

# Foreign Extradition and In Absentia Convictions

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## I. INTRODUCTION

International requests for the extradition of a fugitive are triggered either by a pending charge or by a conviction.<sup>1</sup> When extradition is sought on the basis of the latter, the proof necessary to support the request ordinarily will consist of a certified copy of the conviction.<sup>2</sup> If the conviction was obtained in absentia, however, courts often will treat the request as if it involved a charge and require sufficient, independent evidence to justify a reasonable belief that the fugitive committed the crime.<sup>3</sup>

This Article, which is divided into three parts, examines the developing case law on foreign requests for extradition when the basis for the request is a conviction obtained in absentia. First, and by way of background, this Article provides an overview of foreign requests for extradition. Next, this Article discusses the mechanics of the

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<sup>1</sup> See, e.g., Treaty of Extradition, U.S.-Braz., art. I, Jan. 13, 1961, 15 U.S.T. 2093 (stating that each Contracting State agrees to surrender persons found within "its territory who have been charged with or convicted of crimes or offenses specified in Article II of the present Treaty"). The term "charge" in the context of extradition treaties "has been interpreted by courts to require something less than a formal charge: for example, the requirement has been deemed satisfied where a subject is 'accused' . . . or the requesting nation intend[s] to prosecute him." *Sacirbey v. Guccione*, No. 05 CV 2949, 2006 WL 2585561, at \*7 (S.D.N.Y. Sept. 7, 2006) (citations omitted).

<sup>2</sup> See, e.g., *Spatola v. United States*, 925 F.2d 615, 618 (2d Cir. 1991) ("[A] certified copy of a foreign conviction, obtained following a trial at which the defendant was present, is sufficient to sustain a judicial officer's determination that probable cause exists to extradite.").

<sup>3</sup> See, e.g., *Germany v. United States*, No. 06 CV 01201, 2007 WL 2581894, at \*7 (E.D.N.Y. Sept. 5, 2007) ("Where a defendant was convicted in absentia, the conviction is merely a charge and an independent determination of probable cause in order to extradite must be made.").

extradition hearing. Lastly, this Article analyzes the developing case law on extradition requests based on in absentia convictions.

## II. OVERVIEW OF EXTRADITION

Extradition involves “the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender.”<sup>4</sup> Foreign requests for extradition are governed by 18 U.S.C. § 3184<sup>5</sup> and, with limited exception, by treaty.<sup>6</sup> The process is triggered when the Department of State receives a formal request from a foreign country.<sup>7</sup> In some instances, the foreign country initially will seek the provisional arrest of the fugitive.<sup>8</sup> In other cases, a complete extradi-

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<sup>4</sup> *Terlinden v. Ames*, 184 U.S. 270, 289 (1902); see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 7B, introductory cmt., at 556–57 (1987) (“Extradition is the process by which a person charged with or convicted of a crime under the law of one state is arrested in another state and returned for trial and punishment.”).

<sup>5</sup> Section 3184 provides, in relevant part:

Whenever there is a treaty or convention for extradition between the United States and any foreign government, . . . any justice or judge of the United States, or any magistrate judge authorized to do so by a court of the United States, or any judge of a court of record of general jurisdiction of any State may . . . issue [a] warrant for the apprehension of the person . . . charged [with having committed within the jurisdiction of any such foreign government any of the crimes provided for by treaty or convention], that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered.

18 U.S.C. § 3184 (2006). See *United States v. Kin-Hong*, 110 F.3d 103, 109 (1st Cir. 1997) (“In the United States, the procedures for extradition are governed by statute.”).

<sup>6</sup> See *In re Extradition of Mironescu*, 296 F. Supp. 2d 632, 634 (M.D.N.C. 2003) (“It is only because the United States has an extradition treaty with Romania that the United States has authority and duty to extradite: current United States extradition statutes only authorize extradition in compliance with an extradition treaty.”). Comity allows for the return of third-country nationals, i.e., persons who are not citizens, nationals, or residents of the United States, absent a treaty, provided certain conditions are satisfied. 18 U.S.C. § 3181(b) (2000); see *Waits v. McGowan*, 516 F.2d 203, 208 (3d Cir. 1975) (“International extradition is governed only by considerations of comity and treaty provisions.”).

<sup>7</sup> See *Manta v. Chertoff*, 518 F.3d 1134, 1140 (9th Cir. 2008) (“Extradition from the United States is a diplomatic process that is initiated when a foreign nation requests extradition of an individual from the State Department.”) (quotation omitted).

<sup>8</sup> See *Duran v. United States*, 36 F. Supp. 2d 622, 624 (S.D.N.Y. 1999) (“In order to avoid the flight of a defendant during preparation of a full formal request, many extradition treaties permit a provisional arrest to be made upon receipt of an informal request.”).

tion request will be submitted. After the Department of State reviews the request to ensure that it conforms to the treaty, it will prepare a declaration authenticating the request and send it to the Department of Justice's Office of International Affairs, which will in turn review the request and send it to the United States Attorney for the district where the person sought to be extradited is located.<sup>9</sup> The United States Attorney then files a complaint in support of an arrest warrant for the fugitive in federal district court.<sup>10</sup>

After the fugitive is apprehended, in the case of a provisional arrest, the foreign government provides, within a prescribed time period, the additional information required under the treaty to carry out the extradition request to the U.S. government.<sup>11</sup> An extradition hearing then follows at which, if the judicial officer "deems the evidence sufficient to sustain the charge"<sup>12</sup>—meaning a finding of probable cause<sup>13</sup>—he will certify the same to the Secretary of State, who will review the case and determine whether to issue a surrender warrant for the fugitive.<sup>14</sup> Absent "sufficient cause," a fugitive who is not

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<sup>9</sup> See U.S. ATTORNEYS' MANUAL § 9-15.700 (1997), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/15mcrm.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/15mcrm.htm) (explaining how the Department of Justice, Office of International Affairs will review request for sufficiency and then forward it to appropriate district).

