No. _____

In The
Supreme Court of the United States

ZHENLI YE GON,

Petitioner,

v.

GERALD S. HOLT and FLOYD AYLOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a writ of certiorari should be granted to resolve a Circuit split concerning whether the international legal principle of *Non Bis In Idem* is limited to the same U.S. double jeopardy "same elements" test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932).

2. Whether a writ of certiorari should be granted to reestablish that lower courts must follow this Court's rule established in *Collins v. Loisel*, 259 U.S. 309, 312 (1922): that to satisfy the principle of Dual Criminality required for extraditions, the issue is whether "the particular act charged is criminal in both jurisdictions."

3. Whether a writ of certiorari should be granted to preserve the U.S. Judiciary's authority over extradition proceedings, against recent Executive Branch claims that it has "exclusive" power to expand foreign prosecutions beyond the charges that U.S. judicial officers have authorized, despite the Rule of Specialty.

PARTIES TO THE PROCEEDINGS

The current parties to the proceedings are listed in the caption. Other parties previously named in this case include the following former Respondents: Attorney General of the United States Eric Holder, Jr., United States Secretary of State Hillary Clinton, and U.S. Marshal for the District of Columbia Edwin D. Sloane. Neither Petitioner Zhenli Ye Gon nor any of the current or former Respondents is a corporation.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Zhenli Ye Gon respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit, affirming a decision by the U.S. District Court denying Petitioner habeas corpus relief.

OPINIONS BELOW

The opinion of the court of appeals is published at 774 F.3d 207, and is reproduced in the Appendix to this petition ("Pet. App.") at 1. The court of appeals' denial of rehearing and later stay of its mandate are reproduced in Pet. App. at 161 and 159, respectively. The pertinent opinions of the district court are published at 992 F. Supp. 2d 637, and 2014 U.S. Dist. LEXIS 6084, and are reproduced in Pet. App. at 31 and 92, respectively. The U.S. Magistrate Judge's

Findings of Fact and Conclusions of Law, granting a Certificate of Extraditability, are published at 768 F. Supp. 2d 69 and reproduced in Pet. App. at 104.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 2014. Pet. App. at 1. A petition for rehearing was denied on February 13, 2015. Pet. App. at 161. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL & STATUTORY PROVISIONS

The Second Amendment to the U.S. Constitution provides as follows: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."

STATEMENT OF THE CASE

This case arises from efforts to extradite Petitioner Zhenli Ye Gon to Mexico for prosecution. Mr. Ye Gon was arrested in Maryland on July 24, 2007, several months after what the U.S. Drug Enforcement Administration then described as the largest currency seizure in the history of the world. *See*

www.dea.gov/divisions/hq/2008/pr070708_admin_remarks.doc (claiming over $207 million in currency was seized from Mr. Ye Gon's Mexican residence).[1] Mr. Ye Gon was initially prosecuted in U.S. federal court by the U.S. Department of Justice, but all of Petitioner's U.S. criminal charges were dismissed, with prejudice, in 2009, after several witnesses recanted and U.S. prosecutors acknowledged "evidentiary concerns." *See also* Mike Scarcella, *A Losing Hand: How DEA's Massive Drug Case Fell Apart*, National Law Journal (July 27, 2009), available at http://www.nationallawjournal.com/id=1202432522319. Efforts to extradite Mr. Ye Gon to Mexico for foreign prosecution nevertheless continued, and later culminated in a Certificate of Extraditability issued by a U.S. Magistrate Judge on February 9, 2011. The next morning, Mr. Ye Gon filed a Petition for a Writ of Habeas Corpus in the Western District of Virginia, where he was then detained, challenging this Certificate.[2] Habeas corpus

[1] The seizure took place in Mexico on March 15, 2007, one day after a high-level meeting in Merida between U.S. President George W. Bush and Mexican President Felipe Calderon, talks that culminated in the so-called "Merida Initiative," under which billions of dollars in U.S. aid was provided to Mexico for drug enforcement. The currency seized from Petitioner's home was not preserved as evidence, but according to Mexican officials, was deposited into banks.

[2] A few months later, the Virginia district judge *sua sponte* transferred this case to the District of Columbia, where a second petition for habeas corpus had been filed after Petitioner was notified in writing that the U.S. Marshal for the District of Columbia "remains the officer responsible for petitioner's custody," despite his incarceration at a Virginia state jail facility. The

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relief was eventually denied by that court on January 19, 2014, albeit on grounds different than articulated by the U.S. Magistrate Judge. The district court's rulings, in turn, were later affirmed, again on different grounds, by the court of appeals on December 16, 2014. Rehearing was denied February 13, 2014, but the court of appeals later stayed its mandate, on February 27, 2015, so that Mr. Ye Gon could file this expedited Petition for a Writ of Certiorari.

The facts of this case revealed that, prior to 2007, Zhenli Ye Gon had never been convicted, charged or even suspected of any wrongdoing in his life. He operated a major Mexican importing business that, for years, had been licensed to import certain restricted chemicals into Mexico, including ephedrine and pseudoephedrine products.[3] Indeed, prior to July 1, 2005, Petitioner's company had, with the Mexican authorities' full knowledge and blessing, imported into Mexico approximately 33,875 tons of these substances, all ***legally***.

Before any allegations of wrongdoing arose, Petitioner had already become a successful businessman, importing hundreds of large bulk shipments, and accumulating verified capital that rendered him

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instant case was later transferred back to Virginia. *See Ye Gon v. Sloane*, 825 F. Supp. 2d 271 & 278 (D.D.C. 2011), *aff'd*, *Ye Gon v. Sloane*, 496 Fed. Appx. 90 (D.C. Cir. 2012).

