich*, the court ruled that the "enhancement [of the] . . . defendant's sentence on the narcotics offense based upon [the] defendant's failure to appear at his arraignment did not constitute 'punishment' for that conduct so as to violate any implicit proscription against such punishment in the extradition treaty."¹⁰¹

Most recently, in *United States v. Angleton*,¹⁰² the Fifth Circuit confronted the issue of the application of the rule of specialty at sentencing. In *Angleton*, the defendant pled guilty to two counts of aiding and abetting the misuse of a passport and one count of conspiracy to commit passport fraud.¹⁰³ The Netherlands had surrendered the defendant on these three passport charges, but had refused to grant extradition on a murder for hire charge and for failure to appear in connection with that charge.¹⁰⁴ In calculating the appropriate sentence, the district court considered the defendant's failure to appear, and the defendant appealed his conviction, arguing in part that the district court's consideration of such conduct had violated the provision of the treaty incorporating the rule of specialty.¹⁰⁵ Adopting the reasoning of the courts in *Lazarevich* and *Garrido-Santana*, the Fifth Circuit rejected this contention and ruled that the doctrine of specialty is not infringed by a district court's consideration of relevant conduct under the sentencing guidelines associated with a non-extradited offense in assessing the appropriate punishment for the offense(s) for which a fugitive was surrendered.¹⁰⁶

⁹⁸ *Id.* at 576.

⁹⁹ *Id.* at 577.

¹⁰⁰ *Id.* at 578.

¹⁰¹ *Id.*; *United States v. Robinson*, 503 F.3d 522, 530 (6th Cir. 2007) (enhancement for obstruction of justice did not violate the rule of specialty).

¹⁰² 201 Fed Appx. 238, 2006 WL 2828657 (5th Cir. 2006).

¹⁰³ *Id.* at 239.

¹⁰⁴ *Id.* at 240.

¹⁰⁵ *Id.* at 243.

¹⁰⁶ *Id.* at 243–44. *See generally* *United States v. Davis*, 954 F.2d 182, 187 n.2 (4th Cir. 1992) (stating in dicta that "the fact that the trial court potentially considered the defendant's prior illegal accounting practices in imposing a sentence does not mean that [the

B. Forfeiture

Challenges to the imposition of a forfeiture order on the grounds that it violated the rule of specialty have not been well received by the courts. In *United States v. Saccoccia*,¹⁰⁷ discussed above, the defendant argued that the forfeiture order, which had been entered pursuant to both the money laundering and the RICO charges, violated the rule of specialty because it was tantamount to a prosecution and conviction for offenses for which the United States had not sought, nor been granted, extradition.¹⁰⁸ The First Circuit Court rejected this contention holding that, for purposes of extradition law, forfeiture was simply “incremental punishment” for proscribed conduct, which in the defendant’s case involved his conviction for money laundering and the RICO offenses.¹⁰⁹

IV. LIMITATION ON PUNISHMENT

On occasion, in response to an extradition request, foreign countries have attempted to set a maximum term of imprisonment for the extradited fugitive. Some courts have analyzed disputes surrounding compliance with such a limitation as falling within the ambit of the doctrine of specialty.¹¹⁰ The following cases illustrate this point.

In *United States v. Cuevas*,¹¹¹ the defendant was extradited from the Dominican Republic on narcotics and money laundering offenses.¹¹² About two weeks after the defendant’s return, the United States received a copy of the decree authorizing his extradition.¹¹³ The decree mentioned that the defendant was covered by the provisions of the Dominican Republic’s domestic law which subjected nationals who were

defendant] was punished for those offenses.”). In addition to *Lazarevich* and *Garrido-Santana*, the court relied on *Leighnor v. Turner*, 884 F.2d 385 (8th Cir. 1989), where the Eighth Circuit held that an increase in the parole release guideline range due to the consideration of a non-extradited offense did not violate the doctrine of specialty. *Leighnor*, 884 F.2d at 390. See *Ahmed v. Morton*, 1996 WL 118543, at *9 (E.D.N.Y. 1996) (“[T]he doctrine of specialty does not prohibit the government from introducing evidence at petitioner’s parole revocation hearing beyond the scope of the charged offense that may otherwise be found to be relevant and admissible by the Parole Commission.”).