<sup>10</sup> See 18 U.S.C. § 3184; *Wang v. Masaitis*, 316 F. Supp. 2d 891, 896 (C.D. Cal. 2004) ("Once approved, the United States Attorney for the judicial district where the person sought is located files a complaint in federal district court seeking an arrest warrant for the person sought.") (quotation omitted).

<sup>11</sup> See Jeffrey M. Olson, Note, *Gauging an Adequate Probable Cause Standard for Provisional Arrest in Light of Parretti v. United States*, 48 CATH. U. L. REV. 161, 172 (1998) ("After executing the provisional arrest request, the requesting state furnishes the United States with any additional information that is required for extradition under the governing statute and treaty.")

<sup>12</sup> 18 U.S.C. § 3184.

<sup>13</sup> See *In re Extradition Drayer*, 190 F.3d 410, 415 (6th Cir. 1999) ("An extradition proceeding is not a forum in which to establish[] the guilt or innocence of the accused; rather, the sole inquiry is into probable cause."); *In re Extradition of Atuar*, 300 F. Supp. 2d 418, 426 (S.D. W. Va. 2003) ("Evidence sufficient to sustain the charge is determined on the basis of probable cause in extradition proceedings.") (quotation omitted).

<sup>14</sup> See 18 U.S.C. § 3184 (providing that judicial officer "shall certify the same . . . to the Secretary of State, that a warrant may issue . . . for the surrender of such person"); *id.* § 3186 ("The Secretary of State may order the person committed under section[] 3184 . . . to be delivered to any authorized agent of such foreign government."); see also *Choe v. Torres*, 525 F.3d 733, 736 n.1 (9th Cir. 2008) ("The ultimate decision whether to extradite is left to the Secretary of State."). The prevailing view is that the Secretary of State will seldom reject an extradition request after a judicial finding of extraditability. See, e.g., John T. Parry, *The Lost History of International Extradition Litigation*, 43 VA. J. INT'L L. 93, 96 (2002) ("In practice, . . . the Secretary rarely exercises discretion, perhaps because the needs of diplomacy outweigh the concerns of individuals who may have committed crimes.")

surrendered to the requesting country within two months of the commitment order must be released.<sup>15</sup> Although there is no direct appeal from a district court judge's or magistrate's extradition ruling,<sup>16</sup> a limited review of that decision is available through a petition for a writ of habeas corpus under 28 U.S.C. § 2241.<sup>17</sup>

### III. THE EXTRADITION HEARING

While extradition proceedings are not considered criminal prosecutions,<sup>18</sup> they are akin to a preliminary hearing in a criminal case.<sup>19</sup> In this respect, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and the Federal Rules of Civil Procedure do not apply.<sup>20</sup> Any discovery afforded by the court is discretionary

<sup>15</sup> See 18 U.S.C. § 3188 (2000).

<sup>16</sup> See *Hoxha v. Levi*, 465 F.3d 554, 560 (3d Cir. 2006) ("An individual challenging a court's extradition order may not appeal directly, because the order does not constitute a final decision under 28 U.S.C. § 1291, but may petition for a writ of habeas corpus."); *Valenzuela v. United States*, 286 F.3d 1223, 1228 n.11 (11th Cir. 2002) ("There is no direct appeal from extradition decisions.");

<sup>17</sup> 28 U.S.C. § 2241 (2006). See *Afanasjev v. Hurlburt*, 418 F.3d 1159, 1163 (11th Cir. 2005) ("A petition for a writ of habeas corpus is a proper method to contest an extradition order because there is no direct appeal in extradition proceedings."); *Bobadilla v. Reno*, 826 F. Supp. 1428, 1431 (S.D. Fla. 1993) ("As there are no appeal rights under 18 U.S.C. § 3184, a habeas corpus petition may be used to contest a Magistrate's decision on foreign extradition."); In a habeas proceeding, a petitioner may challenge "whether the magistrate had jurisdiction, whether the offense charged [wa]s within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); accord *Haxhiaj v. Hackman*, 528 F.3d 282, 286 (4th Cir. 2008); *Manta v. Chertoff*, 518 F.3d 1134, 1140 (9th Cir. 2008). A final order in a habeas proceeding is subject to review under 28 U.S.C. § 2253 by the United States Court of Appeals for the circuit where the district court is located. See *In re Requested Extradition of Artt*, 158 F.3d 462, 468–69 (9th Cir. 1998).

<sup>18</sup> See *DeSilva v. DiLeonardi*, 181 F. 3d 865, 868 (7th Cir. 1999) ("Extradition . . . is not a criminal prosecution.") (quotation omitted); *Austin v. Healey*, 5 F.3d 598, 603 (2d Cir. 1993) ("[A]n extradition hearing is not a criminal prosecution; the order of extraditability expresses no judgment on [petitioner's] guilt or innocence.");

<sup>19</sup> See *Benson v. McMahon*, 127 U.S. 457, 463 (1888) (noting that an extradition proceeding is "of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused"); *In re Extradition of Lehming*, 951 F. Supp. 505, 513–14 (D. Del. 1996) ("Pursuant to 18 U.S.C. § 3184, extradition hearings are in the nature of a preliminary hearing where the magistrate judge need only determine if there is probable cause which justifies the holding of the accused to answer for a charge.") (quotation omitted).

<sup>20</sup> See FED. R. CRIM. P. 54(b)(5) ("These rules are not applicable to extradition and rendition of fugitives."); FED. R. EVID. 1101(d)(3) ("The rules . . . do not apply . . . [to] [p]roceedings for extradition or rendition . . ."); *In re Requested Extradition*

and “narrow in scope.”<sup>21</sup> The putative extraditee has no right either to present witnesses that contradict the government’s proof,<sup>22</sup> or to cross-examine any government witnesses, at least as to matters relevant to his defense.<sup>23</sup> The evidence at the extradition hearing may consist of unsworn statements<sup>24</sup> and hearsay,<sup>25</sup> and credibility determinations are solely within the purview of the judicial officer.<sup>26</sup> Additionally, 18 U.S.C. § 3190 permits the demanding country to introduce properly authenticated evidence gathered within its borders,<sup>27</sup> while “[a]libi evidence, facts contradicting the requesting country’s

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of Smyth, 61 F.3d 711, 720–21 (9th Cir. 1995) (“[T]he rules of evidence and civil procedure that govern federal court proceedings heard under the authority of Article III of the United States Constitution do not apply in extradition hearings that are conducted under the authority of a treaty enacted pursuant to Article II.”).