[3] In his U.S. criminal case, a DEA agent's affidavit confirms that pseudoephedrine and ephedrine are legitimate pharmaceutical chemicals commonly used in cold and allergy medications.

a millionaire many times over. He had purchased land and invested over $23 million for equipment to build a top-of-the-line new pharmaceutical plant in Toluca, Mexico. A Chinese national, Petitioner became a Mexican citizen in 2002, at a naturalization ceremony personally attended by Mexican President Vicente Fox. But Mexican officials now contend that, after Petitioner's license to import controlled substances ended on July 1, 2005, he continued to import certain of these products, now claimed by Mexico to have been imported illegally. In particular, Mexico claims that on December 5, 2005, January 3, 2006, and July 3, 2006, Petitioner imported three containers containing N-acetyl pseudoephedrine, and in November 2006, a fourth container containing ephedrine acetate.[4]

Of Petitioner's 291 import operations, only these four have ever been challenged.[5] And for most of the

[4] The containers were labeled as containing ***non***-controlled substances. Mexico's government-approved chemist, Bernardo Mercado Jiminez, assigned to Petitioner's company, has sworn that he did not know or believe that these imported substances were illegal under Mexican law – and that he told Petitioner (who is not a chemist) this. Under the "rule against contradiction" applied in U.S. extradition proceedings, however, this exculpatory evidence was not considered below.

[5] Mexico's professed theory is that these precursors would be used to manufacture processed pseudoephedrine products. But during this same period, Petitioner undeniably had ***9.806 tons*** of other, ***already-processed*** pseudoephedrine products – ***legally*** possessed from Petitioner's authorized importations prior to July 1, 2005 – ***sitting idly*** in his warehouse, literally for

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four containers challenged, the underlying evidence no longer even exists. U.S. prosecutors have revealed that Mexico's samples taken from the first two of these challenged shipments, for example, were "used up in the laboratory analysis." And the final container, seized in its entirety, also was apparently later destroyed by Mexican officials.[6]

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a period of years. All of that was admittedly accounted for, with none of it ever diverted. This quantity of 9.806 tons was later sold ***in 2006*** under permits Mexican officials specifically authorized.

[6] The court of appeals referred to Petitioner's Toluca facility as a "pseudoephedrine manufacturing plant," Pet. App. at 7, but no such finding of fact was ever made. Indeed, blueprints and photos of the Toluca plant revealed sophisticated, unrelated pill processing lines and high-end pharmaceutical processing equipment purchased from Bosch, Uhlmann and other suppliers. The notion that Petitioner was building the most sophisticated pharmaceutical plant in Central and South America to call attention to a location where he would be conducting illegal activities borders on the absurd. Invoices instead revealed tens of thousands of kilograms of other chemicals routinely imported by Petitioner's companies in bulk, such as testosterone, penicillin, and various other chemical products, including tons of naproxen (used to make Alleve), which Petitioner's expert chemist, Dr. Thomas Lectka, testified is also a white crystalline powder. No sizeable quantities of epehedrine or pseudoephedrine products were ever found at the Toluca lab; at most, Mexican authorities cited mere "trace" quantities, which Dr. Lectka testified could have emanated from mere reprocessing performed on the 9.806 kilograms legally resold, to render that saleable after years of storage had rendered it hardened and discolored. From 2002-06, at least 10 separate Mexican audits were performed on Petitioner's companies; no improprieties or diversions were ever found.

Petitioner was ultimately charged by Mexican officials with various crimes, in a Mexican Arrest Warrant comprising 641 English pages, as translated. Of the actual charges, which the Government conceded below are found only on pages 636-39, not all of the paragraphs relate to Mr. Ye Gon, but Paragraphs 1-5 charge Petitioner and others with certain specified drug-related offenses. Paragraph 7 then charges Petitioner with "the crime of bearing firearms which use is reserved for the Army, Navy and Air Force," and Paragraph 8 raises a similar charge with respect to a different, fifth firearm. Paragraph 11 charges a violation of Mexico's "Organized Crime" law.[7] Finally, Paragraph 14 charges Petitioner and others with money laundering "in the modality that . . . they maintained funds in Mexican territory" that they knew had an illegal source. Moreover, virtually all of Mexico's charged offenses in the Mexican Arrest Warrant include a specific reference to Article 13 of the Mexican Criminal Law; under that provision, for each such offense, Petitioner would face criminal liability in Mexico arising from jointly-undertaken activity, including if he was merely one "who agree[d] to or plan[ned] the crime."

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[7] A closer look at this charge reveals that the alleged "criminal organization" in reality consists of nothing more than certain employees of Mr. Ye Gon's companies. Petitioner's so-called "'trusted team' of collaborators" included a company chemist approved by the Mexican government, Petitioner's sister-in-law, a company engineer, and Petitioner's personal driver.

