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## Criminal Procedure - Parretti v. United States

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## CRIMINAL PROCEDURE

### *PARRETTI v. UNITED STATES*

143 F.3d 508 (9th Cir. 1998)

#### I. INTRODUCTION

In *Parretti v. United States*,<sup>1</sup> the United States Court of Appeals for the Ninth Circuit, sitting en banc, addressed two constitutional claims: (1) whether Giancarlo Parretti's arrest pursuant to an Extradition Treaty with France violated the Fourth Amendment;<sup>2</sup> and (2) whether his detention without bail prior to the French government's request for his extradition violated the Due Process Clause of the Fifth Amendment.<sup>3</sup>

The en banc court refused to address these issues, however, claiming that since Parretti fled the United States while his appeal was pending, he was a fugitive from justice.<sup>4</sup> The en banc court therefore dismissed his appeal under the fugitive disentitlement doctrine.<sup>5</sup>

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1. 143 F.3d 508 (9th Cir. 1998) (en banc), *cert. denied*, 119 S.Ct. 179 (1998). The appeal from the United States Court of Appeals for the Ninth Circuit was argued and submitted on December 18, 1997 before the Ninth Circuit sitting en banc. The decision was filed on May 1, 1998. Judge Pregerson authored the opinion of the en banc court. Judge Reinhardt wrote the dissent.

2. See U.S. CONST. amend. IV. (“[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation ...”).

3. See U.S. CONST. amend. V.

4. *Parretti v. United States*, 143 F.3d at 508.

5. See *id.* The fugitive disentitlement doctrine empowers the court to “dismiss the appeal of a defendant who flees the jurisdiction of the United States after timely appealing.” See *id.* at 510. See also *Ortega-Rodriguez v. United States*, 507 U.S. 234, 242 (1993) (Dismissal under the fugitive disentitlement doctrine serves as an “appropriate sanction” against the defendant fugitive.).

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## II. FACTS AND PROCEDURAL HISTORY

In 1990, Pathe Communications Corporation, headed by appellant, Giancarlo Parretti, an Italian citizen and resident, purchased MGM-United Artists.<sup>6</sup> This transaction gave rise to a number of lawsuits.<sup>7</sup> On October 9, 1995, Parretti came to the United States in response to two of these lawsuits.<sup>8</sup> The following day, France sent a diplomatic note to the United States Department of State, requesting Parretti's "provisional arrest" pursuant to the U.S.-France Treaty of Extradition.<sup>9</sup>

An assistant United States Attorney, acting on behalf of the French government, filed a Complaint for Provisional Arrest Warrant.<sup>10</sup> No affidavits or other competent evidence were attached in support of the complaint.<sup>11</sup> Nevertheless, a United States Magistrate Judge issued an arrest warrant based solely on the information contained within the complaint.<sup>12</sup> On October 18, 1995, federal agents arrested Parretti pursuant to a provisional arrest warrant at the Los Angeles law firm of White & Case.<sup>13</sup>

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6. See *Parretti v. United States*, 143 F.3d 508, 509 (9th Cir. 1998).

7. See *id.*

8. See *id.* at 509-510. The state of Delaware obtained jurisdiction over Parretti in October 1995 in regard to perjury charges. He was also to be deposed in regard to another suit filed in Los Angeles Superior Court. See *Parretti v. United States*, 112 F.3d 1363, 1365 (9th Cir. 1997), amended by *Parretti v. United States* 112 F.3d 758 (9th Cir. 1997), withdrawn by *Parretti v. United States*, 143 F.3d 508 (9th Cir. 1998) (en banc).

9. See *Parretti*, 143 F.3d at 510. Article IV of the French Treaty provides:

The arrest and detention of a fugitive may be applied for on information, even by telegraph, of the existence of a judgment of conviction or of a warrant of arrest ... and that the person provisionally arrested may be held for up to 40 days pending a possible request that the fugitive be extradited.