¹⁰⁷ 58 F.3d 754 (1995).

¹⁰⁸ *Id.* at 783.

¹⁰⁹ *Id.* at 784; *cf.* *United States v. Moss*, 344 F. Supp. 2d 1142, 1147–48 (W.D. Tenn. 2004) (denying the defense’s motion to dismiss counts in the indictment charging RICO substantive and conspiracy charges, as well as forfeiture, because they were based on money laundering charges for which Costa Rican authorities had denied extradition, reasoning that under *Saccoccia*, these offenses could be used as predicate acts).

¹¹⁰ See, e.g., *United States v. Cuevas*, 496 F.3d 256 (2d Cir. 2007).

¹¹¹ 402 F. Supp. 2d 504 (S.D.N.Y. 2005).

¹¹² *Id.* at 505–06.

¹¹³ *Id.* at 506.

extradited to a maximum penalty of thirty years' imprisonment.¹¹⁴ Following his guilty plea for the offenses for which he was extradited, the district court sentenced the defendant to 390 months' imprisonment, finding that the 30-year cap did not apply because the United States had never agreed to this limitation as a condition of the extradition.¹¹⁵

On appeal, the United States Court of Appeals for the Second Circuit affirmed the ruling below.¹¹⁶ After recognizing that this case raised the application of the rule of specialty in the sentencing context,¹¹⁷ the court preliminarily noted that the extradition treaty between the United States and the Dominican Republic did not contain any provision limiting sentencing.¹¹⁸ The court then found that there was no support in the record for the proposition that the United States had ever made any substantive assurance to the Dominican Republic that, if extradited, the defendant would not be sentenced to more than 30 years' imprisonment.¹¹⁹ Pointing to the normal course of dealings in extradition practice, the court observed that generally, when a foreign nation seeks to impose a limitation on the sentence that a fugitive may receive as a condition to the grant of the extradition request, the foreign nation formally seeks assurances from the United States as to this limitation through diplomatic channels, by way of a diplomatic note.¹²⁰ This gives the United States the opportunity to consider this request and if, after consideration of the matter, the United States elects to provide such assurance, it conveys its position by way of a diplomatic note to the

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 506–08.

¹¹⁶ *United States v. Cuevas*, 496 F.3d 256 (2d Cir. 2007).

¹¹⁷ *Id.* The court observed:

Typically, the rule of specialty is invoked to circumscribe the specific crimes for which a defendant may be tried following extradition. However, the rule of specialty has application in the sentencing context as well. As we held in *United States v. Baez*, since the cauldron of circumstances in which extradition agreements are born implicate the foreign relations of the United States, a district court, [i]n sentencing a defendant extradited to this country in accordance with a diplomatic agreement between the Executive branch and the extraditing nation . . . delicately must balance its discretionary sentencing decision with the principles of international comity in which the rule of specialty sounds. In more concrete terms, this means that a district court should temper [its] discretion in sentencing an extradited defendant with deference to the substantive assurances made by the United States to an extraditing nation.

Id. at 262 (citations omitted) (emphasis omitted) (internal quotation marks omitted).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 264.

foreign nation.¹²¹ In *Cuevas*, the Dominican Republic never requested or secured any assurance regarding a limitation on the defendant's sentence; therefore, there was no violation of the rule of specialty when the district court imposed a sentence in excess of 30 years' imprisonment.¹²²