After the return of this Arrest Warrant, Mexico asked the U.S. Secretary of State to pursue Petitioner's extradition, and submitted supporting documentation. Eventually, a U.S. Extradition Complaint was filed, in September 2008.[8]

As noted, however, prior to the filing of this Extradition Complaint, the U.S. itself had prosecuted Petitioner based on these same activities, in *United States v. Ye Gon*, Criminal Action No. 1:07-CR-181 (D.D.C.). Petitioner was arrested in Maryland on a U.S. criminal complaint, and active U.S. criminal prosecution continued thereafter for a period of more than two years, with Petitioner held in continuous pretrial detention on U.S. indictments. Both an original and superseding U.S. indictment specifically referenced a conspiracy extending into "Mexico," and, as will be discussed in more detail below, U.S. prosecutors also acknowledged that Mexico's own charges and evidence were similar or identical to what the U.S. prosecutors were pursuing. This U.S. criminal

[8] While the supporting documents included incriminating statements taken from four workers in Petitioner's business, the record revealed all four as disgruntled employees, who had either quit or been fired. Mexico's only actual Affiant, Jorge Joaqin Diaz Lopez, also later resigned from his position as a state prosecutor, following Mexico's anti-corruption Operation Limpieza (Clean Sweep). The record further revealed that Diaz Lopez's boss, Noe Ramirez Mandujano – the head of Mexico's entire organized crime division, and the man responsible for overseeing Petitioner's prosecution – was himself fired and later prosecuted for collusion with drug cartels.

case was still pending in September 2008, when the Extradition Complaint was filed on behalf of Mexico.

In June 2009, however, U.S. prosecutors filed a motion to dismiss the U.S. prosecution. They had earlier expressly admitted having no "smoking gun"-type evidence, and now, in a filing specifically designed to "provide a statement of reasons and underlying factual basis for the motion to dismiss," U.S. prosecutors specifically listed new "evidentiary concerns," after revealing previously undisclosed recantations by several Government witnesses. Although U.S. prosecutors initially sought to dismiss the U.S. criminal case without prejudice, they ultimately agreed to a dismissal with prejudice, which the U.S. District Judge granted in 2009. All U.S. forfeiture proceedings were also similarly dismissed with prejudice. Petitioner's extradition case then proceeded in D.C.'s federal court before a U.S. Magistrate Judge, with Petitioner held in federal custody after the extradition case's detainer was activated. Mr. Ye Gon has now been continuously incarcerated for a period of more than 7 ½ years.

Following various submissions and briefings, extradition hearings were held on May 14 and June 3, 2010. Petitioner called two witnesses, both accepted as experts: Johns Hopkins University Chemistry Professor Dr. Thomas Lectka, and George Washington University Law Professor Stephen Saltzburg. With Professor Saltzburg's support, Petitioner raised a *non bis in idem* defense against successive prosecutions. As the extradition magistrate himself specifically

noted, "It appears that there are only two reported cases in American legal history" in which an independent U.S. prosecution has preceded a foreign government's extradition request. As Petitioner also noted, this appears to be the first case ever in American legal history in which a related U.S. prosecution was dismissed with prejudice. In addition to *non bis in idem*, Petitioner also raised dual criminality defenses, based on Dr. Lectka's testimony that the particular substances Mexico had alleged were imported by Petitioner did not represent controlled substances under U.S. law.[9] Various other legal challenges were also raised. On February 9, 2011, however, the extradition magistrate rejected all of these arguments, and certified Petitioner's extraditability on each of Mexico's charged offenses. Pet. App. at 104.

A habeas corpus petition was filed the next morning in the U.S. District Court for the Western District of Virginia, where Petitioner was then detained. On November 25, 2013, following various proceedings, submissions and oral arguments, the district court

[9] Dr. Lectka, a DEA licensee, swore that N-acetyl pseudoephedrine (allegedly found in the first three shipments) is not a salt, optical isomer, or salt of optical isomer of pseudoephedrine – and thus neither a controlled substance nor List I chemical under U.S. law. Dr. Lectka also swore that the form of ephedrine acetate described as being found in the fourth shipment, based on the molecular weight described in the Mexican Central Lab's own lab report, was "most likely" not a salt, optical isomer or sale of an optical isomer of ephedrine, and thus neither a controlled substance nor a List 1 chemical under U.S. law. This expert testimony was entirely unrebutted.

denied habeas corpus and issued an Opinion, later amended on January 17, 2014, adopting the extradition magistrate's factual findings, but often relying on different grounds than the extradition magistrate had articulated. Pet. App. at 31. The district judge nevertheless acknowledged that "Ye Gon may be innocent of the Mexican charges against him," Pet. App. at 85, and in a separate opinion, further noted that there was more than a mere possibility Petitioner might succeed on appeal "on at least some of his claims, especially his dual criminality challenges and his *non bis in idem* challenges." *Ye Gon v. Holt*, 2014 U.S. Dist. LEXIS 6568, at *3 (W.D. Va. 2014). A timely appeal was filed, but on December 16, 2014, the court of appeals affirmed, in a published opinion which again often relied on different grounds. Pet. App. at 1.

Three issues are pertinent here. On the issue of *non bis in idem*, the court of appeals became the first, ever, to reject the "same offense" framework established in *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980), which Professor Saltzburg described in sworn testimony as the seminal case in this context, followed for decades by other federal courts – thus creating a Circuit conflict. On the issue of dual criminality, the court of appeals failed to accurately apply this Court's rule in *Collins v. Loisel*, 259 U.S. 309, 312 (1922), which specifies that dual criminality requires that the "particular act charged must be criminal in both jurisdictions" – with the court of appeals in the process becoming the ***first in American history*** to authorize a U.S. extradition that will allow for a

felony conviction based ***solely*** on evidence that the Petitioner ***passively possessed firearms without approval from the military***. Finally, the court of appeals refused to even address Petitioner's rule of specialty issue, thereby diminishing the role of the U.S. Judiciary in future extradition proceedings. These are questions of exceptional importance, and create conflicts within the Circuits and with relevant decisions of this Court. Similar issues are likely to recur in future extradition proceedings, and accordingly, this Court should issue a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should be Granted Because the Court of Appeals' Decision Creates a Circuit Conflict on the Issue of *Non Bis In Idem*

The U.S.-Mexico extradition treaty's Article 6 ("Non bis in idem") states:

> Extradition shall not be granted when the person sought has been prosecuted or has been tried and convicted or acquitted by the requested Party for the offense for which extradition is required.