22 U.S.T. 407, as amended, T.I.A.S. 7075.

10. See *Parretti*, 122 F.3d 758, 761 (9th Cir. 1997), withdrawn by *Parretti v. United States*, 143 F.3d 508 (9th Cir. 1998) (en banc). See *infra* note 28. The complaint alleged that each of the charged offenses was an extraditable offense under the Treaty and that France had requested Parretti's "provisional arrest" under Article IV of the treaty. See *Parretti*, 122 F.3d at 761. The French arrest warrant charged Parretti with misuse of company assets, forgery, embezzlement by false pretenses, and perjury. See *id.*

11. See *Parretti*, 122 F.3d at 761.

12. See *id.*

13. See *Parretti*, 143 F.3d at 512 (Reinhardt, J., dissenting).

Parretti was held without bail pending a request by the French government for his extradition.<sup>14</sup> During this time, Parretti filed an application to be released on bail and he filed a petition for habeas corpus in the United States District Court for the Central District of California.<sup>15</sup> Both requests were denied on November 9, 1995.<sup>16</sup>

Parretti then filed a motion seeking emergency review.<sup>17</sup> On November 21, 1995, the Ninth Circuit granted Parretti's motion and ordered his release.<sup>18</sup> Eight days later, pursuant to France's request, the United States government filed a formal request with the Magistrate Judge for his extradition.<sup>19</sup> On May 10, 1996, the formal extradition hearing was held before the Magistrate Judge.<sup>20</sup> Parretti was present at this hearing.<sup>21</sup> On May 31, 1996, Parretti was found extraditable on all charges alleged in the French arrest warrant.<sup>22</sup> Subsequently, on July 1, 1996, Parretti filed a habeas petition, challenging the Magistrate Judge's finding of extraditability, in the United States District Court for the Central District of California.<sup>23</sup>

In October 1996, the Delaware superior court tried and convicted Parretti on criminal charges relating to a suit arising from the purchase of MGM studios.<sup>24</sup> Pending sentencing on these offenses, Parretti fled the Delaware court's jurisdiction in January of 1997.<sup>25</sup>

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14. *See id.* at 510.

15. *See id.* In Parretti's habeas petition in the district court, he argued that the warrant for his provisional arrest was issued without probable cause in violation of the Fourth Amendment. *See Parretti*, 122 F.3d at 761-763. On appeal to the Ninth Circuit for emergency review, Parretti argued that his detention without bail violated the Fifth Amendment Due Process Clause since he did not pose a risk of flight or danger to the community. *See id.* at 777.

16. *See Parretti*, 143 F.3d at 512 (Reinhardt, J., dissenting).

17. *See id.*

18. *See id.* at 510.

19. *See id.* at 512 (Reinhardt, J., dissenting).

20. *See Parretti*, 112 F.3d at 1368 n.6.

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.*

25. *See Parretti*, 143 F.3d at 510, 512.

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On March 12, 1997, the district court dismissed Parretti's habeas petition with prejudice pursuant to the fugitive disentitlement doctrine.<sup>26</sup>

Thereafter, on May 6, 1997, the Ninth Circuit panel released a published opinion regarding its November 21, 1995 order for Parretti's release.<sup>27</sup> On October 2, 1997, the Ninth Circuit granted the United States government's request for rehearing en banc.<sup>28</sup>

### III. THE COURT'S ANALYSIS

#### A. THE MAJORITY OPINION

The Ninth Circuit, sitting en banc, dismissed the United States government's appeal pursuant to the fugitive disentitlement doctrine (hereinafter "the doctrine").<sup>29</sup> The majority explained that the doctrine empowered the court to "dismiss an appeal of a defendant who flees the jurisdiction of the United States after timely appealing."<sup>30</sup>

The court set out the four rationales underpinning the fugitive disentitlement doctrine as applied to Parretti's appeal.<sup>31</sup> First, the court reasoned that Parretti's fugitive status disentitled him from "calling upon the resources of the court to re-

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26. See *Parretti*, 112 F.3d at 1368 n.6.

27. See *Parretti v. United States*, 112 F.3d 1363 (9th Cir. 1997), amended by *Parretti v. United States* 122 F.3d 758 (9th Cir. 1997). The amended opinion was subsequently withdrawn by *Parretti v. United States*, 143 F.3d 508 (1998). In the amended opinion, the panel held in part that: (1) as a matter of first impression, sections of the extradition treaty with France which permitted "provisional arrest" without independent judicial determination of probable cause violated the Fourth Amendment's warrant clause; and (2) detention of a fugitive without bail violated due process, absent a showing that the fugitive posed flight risk. See *Parretti*, 122 F.3d 758 (9th Cir. 1997). Note that "where an order specifies that the opinion of the panel has been withdrawn, that opinion shall not be regarded as precedent and shall not be cited in either briefs or oral argument to the Ninth Circuit or any district court in the Ninth Circuit." U.S. CT. OF APP. 9TH CIR. R. 35-3 (5), 28 U.S.C.A. The Ninth Circuit issued the May 6, 1997 opinion to explain its November 1995 order. See *Parretti*, 122 F.3d 758, 776 n.22.