Even when the foreign country has clearly conditioned the surrender of the fugitive on a sentencing cap, if it turns him over *before* obtaining an assurance from the United States, no application, much less violation of the rule of specialty, will be found if the sentence imposed exceeds the limitation. For example, in *Benitez v. Garcia*,¹²³ the defendant, a Mexican citizen, was convicted of murder in California.¹²⁴ The United States requested the defendant's extradition from Venezuela and advised the authorities that if convicted of first-degree murder he "would receive a sentence of incarceration of 25 years to life."¹²⁵ The United States-Venezuela extradition treaty expressly provided that before granting an extradition request, the extraditing country had the right to extract assurances that "the death penalty or imprisonment for life w[ould] not be inflicted[,]"¹²⁶ and the Venezuelan Supreme Court subsequently approved the defendant's extradition with the proviso that if he was ultimately convicted, a sentence of death, life imprisonment, or "punishment depriving his freedom for more than thirty years[]" would not be imposed.¹²⁷ The Ministry of Foreign Affairs thereafter advised the United States that the defendant's extradition had been approved on the

¹²¹ *Id.* As the district court aptly noted below, "[d]iplomatic custom demands such formality for good reasons: requiring that conditions of extradition be clearly established by diplomatic exchange avoids ambiguity, provides courts with clear evidence of intent, and establishes unambiguous guidelines for countries engaged in negotiation." *United States v. Cuevas*, 402 F. Supp. 2d 504, 507 (S.D.N.Y. 2005).

¹²² *Cuevas*, 496 F.3d at 264. The request for defendant's extradition was made pursuant to a bilateral extradition treaty between the United States and the Dominican Republic, as well as a multilateral treaty to which both nations were signatories. *Id.* at 259. The court rejected defendant's contention that under the multilateral treaty, the United States was bound by the Dominican Republic's domestic laws, reasoning that "[t]he onus [wa]s on the requested State to determine, prior to surrendering the individual, whether extradition is permitted under its own laws and treaty obligations." *Id.* at 263; *see also* *United States v. Banks*, 464 F.3d 184, 192 (2d Cir. 2006) (while the Dominican Republic's domestic law provides a sentencing limitation when it extradites its own citizens, defendant was unable to "point[] to any agreement or undertaking made by the United States to limit his sentence or even to a communication from the Dominican Republic to the United States expressing an expectation that the sentence would be so limited.")

¹²³ 495 F.3d 640 (9th Cir. 2007).

¹²⁴ *Id.* at 642.

¹²⁵ *Id.* (internal quotation marks omitted).

¹²⁶ *Id.* (quoting Treaty of Extradition, Jan. 19-21, 1922, U.S.-Venez., Art. IV, 43 Stat. 1968, T.S. No 675).

¹²⁷ *Id.* (internal quotation marks omitted).

condition that he would “not be sentenced to [death or] . . . life in prison or incarceration for more than thirty (30) years.”¹²⁸ Shortly thereafter, the defendant was extradited to the United States, where he was convicted of murder and sentenced to an unspecified sentence of fifteen years to life.¹²⁹

On appeal from the denial of his petition for a writ of habeas corpus, the United States Court of Appeals for the Ninth Circuit initially observed that *Rauscher* had addressed limitations on charged offenses whereas, in this case, the extradition decree attempted “unilaterally to limit [defendant]’s sentence.”¹³⁰ In that regard, the court observed that while Venezuela could have refused to surrender the defendant until the United States had agreed to the sentencing limitation, it instead opted to prematurely relinquish custody of him.¹³¹ Declining to find that the district court’s refusal to extend the teaching of *Rauscher* to a unilaterally imposed condition was an unreasonable application of the existing law, the Ninth Circuit affirmed the district court’s denial of the petition for a writ of habeas corpus.¹³²

When a fugitive has been surrendered pursuant to an express condition involving a limitation of his possible sentence to which the United States has consented, courts (in the Second Circuit) have analyzed the agreed upon limitation in ascertaining whether the sentence imposed violated the rule of specialty. For example, in *United States v. Baez*,¹³³ the defendant was extradited from Colombia on four counts of an indictment charging him with racketeering, racketeering

¹²⁸ *Id.* (internal quotation marks omitted).

¹²⁹ *Id.* at 641–42.

¹³⁰ *Id.* at 644.