Here, where Mr. Ye Gon ***had*** earlier been prosecuted on admittedly "related" charges in the U.S., with all U.S. criminal charges then dismissed ***with prejudice***, Pet. App. at 9, the court of appeals did not deny either that Petitioner had been "prosecuted" or "acquitted" by the U.S. as the "requested Party."

But the court of appeals expressly adopted the "same elements" test of *Blockburger v. United States*, 284 U.S. 299 (1932), arising from U.S. Double Jeopardy law, to the very different international rule of *non bis in idem*, and then found that since the U.S. and Mexican charges had different elements, extradition was not barred.[10] In doing so, the court of appeals became the first Circuit Court ***ever*** to expressly "decline to follow *Sindona*'s 'same conduct' framework." Pet. App. at 19.

Other U.S. courts have recognized that "a treaty could contain a double jeopardy provision more restrictive – that is, barring more prosecutions – than the [U.S.] Constitution's Double Jeopardy Clause." *United States v. Rezaq*, 134 F.3d 1121, 1128 (D.C. Cir.), *cert. denied*, 525 U.S. 834 (1998). And as Professor Stephen Saltzburg testified under oath, international principles of *non bis in idem* have long been recognized as broader than U.S. Double Jeopardy law.

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[10] Article 6 of the U.S.-Mexican extradition treaty is actually a successive prosecution bar, not a double jeopardy provision – indeed, the word "jeopardy" appears nowhere therein. Looking at Article 6's language, the U.S. Government clearly "prosecuted" Petitioner, since it not only "filed criminal charges against Ye Gon in this country" but also "pursued them for two years," "contested the attempts of Ye Gon to obtain a bond," and "otherwise actively sought to convict him of the criminal charges." Pet. App. 53. Moreover, the dismissal of Petitioner's U.S. criminal charges ***with prejudice*** meant he was effectively "acquitted," as Professor Saltzburg testified below. The court of appeals, however, never addressed any of these issues. It based its rejection of Petitioner's *non bis in idem* argument, instead, entirely on the *Blockburger* doctrine.

He also explained why: Because foreign and U.S. laws will almost always have different ***jurisdictional*** elements, "if you applied *Blockburger* to most extradition situations, th[en] essentially you'd never have a double jeopardy bar, almost never, because . . . different nations use different language in describing crimes that are similar." Accordingly, literally for decades, according to Professor Saltzburg, "other courts have tended to follow the lead of the Second Circuit [in Judge Friendly's decision in *Sindona*] and to basically give a broader definition to the bar on success[ive] prosecutions than the *Blockburger* standard."[11]

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[11] *Sindona* applies a "same offenses" test. It does not bar extraditions whenever charges arise from the same "acts," but neither does it require that the crimes have identical "elements." Instead, under its middle-ground approach, the term " 'same offenses' may range from 'identical charges' to 'related . . . but not included charges.' " 619 F.2d at 177. And here, the Government affirmatively ***admitted*** the U.S. charges were "similar" and "related" to Mexico's charges. The extradition complaint itself, ***on its face,*** claims Petitioner's Mexican charges are "related" to his U.S. charges. And the record further reveals that Petitioner's U.S. prosecutor (1) admitted that the U.S. and Mexican prosecutions involved "similar" offenses, (2) described the U.S. prosecution as involving the same "transactions" and "episodes" as Mexico's charges, (3) proceeded on U.S. indictments that expressly charged a conspiracy extending ***into the country of Mexico***, (4) described how "the conduct with which the defendant is charged" in the U.S. case occurred "largely within the country of Mexico," (5) stated that "much of the evidence and witnesses upon which the [U.S.] government would rely are from Mexico," (6) told the judge it would be "fair" to say the evidence he planned to use in the U.S. case was the "same evidence" Mexican prosecutions would use, and (7) stated that "almost every part of the [U.S. criminal] case" would involve "rely[ing]

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Application of the *Blockburger* test to this particular treaty, signed in 1978, would also be ***particularly*** inappropriate – since *Blockburger* was not even recognized as the rule governing U.S. Double Jeopardy law at that time. Shortly before this treaty's signing on May 4, 1978, this Court's latest pronouncement, issued in *Brown v. Ohio*, 432 U.S. 161 (1977), was in fact expressly that "[t]he *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense." *Id.* at 166 n.6. As even the U.S. Government conceded below, treaties are to be ascertained by "the same rules of construction and reasoning which apply to the interpretation of private contracts." Thus, if anything can be said about the treaty parties' understanding of *non bis in idem* in 1978, it is that ***nobody*** likely believed its principles (or even U.S. Double Jeopardy principles) at that time were limited to the *Blockburger* test, since this Court had just announced that reality.[12]

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on foreign witnesses," since necessary evidence "cannot come from witnesses in the United States." The court of appeals thus did not (and could not legitimately) say that the U.S. and Mexican charges were not the "same offenses" under *Sindona*.

[12] It is no answer to this issue to reference this Court's decision issued 15 years later, in *United States v. Dixon*, 509 U.S. 688 (1993), or Executive Branch comments on *other* treaties issued by another State Department trying to expand extraditions, at points years later (after the Reagan Administration, with a very different foreign policy paradigm, replaced the Carter Administration). The key issue is the parties' understanding of meaning of this treaty's terms ***when signed on May 4, 1978***.