28. See *Parretti*, 143 F.3d. at 512 (Reinhardt, J., dissenting).

29. See *Parretti v. United States*, 143 F.3d 508, 510 (9th Cir. 1998).

30. *Id.*

31. See *id.* at 511.

solve his claims.<sup>32</sup> Therefore, Parretti forfeited his right to an appeal when he fled the jurisdiction of the United States.<sup>33</sup>

Second, the court found that Parretti's fugitive status rendered him beyond the reach of the court's jurisdiction.<sup>34</sup> Thus, without jurisdiction, the court concluded that its judgment would not be enforceable.<sup>35</sup>

Third, the court reasoned that invoking the fugitive disentitlement doctrine served as a deterrent and promoted the integrity of appellate practice.<sup>36</sup> Lastly, the court stated that the adversary character of the criminal litigation could be compromised because the fugitive's counsel may lose incentive to represent a fugitive client.<sup>37</sup>

Accordingly, the court dismissed the appeal pursuant to the fugitive disentitlement doctrine and withdrew the panel opinion.<sup>38</sup>

## B. THE DISSENTING OPINION

Judge Reinhardt, in dissent, argued that the fugitive disentitlement doctrine did not apply to Parretti's circumstances.<sup>39</sup>

32. *Id.*, citing *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970), which holds that: No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims.

*Molinaro*, 396 U.S. at 366.

33. *See Parretti*, 143 F.3d at 511.

34. *See id.*, citing *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239-240 (1993), for the proposition that it is within the court's discretion to refuse to hear a criminal case when the defendant fugitive cannot be made to respond to any ruling.

35. *See Parretti*, 143 F.3d at 511.

36. *See id.* (citing *Ortega-Rodriguez*, 507 U.S. at 242, in turn citing *Estelle v. Dorough*, 420 U.S. 534, 537 (1975)).

37. *See id.* (citing *United States v. Sharpe*, 470 U.S. 675, 724 (1985) (Stevens, J., dissenting)). Judge Reinhardt, in dissent, noted that this rationale was not applicable in the instant case since Parretti's counsel agreed to continue his representation in spite of his client's fugitive status. *See Parretti*, 143 F.3d at 513 (Reinhardt, J., dissenting).

38. *See Parretti*, 122 F.3d 758 (1997).

39. *See Parretti*, 143 F.3d at 511-512.

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He asserted that the court had the duty to reach the merits of the case.<sup>40</sup>

The dissent noted that the purpose of the fugitive disentitlement doctrine is to deny fugitives of the benefits and privileges of the court's jurisdiction.<sup>41</sup> The dissent reasoned that the majority's dismissal did not deny Parretti of any such benefits because Parretti did not seek relief from the court.<sup>42</sup> Instead, the dissent explained that the United States government sought relief on appeal from the precedential effect of the panel opinion.<sup>43</sup> Therefore, the dissent argued that the fugitive disentitlement doctrine did not apply.<sup>44</sup> By dismissing the appeal,

40. *See id.* Judge Reinhardt argued that two "extremely important issues" were before the court and should be carefully examined. These two constitutional were: (1) whether Parretti's arrest pursuant to an extradition treaty with France violated the Fourth Amendment; and (2) whether his detention without bail prior to France's request for his extradition violated the Due Process Clause of the Fifth Amendment. *See id.*, at 510. In regard to the applicability of the fugitive disentitlement doctrine, the Ninth Circuit panel decision declined to dismiss the appeal under the doctrine noting that "Parretti is not seeking further relief from this court, and the relief we previously provided is of not further benefit to him." *See Parretti*, 122 F.3d at 766 n.22. This doctrine would only have been applicable had Parretti fled the United States prior to the Ninth Circuit's order for his release from custody. *See id.*

41. *See id.* at 513. Disentitlement requires a "nexus" between a defendant's fugitive status and the appellate proceedings. *See Ortega-Rodriguez*, 507 U.S. at 244.

42. *See Parretti*, 143 F.3d at 513. *See also Degen v. United States*, 517 U.S. 820, 828 (1996) ("[t]he sanction of disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked. The dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits."). *See also U.S. v. Barnette*, 129 F.3d 1179 (11th Cir. 1997) (citing *Degen v. United States*, 517 U.S. 820 (1996)), holding that: "The Supreme Court has refused to allow application of disentitlement when enforcement is possible despite the appellant's absence." *Barnette*, 129 F.3d 1184.