¹³¹ *Id.*

¹³² *Id.*; cf. *United States v. Lara*, 67 Fed. Appx. 72, 73–74 (2d Cir. 2003) (summarily rejecting contention that under specialty doctrine, defendant, who had been extradited from Colombia, could only be sentenced to the maximum term of imprisonment authorized for his crimes under Colombian law). See *Johnson v. Browne*, 205 U.S. 309 (1907). The Ninth Circuit also reasoned that the district court’s ruling was consistent with the teaching of *Browne*. *Id.* In *Browne*, defendant was convicted of conspiracy to defraud and fled to Canada. *Id.* at 310–11. Because of the limitations in the treaty, the Canadian authorities ultimately surrendered defendant for attempting to import certain goods without paying full customs duties, an offense for which he had been charged but not tried. *Id.* at 311–12. When he arrived in the United States, he was sent to prison to serve his sentence for conspiracy. *Id.* at 316. The Supreme Court declined to uphold the reinstatement of the conviction on the conspiracy charge finding that the treaty “limit[ed] the imprisonment as well as the trial to the crime for which extradition had been demanded and granted.” *Id.* at 318.

¹³³ 349 F.3d 90 (2d Cir. 2003).

conspiracy, and murder in aid of racketeering.¹³⁴ Following his conviction, he was sentenced to life imprisonment.¹³⁵

On appeal, the defendant argued that his sentence violated the rule of specialty because it contravened the terms of a diplomatic note which had been given by the United States to Colombia containing specific assurances regarding the imposition of a life sentence.¹³⁶ In particular, after obtaining an assurance from the United States that the death penalty would not be sought or imposed, Colombian authorities sought a further assurance that the defendant would not be subject to a life sentence.¹³⁷ In response, the United States assured Colombia through a diplomatic note that it would not seek such a sentence and that, if one was imposed, "the United States executive authority w[ould] take appropriate action to formally request that the court commute such sentence to a term of years."¹³⁸ The defendant was then extradited.¹³⁹

Concluding that the district court had not abused its discretion in imposing a life sentence, the United States Court of Appeals for the Second Circuit found that, contrary to the defendant's contention, the diplomatic note had not unqualifiedly assured the Colombian authorities that a life sentence would not be imposed.¹⁴⁰ To the contrary, the note expressly contemplated this possibility, but assured the authorities that if that occurred, the United States would seek to have the sentence reduced to a term of years.¹⁴¹ In this case, the prosecutor did just that, but the district court declined the request and sentenced the defendant to life.¹⁴²

¹³⁴ *Id.* at 91.

¹³⁵ *Id.*

¹³⁶ *Id.* at 92.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*; see *United States v. Gonzalez*, 275 F. Supp. 2d 483, 488 (S.D.N.Y. 2003) (no violation of the rule of specialty where diplomatic correspondence indicated that life sentence might be imposed in which case Executive would request reduction of that sentence).

¹⁴² *Baez*, 349 F.3d at 92-93. While affirming the sentence, the Second Circuit was critical of the district court's apparent view that it was free to "ignore the consequences of an extradition agreement between Colombia and the United States because the Judiciary is a branch of our tripartite government independent of the Executive branch." *Id.* at 93. The court observed:

[C]ourts should temper their discretion in sentencing an extradited defendant with deference to the substantive assurances made by the United States to an extraditing nation. If anything, such deference may well allow the United States to secure the future extradition of other individuals because foreign nations would observe that the limitations they negotiated with the Executive branch in respect to the prosecution of their extradited citizens are being honored. This is not a surrender of the independence of the Judiciary to the Executive branch. To the