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This Court's stated understanding of double jeopardy in 1977-78, as expressed in *Brown*, is similar to the understanding of *non bis in idem* described by Professor Saltzburg, and codified in Judge Friendly's seminal *Sindona* opinion in 1980. And as *Sindona* noted, "[f]oreign countries could hardly be expected to be aware of *Blockburger*." 619 F.2d at 178. Given this common understanding that existed between the signatory parties at the time, the court of appeals was obliged to apply that common understanding to this treaty. Moreover, as Professor Saltzburg noted, a broader test than *Blockburger* must be applied if *non bis in idem* clauses are to have any real meaning. The court of appeals thus erred in becoming the first Circuit, ever, to reject *Sindona*'s test for *non bis in idem*, and certiorari should be granted to resolve this Circuit split, with the case remanded so that the proper framework in this context can be considered.[13]

Given *Brown*'s express statement in 1977, Government officials negotiating this treaty would have been presumptuous indeed to blithely ignore these broader double jeopardy principles contemporaneously stated by this Supreme Court.

[13] Petitioner's briefs below detailed why *non bis in idem* will bar extradition of various claims under the *Sindona* test. *See also* note 11, *supra*. The court of appeals, however, never evaluated that issue. If the *Sindona* test is properly adopted for *non bis in idem* review, as requested here, this Court should remand so that the court of appeals can then apply that proper standard to this case's facts. Once applied, that *Sindona* test is met. *See also*, Affidavit of DEA Agent Chavez in Support of U.S. Criminal Complaint ¶ 6 (specifically alleging in his U.S. prosecution that Petitioner was also importations were "violating Mexican law" in furtherance of the U.S. conspiracy).

II. Certiorari Should be Granted Because the Court of Appeals' Decision Conflicts with this Court's Dual Criminality Decision in *Collins v. Loisel*

Before any extradition, the law requires that the act charged be criminal in both countries. As this Court has specified in *Collins v. Loisel*, 259 U.S. 309 (1922), the relevant issue when evaluating this "dual criminality" requirement is whether "the ***particular act charged*** is criminal in both jurisdictions." *Id.* at 312 (emphasis added).

The court of appeals acknowledged "[t]he language that Ye Gon cites from Collins," but nevertheless held that it would allow even ***uncharged*** acts to satisfy the dual criminality requirement, suggesting that "Collins did not address the question of the scope of the conduct that may be considered in conducting a dual criminality analysis." Pet. App. at 21. The court of appeals' statement cannot fairly be reconciled with *Collins*' ***express language***, however. This Court in *Collins* did indeed discuss "the scope of the conduct that may be considered" – this Court even specified how "the ***particular act charged***" must be criminal in both jurisdictions. The court of appeals' decision thus flies in the face of this Court's directive – since it allows even ***uncharged*** acts to satisfy dual criminality – and then goes further, even stating that those acts would suffice if they simply satisfy a ***generic*** "same basic evil" test. Pet. App. at 20. Finding dual criminality based on alleged generic similarities of each signing party's laws – even when the specific

charges ***do not*** represent a crime – would rework this Court's dual criminality case law dating back almost a century. That is not what *Collins* held, and the court of appeals' "broader framework," authorizing use of "conduct outside that alleged in the requesting country's charging documents," Pet. App. at 21, will create great mischief in future extradition proceedings.[14]

Even here, one sees disturbing elements of the mischief this expansion can create. The chemicals Petitioner supposedly imported into Mexico, for example, plainly were not controlled substances in the U.S., as Dr. Lectka verified. While the Government did advance a theory, after Dr. Lectka testified, that Petitioner had reasonable cause to believe these substances would be used to manufacture another controlled substance, thereby attempting to establish dual criminality under 21 U.S.C. § 843(a)(6) & (7), no evidence at all was ever presented that any of these four shipments was ever actually used to make another substance; the necessary link was absent. And even if such evidence did exist, Mexico's

[14] Under the court of appeals' overbroad "same basic evil" approach, which the district court had ***declined*** to adopt from the U.S. Magistrate Judge's opinion, executives of a U.S. company, for example, operating in another country and using chemicals that fully comply with specific U.S. pollution standards, could then face extradition for ***criminal prosecution*** in another country that has different pollution laws that outlaw a chemical that the EPA has ***approved*** – on this theory that both countries have pollution laws and thus offenses directed at the "same basic evil."

charged acts never asserted such a link, as *Collins* requires. These were, instead, wholly uncharged acts raised after Mexico's extradition request was filed. Stated differently, if Petitioner is now extradited, no Mexican court ***will ever need to*** (or in fact ***ever will***) determine if Petitioner knew or had reasonable cause to believe that these imported substances would be used to manufacture any product illegal in the U.S. And this is, of course, what the dual criminality doctrine is designed to prevent – a person who would be innocent in the U.S. being extradited to face serious charges in Mexico based on acts the U.S. would not regard as criminal – with a felony conviction and lengthy prison term possible.[15]

Mexico's money laundering charge that Mr. Ye Gon merely "maintained funds" in Mexico, moreover, contains its own independent dual criminality infirmities. The court of appeals acknowledged that Mexico's charged offense does not include any charged financial transaction – an admitted requirement for the offense to constitute a violation of U.S. money laundering laws. *See* 18 U.S.C. § 1956. In reality,

[15] Each of Mexico's other charged offenses is necessarily dependent, directly or indirectly, on the validity of Mexico's drug charges as a predicate offense. For example, Mexico's money laundering charge depends on a theory that Petitioner's money represented the proceeds of illegal drugs. Mexico's Organized Crime charge, in turn, is dependent on these same predicate offenses of illegal drug dealing and money laundering. So non-extraditability on Mexico's drug offenses should also bar Petitioner's extradition on Mexico's other charged offenses.