<sup>21</sup> *Koskotas v. Roche*, 931 F.2d 169, 175 (1st Cir. 1991). *But see In re Extradition of Singh*, 123 F.R.D. 108, 113–16 (D.N.J. 1987) (holding that courts have no inherent power to allow discovery in extradition proceedings).

<sup>22</sup> *See Mainero v. Gregg*, 164 F.3d 1199, 1207 n.7 (9th Cir. 1999) (“Generally, evidence that explains away . . . probable cause is the only evidence admissible at an extradition hearing, whereas evidence that merely controverts the existence of probable cause, or raises a defense, is not admissible.”).

<sup>23</sup> *See Yin-Choy v. Robinson*, 858 F.2d 1400, 1407 (9th Cir. 1988) (finding defendant was not denied due process when court refused to allow him to cross examine witness at extradition hearing); *Messina v. United States*, 728 F.2d 77, 80 (2d Cir. 1984) (“As in the case of a grand jury proceeding, a defendant has no right to cross-examine witnesses or introduce evidence to rebut that of the prosecutor.”).

<sup>24</sup> *See Collins v. Loisel*, 259 U.S. 309, 317 (1922) (“[U]nsworn statements of absent witnesses may be acted upon by the committing magistrate, although they could not have been received by him under the law of the State on a preliminary examination.”).

<sup>25</sup> *See Haxhiaj v. Hackman*, 528 F.3d 282, 292 (4th Cir. 2008) (“[C]ourts have consistently concluded that hearsay is an acceptable basis for a probable cause determination . . . .”); *United States v. Kin-Hong*, 110 F.3d 103, 120 (1st Cir. 1997) (“The evidence may consist . . . entirely of hearsay.”).

<sup>26</sup> *See Quinn v. Robinson*, 783 F.2d 776, 815 (9th Cir. 1986) (“The credibility of witnesses and the weight to be accorded their testimony is solely within the province of the extraditing magistrate.”).

<sup>27</sup> Section 3190, captioned “Evidence on hearing,” states:

Depositions, warrants or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

18 U.S.C. § 3190 (2006).

proof, and defenses such as insanity, may properly be excluded at the extradition hearing."<sup>28</sup>

The governing standard at an extradition hearing is probable cause,<sup>29</sup> which has been defined as evidence that "supports a reasonable belief that a fugitive committed the charged offenses."<sup>30</sup> Thus, the judicial officer "does not weigh conflicting evidence and make factual determinations but, rather, determines only whether there is competent evidence to support the belief that the accused has committed the charged offense."<sup>31</sup> A certificate of extradition ultimately will issue if the judge or magistrate has jurisdiction over the subject matter and the person sought to be extradited, the offense for which extradition was sought was an extraditable offense under a treaty in effect at the time of the request, and the government presents competent evidence sufficient to establish probable cause that the extraditee committed the alleged offense.<sup>32</sup>

#### IV. IN ABSENTIA CONVICTIONS

It is well settled that a "foreign conviction obtained after a trial at which the accused is present is sufficient to support a finding of

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<sup>28</sup> *United States v. Wiebe*, 733 F.2d 549, 553 n.4 (8th Cir. 1984); *see Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir. 1978) (finding alibi or other evidence contradicting proof of probable cause inadmissible); *United States v. Peterka*, 307 F. Supp. 2d 1344, 1349 (M.D. Fla. 2003) ("[E]xtraditees may only introduce evidence to explain rather than contradict the evidence presented by the Government, and the court shall exclude evidence that is proffered to contradict testimony, challenge the credibility of witnesses, or establish a defense to the crimes alleged."). *See Jacques Semmelman, The Rule of Non-Contradiction in International Extradition Proceedings: A Proposed Approach to the Admission of Exculpatory Evidence*, 23 FORDHAM INT'L L.J. 1295 (2000).

<sup>29</sup> *See Hoxha v. Levi*, 465 F.3d 554, 561 (3d Cir. 2006) ("The probable cause standard applicable to an extradition hearing is the same as the standard used in federal preliminary hearings."); *Jimenez v. Aristeguieta*, 311 F.2d 547, 562 (5th Cir. 1962) ("With respect to the evidence upon which the extradition magistrate acted, it must be remembered that the extradition magistrate merely determines probable cause, making an inquiry like that of a committing magistrate and no more.").

<sup>30</sup> *Peterka*, 307 F. Supp. 2d at 1349; *accord In re Extradition of Chan Seong-I*, 346 F. Supp. 2d 1149, 1161 (D.N.M. 2004) ("The evidence showing probable cause need not be sufficient to support a conviction, but need only be sufficient to warrant a finding that there are reasonable grounds to believe the relator is guilty and thus hold her for trial.").

<sup>31</sup> *In re Extradition of Solis*, 402 F. Supp. 2d 1128, 1132 (C.D. Cal. 2005) (quoting *Quinn v. Robinson*, 783 F.2d 776, 815 (9th Cir. 1986)).

<sup>32</sup> *See, e.g., Cheung v. United States*, 213 F.3d 82, 87-88 (2d Cir. 2000) (identifying factors to establish probable cause); *Enami v. U.S. Dist. Court*, 834 F.2d 1444, 1447 (9th Cir. 1987) (same).

probable cause for the purpose of extradition.”<sup>33</sup> Two justifications have been advanced in support of this view. The first, based on a common-sense application of the probable cause standard, is “that a reasonable person would have reasonable cause to believe that a person is guilty of a crime if that person has been convicted of that crime.”<sup>34</sup> The second justification concerns the need to abide by principles of international comity.<sup>35</sup>

But what if the fugitive was not present at all, voluntarily excused himself after some participation in his trial, or was represented only by counsel? How is the standard then applied? And what role, if any, do the courts play when a defendant convicted in absentia contests his extradition on the grounds that his surrender to the requesting state violates his right to due process because he will not be afforded a new trial? The cases discussed below address these questions.