Another example involving agreed upon limitations regarding sentencing is found in *United States v. Campbell*.¹⁴³ There, the defendant was convicted of numerous armed robbery and firearms charges following his extradition from Costa Rica for these offenses.¹⁴⁴ Prior to his extradition, Costa Rican authorities sought an assurance from the United States that the defendant's sentence would not exceed fifty years, and the United States responded that defendant would "not be sentenced to serve a term of imprisonment greater than 50 years."¹⁴⁵ In addition, the district court entered an order prior to the defendant's extradition indicating that should he ultimately be convicted, the court would not "impose any sentence pursuant to which the defendant would serve a term of imprisonment of greater than fifty years."¹⁴⁶ Following the jury's verdict, the United States obtained clarification from the Costa Rican authorities that the judgment of conviction could provide a term of imprisonment greater than fifty years, so long as the defendant's release was guaranteed after he served no more than fifty years.¹⁴⁷ The district court thereafter sentenced the defendant to 155 years' imprisonment, but ordered his release after he served fifty years.¹⁴⁸

On appeal, the defendant argued that his 155-year sentence had violated the terms of the grant of his extradition because he had received a sentence which exceeded fifty years.¹⁴⁹ The Second Circuit rejected this contention holding that the district court's order, accompanying its judgment, which made clear that the defendant was to serve no more than fifty years of the 155-year sentence, fully complied with the terms of the extradition grant.¹⁵⁰

contrary, it is the classical deference courts afford to the political branches in matters of foreign policy.

Id.

¹⁴³ 300 F.3d 202 (2d Cir. 2002), *cert. denied*, 538 U.S. 1049 (2003).

¹⁴⁴ *Id.* at 205.

¹⁴⁵ *Id.* at 206 (internal quotation marks omitted).

¹⁴⁶ *Id.* at 206-07 (internal quotation marks omitted).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 205.

¹⁴⁹ *Id.* at 211.

¹⁵⁰ *Id.* at 212. The court in *Campbell* discussed the doctrine of specialty in its opinion but did not directly tie it to its ruling that the sentence imposed had not violated the terms of the extradition grant. *But see* *United States v. Cuevas*, 496 F.3d 256, 262 (2d Cir. 2007) (court recognized that the "rule of specialty has application in the sentencing context as well[']"). *Id.*

V. CONCLUSION

The doctrine of specialty firmly establishes “that the requesting state, which secures the surrender of a person, can prosecute that person only for the offense for which he was surrendered by the requested state or else the requesting state must obtain the consent of the surrendering state before proceeding on other charges.”¹⁵¹ When applying this rule, federal courts have been careful to ensure that it is not “construed to permit foreign intrusion into the evidentiary or procedural rules of the requisitioning state, as distinguished from limiting the jurisdiction of domestic courts to try or punish the fugitive for any crimes committed before the extradition, except [for] the crimes for which he was extradited.”¹⁵² Thus, the rule of specialty has neither been interpreted to bar the admission of evidence relating to offenses for which extradition was denied to establish predicate acts under RICO and Travel Act counts, when extradition was granted for those offenses,¹⁵³ nor does it bar admission of evidence to establish participation in a narcotics conspiracy.¹⁵⁴ Courts also will not apply the rule of specialty to restrict the scope of proof with respect to a conspiracy charge for which extradition was granted when the evidence admitted at trial exceeds that which was presented to the rendering state at the time the extradition request was submitted,¹⁵⁵ or to foreclose the government from obtaining a *Pinkerton* instruction in connection with offenses for which the defendant was extradited.¹⁵⁶

In the sentencing context, and consistent with well-established principles, federal courts continue to exercise wide discretion as to the information considered in fashioning an appropriate sentence. In the case of defendants who have been extradited, courts will consider

¹⁵¹ M. Cherif Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW & PRACTICE § 6.1, at 511 (4th ed. 2002); see 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 477, 578 (1987).

¹⁵² *United States v. Flores*, 538 F.2d 939, 944 (2d Cir. 1976) (internal quotation marks omitted).

¹⁵³ See *United States v. Saccoccia*, 58 F.3d 754, 767-68 (1st Cir. 1995); *United States v. Moss*, 344 F. Supp. 2d 1142, 1147-48 (W.D. Tenn. 2004).