Mexico's charged offense actually asserts the ***opposite*** of a financial transaction – that Petitioner merely "maintained funds in Mexican territory," knowing that the funds had an illegal source.[16] Perhaps Mexico could have charged acts involving more than "maintaining funds," or amended its extradition request, but it chose not to do so. Yet the court of appeals overlooked this deficiency, based ***merely on what a prosecutor claimed***. *See* Pet. App. at 25 ("The Mexican prosecutor did cite financial transactions. . . ."). This notion that a prosecutor's statements alone – even if never adopted in the probable cause finding contained in a requesting country's charging documents – will suffice in this context, totally eviscerates the dual criminality requirement in ways this Court's opinion in *Collins* does not permit. Indeed, under the "rule against contradiction" applied in U.S. extradition proceedings generally, Petitioners cannot even contest such factual statements when presented in U.S. courts – which means these statements never approved by Mexico's courts or adopted in any charging documents must simply be accepted as true by our U.S. courts, whether

[16] Many wealthy Americans may be surprised indeed to learn they can be extradited on a foreign charge alleging that, in an overseas home, they simply "maintain funds" that the other country alleges were derived from illegal conduct, unless the accused party can "explain" their wealth, as the U.S. Magistrate Judge complained Mr. Ye Gon had failed to do here. Without any "financial transaction" required, that is the essence of Mexico's money laundering charge.

accurate or not. Under the court of appeals' analysis, the "dual criminality" requirement will thus become meaningless, and no longer serve its historic role as an important check on overreaching extradition efforts.[17]

Similar concerns arise from the court of appeals' unprecedented approval of an extradition that will force Petitioner to face Mexican criminal charges alleging a mere ***status*** offense of passively possessing firearms without authorization from the government's military. Mexico does not charge that Petitioner ever brandished or used any of these firearms; indeed, the firearms were seized ***months after*** Petitioner had ***already left Mexico***. Nor are Mexico's charges dependent on any proximity between any of these firearms and money or drugs. Instead, Mexico's firearms charges arise ***solely*** from its allegation that Petitioner violated Mexican law by possessing firearms "of a kind reserved for the exclusive use of the military."

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[17] This is why "uncharged" acts cannot properly satisfy dual criminality. If even uncharged acts could support dual criminality, the Government essentially would never lose an extradition, because its unlimited ability to add new (uncharged) acts – which cannot even be contradicted – would allow it to establish dual criminality in any deficient petition. Constrained by this rule against contradiction, a U.S. Magistrate cannot make factual findings that suddenly establish dual criminality. Probable cause and dual criminality are separate issues, and with the latter, it is ***Mexico's*** (not the Magistrate's) charged acts that control.

The United States obviously has no laws remotely comparable to Mexico's federal offense banning simple possession of such firearms by persons not authorized by its organized military to have them. Indeed, even under the overbroad standard of dual criminality adopted by the court of appeals, our two countries' laws in this context are not even aimed at the "same basic evil." The so-called "evil" targeted by Mexico – guns possessed by persons outside the military – is flatly rejected in the Second Amendment to our U.S. Constitution. Mexico's law on which extradition is sought ***literally*** appears to prohibit, ***by design***, the very concept of a citizen militia comprised of individuals with a right to keep and bear arms. And no crime appears to exist at all in Mexico for possessing a firearm in furtherance of a drug offense, or possessing a firearm with an obliterated serial number. This is not "dual" criminality, but two entirely different types of criminality. And even persons ***wholly innocent*** of 18 U.S.C. §§ 924(c) and 924(o) offenses can be convicted of the mere status offenses that Mexico is charging, if such extradition is allowed.

To be clear, neither the court of appeals nor any other court below ever made factual findings that Mr. Ye Gon did possess firearms in furtherance of drug trafficking, or with an obliterated serial number.[18]

[18] Five firearms were allegedly seized in Mexico. Four were said to be in Petitioner's home – where no controlled substances of any kind were ever found, and where no drug transactions

(Continued on following page)

And if Petitioner is extradited on these charges, no jury, judge or court ***ever will*** make ***any*** of those determinations. The required dual criminality is therefore lacking. The court of appeals erred in becoming the first ever to allow a person to be extradited to face a mere status offense, as a felony, that codifies a principle (that only a federal military gets to decide who can possess firearms) ***antithetical*** to the values enshrined in our Second Amendment – as clarified by this Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008). The Government's request for extradition on these charges in this case stands in stark contrast to its previous treatment of such offenses, *see, e.g., In re Petition of France for the Extradition of Sauvage*, 819 F. Supp. 896, 899 (S.D. Cal. 1993) (France charged that Sauvage possessed a "stock of war weapons," but "[n]o request for extradition is brought for firearms violations"), and certiorari ought to be granted to assure adherence to this Court's dual criminality rule in *Collins*, and to preserve these principles enshrined in our Second Amendment.

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were even ***alleged*** to have taken place – inside "a locked, hidden room off the master bedroom." As for the fifth firearm, it was said to be found in a file cabinet in Petitioner's personal office in Mexico City, at a location where police also found small baggies with typed "Lot #" designations – obvious batch samples left over from his company's prior, ***legal*** sales of pseudoephedrine-related products. Mexico also never claimed this fifth firearm had an "obliterated" serial number – at most, Mexico simply asserted that no serial number was "visible."