#### A. *No Distinction Between Nature of Conviction*

A number of courts have held that an in absentia conviction provides sufficient evidence of criminality on its face to satisfy the probable cause requirement governing extradition requests. For example, in *Gouveia v. Vokes*,<sup>36</sup> Portugal sought the defendant’s extradition on the basis of an in absentia conviction under which he was sentenced to three years and nine months’ imprisonment.<sup>37</sup> The

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<sup>33</sup> *Sidali v. INS*, 107 F.3d 191, 196 (3d Cir. 1997); *United States v. Spatola*, 925 F.2d 615, 618 (2d Cir. 1991) (“[A] certified copy of a foreign conviction, obtained following a trial at which the defendant was present, is sufficient to sustain a judicial officer’s determination that probable cause exists to extradite.”); *United States v. Clark*, 470 F. Supp. 976, 978 (D. Vt. 1979) (“[T]he certified copy of respondent’s Certificate of Conviction in Canada . . . is sufficient proof that probable cause exists that respondent has been guilty of an offense involving criminality and we hold that document satisfies the requirement that the court find sufficient ‘evidence of criminality’ as set forth in 18 U.S.C. § 3184.”); *In re Extradition of Edmondson*, 352 F. Supp. 22, 24 (D. Minn. 1972) (“The court finds the certified copies of convictions in Canada to be sufficient proof that probable cause exists that respondents there have been guilty of an offense involving ‘criminality’ and finds these documents to satisfy the requirement that the court hear the ‘evidence of criminality’ as set forth in 18 U.S.C. § 3184.”).

<sup>34</sup> *Lindstrom v. Gilkey*, No. 98 C 5191, 1999 WL 342320, at \*10 (N.D. Ill. May 24, 1999).

<sup>35</sup> See *Haxhiaj v. Hackman*, 528 F.3d 282, 290 (4th Cir. 2008) (“The principle that foreign convictions generally constitute probable cause under § 3184 is rooted in comity.”); *Spatola*, 925 F.2d at 618 (“To hold that such convictions do not constitute probable cause in the United States would require United States judicial officers to review trial records and, consequently, substitute their judgment for that of foreign judges and juries.”).

<sup>36</sup> 800 F. Supp. 241 (E.D. Pa. 1992).

<sup>37</sup> *Id.* at 242.

magistrate judge found the defendant extraditable, and the defendant thereafter sought review of that decision by filing a petition for a writ of habeas corpus.<sup>38</sup> While the district court ultimately granted the relief sought on the grounds that a statutory amendment authorizing the extradition of American citizens under the treaty was not applicable to the defendant (because he had been convicted prior to the amendment), it recognized that, given the limited scope of review of a magistrate's decision and the "modest requirements" of § 3184,<sup>39</sup> it could not "question whether, in fact, the Portuguese Court was correct in finding [the defendant] guilty."<sup>40</sup>

Similarly, in *United States v. Bogue*,<sup>41</sup> France sought the defendant's extradition on the basis of an in absentia conviction.<sup>42</sup> After the magistrate judge issued a certificate of extraditability, the defendant filed a petition for a writ of habeas corpus alleging, in part, that the magistrate's determination of probable cause was erroneous because it was based solely on an in absentia conviction.<sup>43</sup> Relying on *Gouveia*, the district court ruled that such a conviction was legally sufficient to satisfy the probable cause requirement.<sup>44</sup> The district court found that "the French government's procedural fairness in undertaking the [defendant's] trial in his absence" was beyond the scope of review in determining the reasonableness of the magistrate's ruling.<sup>45</sup>

Courts outside of the Third Circuit also have recognized that an in absentia conviction conclusively establishes probable cause for purposes of extradition. In support of their rulings, these courts have relied on *Esposito v. INS*,<sup>46</sup> where, in the context of deportation, the United States Court of Appeals for the Seventh Circuit held that a certified copy of an in absentia conviction was sufficient to establish "probable cause to believe that the [defendant was] guilty of the crimes in question."<sup>47</sup> Thus, in *United States v. Avdic*,<sup>48</sup> the district

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<sup>38</sup> *Id.*

<sup>39</sup> See *supra* note 5.

<sup>40</sup> *Gouveia*, 800 F. Supp. at 245. The court observed that although the defenses raised by *Gouveia* to his in absentia conviction "might well create 'reasonable doubt' in the minds of an American jury, [the court] simply [could not] impugn the regularity of the 1987 proceedings in Lisbon." *Id.* at 245 n.5.

<sup>41</sup> No. CRIM.A. 98-572-M, 1998 WL 966070 (E.D. Pa. Oct. 13, 1998).

<sup>42</sup> *Id.* at \*1.

<sup>43</sup> *Id.* at \*2.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 936 F.2d 911 (7th Cir. 1991).

<sup>47</sup> *Id.* at 914. In *Esposito*, the Board of Immigration Appeals (BIA or "the Board") declined to grant the defendant a waiver of exclusion—his spouse was a United States citizen—in part because of three in absentia convictions. *Id.* at 913–14. In *de-*

court held that an in absentia conviction from a tribunal in Bosnia and Herzegovina was sufficient on its face to establish probable cause for the defendant's extradition.<sup>49</sup>

In *Haxhijaj v. Hackman*,<sup>50</sup> where the government relied on a conviction in absentia that was affirmed by the Court of Appeal of Milan and a statement from an Italian magistrate, the United States Court of Appeals for the Fourth Circuit declined to "weigh in on the question of whether the fact of a foreign conviction, without more, can ever be sufficient to establish probable cause under § 3184 when the conviction resulted from a trial conducted in absentia."<sup>51</sup> However, the court of appeals went on to note that it "seem[ed] debatable that the international comity justification for the general rule that foreign convictions constitute probable cause under § 3184 would not include in absentia foreign convictions."<sup>52</sup>

### B. Presence at Proceeding Leading to Conviction

When a fugitive partially participates in his trial but voluntarily chooses not to return before a final judgment in the case is rendered, courts have treated any ensuing conviction as sufficient for establishing probable cause for extradition. In *United States ex rel. Bloomfield v. Gengler*,<sup>53</sup> for example, the defendants were charged by Canadian authorities with conspiracy to import, conspiracy to export, and conspiracy to traffic in hashish.<sup>54</sup> After the evidence was presented, the judge dismissed the case, finding that there had been a variance be-