43. *See Parretti*, 143 F.3d at 513. In cases where the fugitive disentitlement doctrine has been invoked, the relevant appellate proceeding had been invoked by the fugitive. *See Smith v. United States*, 94 U.S. 97 (1879) (Supreme Court refused to hear a writ of error to review a criminal conviction, brought by the convicted party when the defendant had escaped from the court's jurisdiction); *Molinaro v. New Jersey*, 396 U.S. 365 (1970) (Supreme Court held that where the defendant, who was free on bail, failed to surrender himself to state authorities, his appeal would be dismissed: "No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction." (Emphasis added.)). *See also Empire Blue Cross and Blue Shield v. Finkelstein*, 111 F.3d 278 (2d Cir. 1997) (holding that the defendants had forfeited their right to appeal the judgment against them under the fugitive disentitlement doctrine). In *Parretti*, the government petitioned for rehearing en banc, not Parretti, who was at that time a fugitive.

44. *See Parretti*, 143 F.3d at 513.

the dissent concluded that the court was “frustrating its ability to resolve critical constitutional claims.”<sup>45</sup>

#### IV. IMPLICATIONS OF DECISION

The constitutional issues before the Ninth Circuit en banc court remain unresolved, leaving a split in the circuit courts.<sup>46</sup> In light of the compelling issues before the Ninth Circuit and the frequency with which these issues arise in extradition cases, some commentators reiterated the need for the Supreme Court to provide some guidance in this area.<sup>47</sup>

Moreover, the Ninth Circuit broadened the applicability of the fugitive disentitlement doctrine to enable a court to dismiss an appeal even when the fugitive is not the party seeking relief.<sup>48</sup> This extension of the doctrine thwarts its underlying

45. *Id.*

46. See *United States v. Wiebe*, 733 F.2d 549, 553-54 (8th Cir. 1984) (upheld a warrant even though it was based on a complaint that alleged only that Wiebe was charged with an extraditable crime); *Caltagirone v. Grant*, 629 F.2d 739, 744 (2d Cir. 1980) (interpreted the “further information” language of the extradition treaty between the U.S. and Italy as requiring a showing of probable cause); *Sahagian v. United States*, 864 F.2d 509, 511 (7th Cir. 1988) (interpreted the “further information” language in the extradition treaty with Spain as requiring a showing of probable cause for the issuance of a warrant for provisional arrest); *In the Matter of Rovelli*, 977 F.Supp. 566 (D. Conn. 1997) (finding “no reason to elevate precedent from the criminal context, or from a lone Ninth Circuit extradition case, over the clear and long-standing extradition precedent of the United States Supreme Court and the Second Circuit”). The Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit was denied on October 5, 1998, see *Parretti v. United States*, 119 S.Ct. 179.

47. See Lis Wiehl, *Extradition Law at the Crossroads: The Trend Toward Extending Greater Constitutional Procedural Protections to Fugitives Fighting Extradition from the United States*, 19 MICH. J. INT'L L. 729, 787 (1998) (noting that: “The Court has not addressed the bail issue in extradition since *Wright v. Henkel* in 1903, and has not heard a case addressing the standards for the issuance of provisional warrants in nearly as long”). See also, Nathaniel Persily, *International Extradition and the Right to Bail*, 34 STAN. J. INT'L L. 407, 436-438 (1998) (questioning the viability of the Court’s decision in *Wright v. Henkel* and calling for the reformation of the “special circumstances test”); Jeffrey Olson, *Gauging an Adequate Probable Cause Standard for Provisional Arrest in Light of Parretti v. United States*, 48 CATH. U. L. REV. 161 (1998) (asserting that should a similar case arise, Congress may eventually have to act by re-drafting the statute that sets forth the procedure for extradition requests pursuant to treaties, 18 U.S.C. § 3184, and that the U.S. may have to renegotiate its extradition treaties).

48. See *supra* note 43.



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purpose.<sup>49</sup> Not only does the en banc court's invocation of the doctrine appear to have been applied inappropriately under the facts of this case, it would appear to be disfavored under *Degen v. United States*,<sup>50</sup> as well.<sup>51</sup>

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49. *See supra* note 5. The doctrine is viewed as a sanction against fugitives who call upon the court's resources. Therefore, dismissing an appeal when someone other than the fugitive seeks relief from the court fails to serve the doctrine's purpose.

50. 517 U.S. 820 (1996) (emphasizing that rules such as the fugitive disqualification doctrine that foreclose consideration of claims on the merits should be used cautiously so as not to erode judicial integrity).

51. *See supra* note 42.

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