III. Certiorari Should be Granted Because the Court of Appeals' Refusal to Address Petitioner's "Rule of Specialty" Issue Will Fundamentally Diminish the U.S. Judiciary's Role in Extraditions Generally

Finally, the court of appeals failed to address the significant risks to judicial power inherent in its refusal to address Petitioner's Rule of Specialty issue. This Court should thus grant certiorari to preserve and defend the U.S. Judiciary's important role in extradition proceedings generally. *See In re Kaine*, 55 U.S. 103 (1853) (describing Judicial Branch's vital role in overseeing extraditions as an independent check on Executive Branch power).

Although never mentioned in the court of appeals' decision, the Executive Branch took an extraordinary, aggressive position in this case. As Petitioner noted below, Mexico has filed additional, separate tax and smuggling charges against Petitioner – on which the U.S. never sought extradition.[19] This is not a situation in which later criminal charges emerged after an extradition was over, and the U.S. Secretary of State then was asked to consent to prosecution on newly-filed charges. These are charges instead already fully known to the U.S. Government, on which no extradition approval was sought from U.S. courts. When Petitioner argued below that no prosecution

[19] Neither Petitioner nor his counsel has ever been served with these new Mexican charges.

should be allowed on these other known charges under the Rule of Specialty, which allows prosecutions only on specific charges an extradition authorizes, the Government boldly responded by asserting that "[t]he decision whether to waive the Rule of Specialty when another country wishes to prosecute for offenses not included in the original extradition request ***rests exclusively with the Secretary of State***." (emphasis added).

The Executive Branch's claims of "exclusive" power in this context would fundamentally change the nature of extradition proceedings, and diminish the role of the U.S. Judiciary generally. If our Executive Branch is afforded the "exclusive" power it claims, the implications are ominous: Any person judicially ordered extradited, even on a very minor criminal charge, would then be entirely powerless (as would the U.S. courts) to stop the Executive Branch from then expanding that extradition to allow prosecution on any other crime or crimes – no matter how many other charges might exist, or how serious they may be.

This case appears to be the first in U.S. history in which the Executive Branch has sought to reserve to itself, ***in advance***, a right to unilaterally authorize a prosecution on foreign charges ***already known*** to the U.S. Secretary of State, which ***could have been but were not*** brought to the U.S. courts for judicial review – in essence, ***a power to circumvent the U.S. Judiciary in extraditions***.

The court of appeals ignored these larger concerns about the U.S. Judiciary's role, and essentially punted, indicating that it would "decline to rule" on Petitioner's Rule of Specialty claim, for two reasons. First, the court of appeals suggested that Petitioner may lack standing to assert this claim. But that finding is inconsistent with this Court's precedent. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Services* (*TOC*)*, Inc.*, 528 U.S. 167, 180-81 (2000). Indeed, citing *Friends of the Earth* just a few years ago in an earlier published decision, this same court of appeals had itself acknowledged that under that case, "there is little question that an individual who is extradited for one offense but then tried for a completely different one suffers a concrete injury." *United States v. Day*, 700 F.3d 713, 721 (4th Cir. 2012). But now, in the instant case, the court of appeals oddly avoided *Day* by asserting that it had simply "assumed without deciding" standing in that case – but without ever addressing this Court's *Friends of the Earth* decision at all, or other related standing precedent. Moreover, as *Day* revealed, even before *Friends of the Earth* issued, there was at least a split among the Circuits on whether an individual has standing to raise treaty-based defenses. *Compare United States v. Cuevas*, 847 F.2d 1417, 1426 (9th Cir. 1988) (yes); *United States v. Diwan*, 864 F.2d 715, 721 (11th Cir. 1989) (yes); *with United States v. Kaufman*, 874 F.3d 242, 243 (5th Cir. 1989) (no); *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir. 1973) (no). Thus, even if *Friends of the Earth* did not control this

standing issue, certiorari is independently warranted to resolve that separate Circuit split.

Second, the court of appeals suggested that this issue "is not yet ripe," because Mr. Ye Gon has not yet been extradited. But this argument is absurd – since it is obvious that when this issue supposedly does "ripen," it will simultaneously become moot, with Petitioner wholly unable to effectively exercise (much less enforce) any such rights in U.S. courts after he is sent to a foreign country. *See Ye Gon v. Holt*, 2014 U.S. Dist. LEXIS 6568, at *3 (W.D. Va. 2014) ("the Government 'does not disagree' that if Ye Gon were deported while his appeal was pending, the appeal would be moot."). Despite Petitioner's claim below that this represented a legal issue capable of repetition yet evading review, the court of appeals refused to address it.

Even if this Court may harbor doubts whether it can or should compel a ***foreign*** government to issue assurances it will comply with this Court's rulings, it is manifest that U.S. courts have an obvious right, and indeed a duty, to ensure that ***U.S.*** officials will comply with the letter and spirit of U.S. court orders. And more broadly, the U.S. Judicial Branch has an obligation to protect and preserve its own historic oversight authority over foreign extraditions. The Executive Branch should not be given a blank check to expand the scope of Petitioner's extradition beyond what U.S. courts have ever approved, or even contemplated, by ***later*** adding foreign criminal charges ***already known***.