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termining whether the BIA had abused its discretion in considering these convictions under its "waiver calculus," the court expressed no view as to whether the Board was correct in its analysis that an in absentia conviction established conclusive proof of guilt, but agreed with the BIA's fall back position that such a conviction was probative of "something less than guilt." *Id.* at 914. In the words of the United States Court of Appeals for the Seventh Circuit, while "in absentia convictions ought not to be treated as evidence of guilt, they may certainly stand for something less: at the very least, in absentia convictions properly constitute probable cause to believe that the petitioner is guilty of the crimes in question." *Id.* at 914. The court went on to note that such convictions were not "solely by virtue of their in absentia nature, so fundamentally infirm as to preclude the Board from considering them for this limited purpose." *Id.*

<sup>48</sup> No. CR. 07-M06, 2007 WL 1875778 (D.S.D. June 28, 2007).

<sup>49</sup> *Id.* at \*8. In *Avdic*, the defendant conceded "that on its face the Bosnian judgment provide[d] probable cause." *Id.* at \*2. He argued that the conviction which authorities obtained was deficient because it was based on a coerced confession from him. *Id.*

<sup>50</sup> 528 F.3d 282 (4th Cir. 2008).

<sup>51</sup> *Id.* at 291.

<sup>52</sup> *Id.* at 291 n.2.

<sup>53</sup> 507 F.2d 925 (2d Cir. 1974).

<sup>54</sup> *Id.* at 926.

tween the charges and the evidence adduced at trial.<sup>55</sup> The defendants thereafter returned home to the United States.<sup>56</sup>

In conformity with Canadian law, the Crown appealed the dismissal of the case and the appellate court reversed the ruling below, entering a judgment of conviction against the defendants for conspiracy to import hashish.<sup>57</sup> The defendants were subsequently arrested in the United States and extradition proceedings were initiated against them.<sup>58</sup> After a finding by the magistrate that there were no valid grounds to refuse the extradition request, the defendants filed a petition for a writ of habeas corpus challenging that ruling.<sup>59</sup> The district court denied the petition, and the defendants thereafter appealed that denial to the circuit court.<sup>60</sup>

In rejecting the defendants' argument that the ruling below was infirm because it was based on convictions obtained in absentia, the United States Court of Appeals for the Second Circuit found the defendants' characterization of their convictions "technical" and held that, in fact, they were "not tried in absentia."<sup>61</sup> The court pointed out that the defendants had been present at the trial and had been represented by counsel.<sup>62</sup> Indeed, their counsel was able to suppress their confessions and also succeeded in dismissing the indictment.<sup>63</sup> That the defendants "left Canada voluntarily after the original dismissal of the charges," rather than awaiting the final conclusion of the criminal proceeding against them did not, the court concluded, render their convictions in absentia.<sup>64</sup>

A similar result was reached by the court in *Lindstrom v. Gilkey*.<sup>65</sup> In *Lindstrom*, the defendant was indicted on Norwegian fraud charges resulting from his participation in a pyramid scheme in which hundreds of investors were fraudulently induced to invest over fifteen million dollars.<sup>66</sup> The defendant was represented by counsel

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<sup>55</sup> *Id.* The court found that a single conspiracy was proved, whereas the indictment charged three separate conspiracies. *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925, 927 (2d Cir. 1974).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 928-29.

<sup>62</sup> *Id.* at 929.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* The court also ruled that defendants' contention that the evidence against them was insufficient was "frivolous" given the limited scope of review. *Id.*

<sup>65</sup> No. 98 C 5191, 1999 WL 342320 (N.D. Ill. May 14, 1999).

<sup>66</sup> *Id.* at \*1, 3.

throughout the trial.<sup>67</sup> Towards the end of the trial, after evidence on his behalf had been presented, the defendant asked for and was granted permission to be absent for several days.<sup>68</sup> When he did not return, the judge continued with the trial and ultimately convicted him of the charges in the indictment.<sup>69</sup>

Following the defendant's conviction, Norway sought his extradition from the United States.<sup>70</sup> After a magistrate concluded that he was extraditable, the defendant filed a petition for a writ of habeas corpus, alleging in part that the magistrate had erred by failing to make a probable cause determination independent of the certified conviction upon which Norway relied.<sup>71</sup> In denying the petition, the district court observed that while the defendant's conviction had been rendered in absentia, it was not at all apparent that the law involving in absentia convictions in the context of extradition requests applied to someone like the defendant who "attended the vast majority of his case and left his trial (and the country) without permission from the trial court."<sup>72</sup> Furthermore, there was no indication that the verdict rested "to any significant degree" on evidence presented after the defendant elected not to return to the trial.<sup>73</sup> Finally, the district court also found that under *Esposito*, an in absentia conviction was sufficient in and of itself to establish probable cause for purposes of extradition.<sup>74</sup>

### C. Representation by Counsel Alone

There is some support in case law for the proposition that representation by counsel alone renders any ensuing conviction as one returned in absentia, thereby not affording such conviction conclusive effect for purposes of establishing probable cause. In *Gallina v. Fraser*,<sup>75</sup> Italy sought the defendant's extradition on the basis of two robbery convictions obtained in absentia.<sup>76</sup> In one of the trials, the defendant was represented by counsel.<sup>77</sup> The district court denied the defendant's petition for a writ of habeas corpus concluding that, in-

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<sup>67</sup> *Id.* at \*1.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at \*2.

<sup>71</sup> *Lindstrom*, 1999 WL 342320, at \*9-10.

<sup>72</sup> *Id.* at \*10.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> 177 F. Supp. 856 (D. Conn. 1959).

<sup>76</sup> *Id.* at 862.