¹⁵⁴ See *United States v. Bowe*, 221 F.3d 1183, 1191(11th Cir. 2000); *United States v. Alvarez-Moreno*, 874 F.2d 1402, 1413-14 (11th Cir. 1989); *United States v. Flores*, 538 F.2d 939, 944 (2d Cir. 1976); *United States v. Knowles*, 2007 WL 1246026, at *3 (S.D. Fla. 2007).

¹⁵⁵ See *United States v. Puentes*, 50 F.3d 1567, 1576 (11th Cir. 1995); *United States v. Abello-Silva*, 948 F.2d 1168, 1174 (10th Cir. 1991); *United States v. Monsalve*, 1999 WL 132238, at *1 (2d Cir. 1999); *Antwi v. United States*, 349 F. Supp. 2d 663, 673 (S.D.N.Y. 2004).

¹⁵⁶ See *Gallo-Chamorro v. United States*, 233 F.3d 1298, 1306 (11th Cir. 2000); *United States v. Gallo-Chamorro*, 48 F.3d 502, 506-07 (11th Cir. 2000); *United States v. Thirion*, 813 F.2d 146, 152-53 (8th Cir. 1987).

evidence relating to counts for which extradition was not granted¹⁵⁷ or sought.¹⁵⁸ The point made by courts here is that even when analyzing the application of the doctrine when punishment, as opposed to prosecution, is involved, there is a difference to be “drawn between proof of other crimes as a matter germane to the determination of punishment for the extradited crime and proof of other crimes in order to exact punishment for those other crimes. Only the latter course is forbidden by the doctrine of specialty.”¹⁵⁹ And, in defining punishment, one circuit has held that an order or forfeiture simply represents “incremental punishment” for proscribed conduct not triggering application of the rule of specialty when such forfeiture was not specifically sought in an extradition request.¹⁶⁰

Finally, some courts have treated challenges by defendants to limitations that sending states have requested the United States place on the defendant’s sentence when granting extradition as falling within the doctrine of specialty. The developing case law reveals that when that limitation was not timely and formally communicated to the United States, no violation of the rule of specialty will be found.¹⁶¹ Even when the foreign country has clearly sought to condition the surrender of the fugitive on a sentencing cap, however, if it turns him over *before* obtaining an assurance from the United States, no application, much less violation, of the rule of specialty will be found when the sentence imposed exceeds the limitation.¹⁶² If the surrender takes place after an express sentencing limitation to which the United States consented, courts will analyze the agreed upon limitation in ascertaining whether the sentence imposed violated the terms of the surrender.¹⁶³

¹⁵⁷ See *United States v. Angleton*, 201 Fed Appx. 238, 243–44 2006 WL 2828657, at *4 (5th Cir. 2006); *United States v. Lazarevich*, 147 F.3d 1061, 1063–64 (9th Cir. 1998). See also *United States v. Fischer*, 2007 WL 927948, at *3 (D. Or. 2007).

¹⁵⁸ See *United States v. Garrido-Santana*, 360 F.3d 565, 577–79 (6th Cir. 2004); *United States v. Garcia*, 208 F.3d 1258, 1261 (11th Cir. 2000), *vacated on other grounds*, 531 U.S. 1062 (2001).

¹⁵⁹ *Garcia*, 208 F.3d at 1261.

¹⁶⁰ See *United States v. Saccoccia*, 58 F.3d 754, 783–84 (1st Cir. 1995).

¹⁶¹ See *United States v. Cuevas*, 496 F.3d 256, 263–64 (2d Cir. 2007); *United States v. Banks*, 464 F.3d 184, 192 (2d Cir. 2006).

¹⁶² See *Benitez v. Garcia*, 459 F.3d 640, 644 (9th Cir. 2007); *cf.* *United States v. Lara*, 67 Fed. Appx. 72, 73–74 (2d Cir. 2003).

¹⁶³ See *United States v. Baez*, 349 F.3d 90, 92–93 (2d Cir. 2003); *United States v. Campbell*, 300 F.3d 202, 211–12 (2d Cir. 2002).