<sup>77</sup> *Id.*

dependent of the conviction, "there [was] sufficient evidence of criminality to justify extradition."<sup>78</sup>

The holding of the district court subsequently was affirmed by the United States Court of Appeals for the Second Circuit which, when discussing the imposition of conditions affecting the surrender of a fugitive, reiterated the rule "that a foreign conviction in absentia does not preclude the federal court from considering whether sufficient evidence of the [defendant's] criminality has been presented in the extradition proceeding."<sup>79</sup> Following this ruling, at least one court has interpreted *Gallina* to stand for the proposition that the presence of counsel alone at a foreign trial is insufficient to give an in absentia conviction conclusive effect insofar as the probable cause determination at the extradition hearing is concerned.<sup>80</sup>

Scenarios may well arise, however, where representation by counsel and other factors may lead a court to conclude that while an ensuing conviction was not returned with the fugitive's presence, his actions and participation through counsel give the conviction conclusive effect for purposes of probable cause. For example, if the record reveals that the fugitive fled because he knew he was about to be charged, and that he then actively participated through counsel in his ensuing trial and any appeal that followed from the resulting conviction, a court may conclude that such a conviction, without more, establishes probable cause under § 3184.

#### D. *No Participation in Proceeding Leading to Conviction*

When the foreign conviction in support of the request for the fugitive's extradition was obtained without his presence, many courts treat the conviction merely as a charge, requiring an independent finding of probable cause.<sup>81</sup> In some cases, when the government has

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<sup>78</sup> *Id.* at 866.

<sup>79</sup> *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960).

<sup>80</sup> See *In re Extradition of Ernst*, No. 97 CRIM.MISC.1 PG.22, 1998 WL 395267, at \*7-8 (S.D.N.Y. July 14, 1998). See also *United States v. Fernandez-Morris*, 99 F. Supp. 2d 1358, 1365 (S.D. Fla. 1999) (acknowledging that a public defender was appointed to represent the defendants but then recognizing that "[b]ecause Defendants were convicted in absentia, that conviction is only considered a charge for purposes of the Court's probable cause analysis.").

<sup>81</sup> See *Argento v. Horn*, 241 F.2d 258, 264 n.1 (6th Cir. 1957); *Germany v. United States*, No. 06 CV 01201, 2007 WL 2581894, at \*7 (E.D.N.Y. Sept. 5, 2007); *In re Extradition of Haxhijaj*, No. 1:05mj829, 2006 WL 2381966, at \*1 (E.D. Va. Aug. 16, 2006); *Arambasic v. Ashcroft*, 403 F. Supp. 2d 951, 962 (D.S.D. 2005); *In re Extradition of Harrison*, No. 03 CR. MISC. 01, 2004 WL 1145831, at \*1 n.1 (S.D.N.Y. May 21, 2004); *In re Extradition of Ribauda*, No. 00 CRIM.MISC.1PG.(KN, 2004 WL 213021, at \*4 (S.D.N.Y. Feb. 3, 2004); *Fernandez-Morris*, 99 F. Supp. 2d at 1365; *In re Extradition*

relied on little more than the judgment of conviction in support of its extradition request, courts have declined to find probable cause. In others, the judgment of conviction appears to have provided sufficient information for the courts to make an independent determination. In yet other cases, the government provided additional record evidence that the courts have relied upon to arrive at their rulings. The following cases illustrate this point.

In *In re Extradition of Ribaudo*,<sup>82</sup> Italy sought the defendant's extradition on the basis of an in absentia conviction for conspiracy and drug trafficking under which the defendant was sentenced to eleven years imprisonment.<sup>83</sup> The only evidence provided in support of the defendant's extradition was the decision of the Florence Court of Appeal, which referenced records of taped conversations involving the defendant and others, and two incriminating letters.<sup>84</sup> The district court found that because the underlying record evidence had not been provided, it could not "make an independent determination concerning whether there [was] probable cause to believe that [the defendant] committed the crimes charged."<sup>85</sup> Additionally, the court found that the "description of the underlying evidence" in the decision from the Florence Court of Appeal itself did not support a reasonable belief that the defendant was guilty of the charged crimes.<sup>86</sup>

A similar result was reached by the court in *In re Extradition of Ernst*,<sup>87</sup> where, in support of Switzerland's extradition request, the only evidence submitted by the government was the decision rendered by the Zurich Supreme Court reflecting the defendant's in absentia conviction with a few attachments.<sup>88</sup> While acknowledging that "[p]robable cause is not an overly demanding standard," the district court found that the "facts" in the Zurich Supreme Court's opinion

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of *Ernst*, 1998 WL 395267, at \*7; *In re Extradition of Mylonas*, 187 F. Supp. 716, 721 (N.D. Ala. 1960); *United States ex rel. Argento v. Jacobs*, 176 F. Supp. 877, 879 (N.D. Ohio 1959); *In re Extradition of D'Amico*, 177 F. Supp. 648, 651 n.3 (S.D.N.Y. 1959); *Ex parte La Mantia*, 206 F. 330, 331 (S.D.N.Y. 1913); *Ex parte Fudera*, 162 F. 591, 592 (C.C.S.D.N.Y. 1908); see also *In re Extradition of Yarden*, No. 87-1250-M, 1989 WL 56119, at \*7-8 (E.D.N.Y. May 24, 1989). Other than *Fernandez-Morris*, these opinions do not mention whether the defendant was represented by counsel in the foreign proceeding resulting in the conviction.

<sup>82</sup> *Ribaudo*, 2004 WL 213021.

<sup>83</sup> *Id.* at \*1-3.

<sup>84</sup> *Id.* at \*6.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at \*6-7.

<sup>87</sup> No. 97 CRIM.MISC.1 PG.22, 1998 WL 395267, at \*7-8 (S.D.N.Y. July 14, 1998).

<sup>88</sup> *Id.* at \*10.

represented “conclusions” drawn from exhibits which had not been furnished, leaving the court without an evidentiary basis from which to make an independent determination of probable cause.<sup>89</sup>

In some cases, courts have relied on the information contained in the foreign judgment when making an independent probable cause determination that there was a reasonable basis to find that the fugitive committed the offense upon which the extradition request was based. For example, in *Arambasic v. Ashcroft*,<sup>90</sup> the probable cause ruling was based on the information contained in the foreign court’s 124-page “Sentence and Judgment” order.<sup>91</sup> In a similar vein, in *Haxhiaj v. Hackman*,<sup>92</sup> the Fourth Circuit ruled that the certified copy of the opinion by the Court of Appeal of Milan “clearly afford[ed] a reasonable basis upon which to find probable cause.”<sup>93</sup> The court observed that the “opinion [was] remarkable for its detailed description of the evidence developed during the investigation” of the fugitive’s drug trafficking operations, including his role.<sup>94</sup>

Lastly, illustrative of a scenario where, in addition to the foreign conviction, other record evidence was presented in support of the extradition request is the case of *In re Extradition of Neto*.<sup>95</sup> There, France sought José Germano Neto’s extradition for violations of its narcotics laws relating to the unlawful exportation of cocaine.<sup>96</sup> While the defendant was convicted in absentia of those charges, the evidence adduced by the government at the hearing, which included wiretap records, hearsay testimony of co-conspirators, police reports, and photographs, established probable cause to believe that defendant was guilty of the charges for which he was sought.<sup>97</sup>

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<sup>89</sup> *Id.* at \*8, 10.

<sup>90</sup> 403 F. Supp. 2d 951 (D.S.D. 2005).

<sup>91</sup> *Id.* at 953; *see also* Germany v. United States, No. 06 CV 01201, 2007 WL 2581894, at \*6, 8 (E.D.N.Y. Sept. 5, 2007).

<sup>92</sup> 528 F.3d 282 (4th Cir. 2008).

<sup>93</sup> *Id.* at 289.

<sup>94</sup> *Id.*

<sup>95</sup> No. 98 CR.MISC.1THK, 1999 WL 627426, at \*4–6 (S.D.N.Y. Aug. 17, 1999).

<sup>96</sup> *Id.* at \*1.

<sup>97</sup> *Id.* at \*4–6; *see In re Extradition of Harusha*, No. 07-x-51072, 2008 WL 1701428, at \*6 (E.D. Mich. Apr. 9, 2008) (“The evidence . . . submitted in support of extradition consist[ed] of the affidavits of Albanian prosecutors summarizing the testimony of eyewitnesses, as corroborated by other evidence.”); *In re Extradition of Haxhiaj*, No. 1:05mj829, 2006 WL 2381966, at \*2 (E.D. Va. Aug. 16, 2006) (“The supplemental record, a statement by [the] Italian Magistrate . . . now summarizes the evidence itself. The prisoner’s guilt of drug trafficking was proven by a combination of wiretaps of his conversations and physical surveillance of his activities.”); *In re Extradition of Yarden*, No. 87-1250-M, 1989 WL 56119, at \*1–2, 8 (E.D.N.Y. May 24, 1989) (discussing information from police reports); *In re Extradition of D’Amico*, 177 F. Supp. 648,

*E. Due Process, Extraditability, and Surrender*

An in absentia conviction is not grounds to find that a fugitive is not extraditable because he may not be afforded a new trial upon surrender to the requesting state. In *Gallina v. Fraser*,<sup>98</sup> the defendant was found extraditable to Italy on the basis of two in absentia convictions for robbery.<sup>99</sup> In one of the cases, he was represented by counsel.<sup>100</sup> In rejecting the defendant's contention that a finding of extraditability violated his due process because he would be returned directly to prison without a trial, the United States Court of Appeals for Second Circuit noted that it could find "no case authorizing a federal court, in a habeas corpus proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the [defendant] upon extradition."<sup>101</sup> The court further observed that the case law holding that in absentia conviction should be treated as a charge "[was] not to be construed as a statement that [a] federal court may, as a condition of discharging the writ, require retrial in the foreign country."<sup>102</sup> Rather, what that holding stood for was simply that an in absentia conviction does not preclude a district court from making an independent, probable-cause determination as to whether the evidence presented justifies a reasonable belief that the fugitive committed the crime for which extradition is sought.<sup>103</sup> Ultimately, as recognized by the Second Circuit, the conditions governing the surrender of the fugitive "remain in the

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651 (S.D.N.Y. 1959) (evidence at hearing included written statement from victims of crime as well as statements of defendant's associates); *cf.* *United States v. Fernandez-Morris*, 99 F. Supp. 2d 1358, 1365 (S.D. Fla. 1999) (affidavit of complainant and summary of proceedings before judge, including the judge's findings and sentencing of defendants insufficient to establish probable cause); *United States v. Jacobs*, 176 F. Supp. 877, 879-83 (N.D. Ohio 1959) (affidavits and transcripts of depositions insufficient to establish probable cause).

<sup>98</sup> 177 F. Supp. 856 (D. Conn. 1959).

<sup>99</sup> *Id.* at 862.

<sup>100</sup> *Id.*

<sup>101</sup> *Gallina v. Fraser*, 278 F.2d 77, 78 (2d Cir. 1960). In the course of its ruling, the court suggested in dicta that it could "imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of" the non-inquiry principle. *Id.* at 79. Subsequent opinions from the Second Circuit have raised questions about the legal force of this dicta. *See, e.g., Sindona v. Grant*, 619 F.2d 167, 174-75 (2d Cir. 1980); *Jhirad v. Ferrandina*, 536 F.2d 478, 484-85 (2d Cir. 1976). Furthermore, as noted by the court in *Hoxha v. Levi*, this highly questionable "exception remains theoretical, however, because no federal court court has applied it to grant habeas relief in an extradition case." *Hoxha v. Levi*, 465 F.3d 554, 564 n.14 (3d Cir. 2006); *see also Ahmad v. Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990).

<sup>102</sup> *Gallina*, 278 F.2d at 78-79.

<sup>103</sup> *Id.* at 79.

hands of the State Department.”<sup>104</sup> Following the teaching of *Gallina*, courts consistently have applied the principle that while “the fact that an extraditee was not present for his trial and sentencing is a factor properly considered by the Secretary of State in deciding whether to grant extradition, it is not a defense to a request for extradition, nor is it a basis for dismissing an extradition request.”<sup>105</sup>

## V. CONCLUSION

As demonstrated by the discussion above, some courts treat in absentia convictions in the same manner as a conviction in which the defendant was present, reasoning that, on their face, both types of convictions establish probable cause for purposes of extradition.<sup>106</sup> When the defendant has participated at his trial but then voluntarily excused himself prior to the conclusion of the proceedings, courts have found that an ensuing conviction rendered in absentia is sufficient to establish probable cause to extradite the fugitive.<sup>107</sup> Representation by counsel at the trial in some cases will not be enough to give an in absentia conviction conclusive effect for purposes of probable cause.<sup>108</sup> In those cases, as well as cases where the defendant was not present at trial, many courts will treat the in absentia conviction as a charge, requiring an independent determination of probable

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<sup>104</sup> *Id.*

<sup>105</sup> *In re* Extradition of Harrison, No. 03 CR. MISC. 01, 2004 WL 1145831, at \*8 (S.D.N.Y. May 21, 2004); see *United States v. Bogue*, No. CRIM.A. 98-572-M, 1998 WL 966070, at \* 2 (E.D. Pa. Oct. 13, 1998) (“A determination of the French government’s procedural fairness in undertaking the [defendant’s] trial in his absence . . . is beyond the scope of this [c]ourt’s review. 18 U.S.C. § 3186. These are questions which are better left to the Secretary of State, who can adequately determine whether humanitarian issues preclude extradition.”); *In re* Extradition of Yarden, No. 87-1250-M, 1989 WL 56119, at \*7 (E.D.N.Y. May 24, 1989) (“[T]he clear weight of authority in [the Second] Circuit requires this court to refrain from inquiring into the Belgian procedures awaiting [defendant] should he be extradited [sic].”). See generally M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE § 7.2, at 572-73 (4th ed. 2002) (“Nothing . . . prevents the executive branch from considering policies and practices in the requesting state that may be deemed too fundamentally unfair and contrary to United States public policy, thereby permitting exercising executive discretion and refusal to surrender the person otherwise judicially found extraditable.”) (footnotes omitted).

<sup>106</sup> See *United States v. Avdic*, No. CR. 07-M06, 2007 WL 1875778, at \*8 (D.S.D. June 28, 2007); *Lindstrom v. Gilkey*, No. 98 C 5191, 1999 WL 342320, at \*10 (N.D. Ill. May 24, 1999); *Bogue*, 1998 WL 966070, at \*2; *DeSena Gouveia v. Vokes*, 800 F. Supp 241, 245 (E.D. Pa. 1992).

<sup>107</sup> See *United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925, 928-29 (2d Cir. 1974); *Lindstrom*, 1999 WL 342320, at \*10.

<sup>108</sup> See *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960); *In re* Extradition of Ernst, No. 97 CRIM.MISC.1 PG 22, 1998 WL 395267, at \*7-8 (S.D.N.Y. July 14, 1998).

cause that, based on the evidence presented, the fugitive committed the offense(s) for which extradition is sought.<sup>109</sup> In practice, this has resulted in some courts declining to find probable cause in support of extradition when the government has relied on little more than the in absentia conviction itself in support of its extradition request,<sup>110</sup> while in other cases, the foreign judgment appears to have provided sufficient information for the courts to make an independent determination of probable cause.<sup>111</sup> And, in another category of cases, additional records have been provided which the courts have relied upon to arrive at their probable cause rulings.<sup>112</sup> Lastly, while an in absentia conviction will be “considered by the Secretary of State in deciding whether to grant extradition, it is not a defense to a request for extradition, nor is it a basis for dismissing an extradition request.”<sup>113</sup>

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<sup>109</sup> See *Argento v. Horn*, 241 F.2d 258, 264 n.1 (6th Cir. 1957); *In re Extradition of Haxhiaj*, No. 1:05mj829, 2006 WL 2381966, at \*1 (E.D. Va. Aug. 16, 2006); *Arambasic v. Ashcroft*, 403 F. Supp. 2d 951, 962 (D.S.D. 2005); *In re Harrison*, 2004 WL 1145831, at \*1 n.1; *In re Extradition of Ribaldo*, No. 00 CRIM.MISC.1PG.(KN, 2004 WL 213021, at \*4 (S.D.N.Y. Feb. 3, 2004); *In re Ernst*, 1998 WL 395267, at \*7; *In re Extradition of Mylonas*, 187 F. Supp. 716, 721 (N.D. Ala. 1960); *United States ex rel. Argento v. Jacobs*, 176 F. Supp. 877, 879 (N.D. Ohio 1959); *Ex parte La Mantia*, 206 F. 330, 331 (S.D.N.Y. 1913); *Ex parte Fudera*, 162 F. 591, 592 (C.C.S.D.N.Y. 1908). See also *In re Yarden*, 1989 WL 56119, at \*7–8.

<sup>110</sup> See *In re Ribaldo*, 2004 WL 213021, at \*6–7; *In re Ernst*, 1998 WL 395267, at \*8, 10.

<sup>111</sup> See *Germany v. United States*, No. 06 CV 01201, 2007 WL 2581894, at \*6, 8 (E.D.N.Y. Sept. 5, 2007); *Arambasic*, 403 F. Supp. 2d at 953.

<sup>112</sup> See *In re Haxhiaj*, 2006 WL 2381966, at \*2; *In re Extradition of Neto*, No. 98 CR.MISC.ITHK, 1999 WL 627426, at \*4–6 (S.D.N.Y. Aug. 17, 1999); *In re Yarden*, 1989 WL 56119, at \*1–2, 8; *In re Extradition of D'Amico*, 177 F. Supp. 648, 651 (S.D.N.Y. 1959); cf. *United States v. Fernandez-Morris*, 99 F. Supp. 2d 1358, 1366–69 (S.D. Fla. 1999); *Jacobs*, 176 F. Supp. at 879–83.

<sup>113</sup> *In re Harrison*, 2004 WL 1145831, at \*8; see *Gallina*, 278 F.2d at 78–79; *United States v. Bogue*, No. CRIM.A. 98-572-M, 1998 WL 966070, at \* 2 (E.D. Pa. Oct. 13, 1998); *In re Yarden*, 1989 WL 56119, at \*6–7.