The U.S. Government apparently has little fear that this Court will reign in the Executive Branch's extradition excesses. The State Department's own Foreign Affairs Manual affirmatively notes how "[t]he Supreme Court receives thousands of petitions a year and agrees to hear fewer than 100 of them, so the likelihood of Supreme Court review is very low. In fact, the Supreme Court has not taken an extradition case in the last 70 years." 7 FAM 1634.3(d) (Judicial Review of a Finding of Extraditability). Particularly in a case like this, however, where the U.S. Judiciary's authority has been directly challenged, and can now plainly be circumvented without any viable recourse then available to this Petitioner, this Court should issue a writ of certiorari to address his Rule of Specialty issue. At a minimum, this Court should remand with a directive that the court of appeals preserve the U.S. Judiciary's authority in this extradition context, by adding the following important (but modest) clarification to its opinion below: that Petitioner cannot be prosecuted on other, ***existing*** charges that Mexico and the U.S. Department of Justice's officials could have, but did not, bring before the U.S. courts, ***without further leave of the U.S. courts***.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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ZHENLI YE GON, Petitioner-Appellant, v. GERALD S. HOLT, U.S. Marshal for the Western District of Virginia; FLOYD G. AYLOR, Warden of the Central Virginia Regional Jail, Respondents-Appellees, and ERIC H. HOLDER, JR., Attorney General of the United States; HILLARY RODHAM CLINTON, United States Secretary of State; EDWIN D. SLOANE, United States Marshal for the District of Columbia, Respondents.

No. 14-6102

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

774 F.3d 207*; *2014 U.S. App. LEXIS 23570

October 29, 2014, Argued
December 16, 2014, Decided

COUNSEL: ARGUED: Gregory Stuart Smith, GREGORY S. SMITH, ATTORNEY AT LAW, Washington, D.C., for Appellant.

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JUDGES: Before SHEDD and FLOYD, Circuit Judges, and DAVIS, Senior Circuit Judge.

OPINION BY: SHEDD

OPINION

SHEDD, Circuit Judge:

In 2008, Mexico sent a request to the United States to extradite Zhenli Ye Gon, a Mexican citizen. Ye Gon's extradition hearing was held before a magistrate judge in the District of Columbia, who determined that Ye Gon was extraditable under the Extradition Treaty Between the United States of America and the United Mexican States[1] ("Treaty"). Ye Gon then filed a habeas corpus petition challenging this determination in the Western District of Virginia, and the district court denied that petition. Ye Gon now appeals the denial, claiming that the magistrate judge lacked jurisdiction to conduct the extradition proceeding and that the Treaty bars his extradition. We affirm.

[1] U.S.-Mex., May 4, 1978, 31 U.S.T. 5059.

I.

We begin by reviewing the mechanics of the extradition process generally, as well as the specific requirements imposed by this Treaty. The process of extraditing a non-United States citizen to a foreign nation is conducted largely by the United States Department of State, which receives any requests for extradition from foreign nations and determines whether those requests are governed by a treaty. *Mironescu v. Costner*, 480 F.3d 664, 665 (4th Cir. 2007). If the State Department determines that there is an applicable treaty, it refers the matter to the Justice Department, which in turn reviews the request under the applicable treaty. If the Justice Department deems the request valid, it then refers the matter to the United States Attorney for the district in which the fugitive is believed to be located. *Id.*

The United States Attorney then files a complaint before a federal justice, judge, or magistrate, seeking a warrant for the fugitive's arrest and a certification that he may be extradited. 18 U.S.C. § 3184. Because the extradition statute provides that this judge may "charg[e] any person found within his jurisdiction" with having committed a foreign crime, *id.*, only judicial officers with jurisdiction over the place where the fugitive is "found" may conduct these extradition proceedings. *See Pettit v. Walshe,* 194 U.S. 205, 218-19, 24 S. Ct. 657, 48 L. Ed. 938 (1904).

Once the extradition judge has issued the extradition warrant and the fugitive has been apprehended, he is brought before that judge for an extradition hearing. 18 U.S.C. § 3184. The extradition hearing is not a full trial; rather, its purpose is to determine (1) whether there is probable cause to believe that there has been a violation of the laws of the foreign country requesting extradition, (2) whether such conduct would have been criminal if committed in the United States, and (3) whether the fugitive is the person sought by the foreign country for violating its laws. *Peroff v. Hylton,* 542 F.2d 1247, 1249 (4th Cir. 1976). If the extradition judge determines that the fugitive is extraditable, he must send his certification of extraditability to the Secretary of State, who has the final executive authority to determine whether to extradite the fugitive. 18 U.S.C. §§ 3184, 3186; *Plaster v. United States,* 720 F.2d 340, 354 (4th Cir. 1983) ("Within the parameters established by the Constitution, the ultimate decision to extradite is, as has frequently been noted, reserved to the Executive as among its powers to conduct foreign affairs.").

The extradition judge who conducts the hearing does not do so in his capacity as a judicial officer of the United States. *In re Kaine,* 55 U.S. 103, 120, 14 L. Ed. 345 (1852). The issuance of a certification of extraditability is therefore not a final order within the meaning of 28 U.S.C. § 1291. As a result, and because § 3184 does not provide for direct review of extradition decisions, a fugitive's only avenue to challenge the decision is to file a petition for habeas

corpus review under 28 U.S.C. § 2241. *See Haxhiaj v. Hackman,* 528 F.3d 282, 285-86 (4th Cir. 2008); *Ordinola v. Hackman,* 478 F.3d 588, 598 (4th Cir. 2007). Habeas corpus review of an extradition case is limited to determining whether the extradition judge had jurisdiction, whether the charged offense is an extraditable offense under the applicable treaty, and whether there is any evidence warranting the conclusion that probable cause exists for the violation of the foreign country's laws. *Ordinola,* 478 F.3d at 598. It is the State Department's practice to suspend all action on an extradition request once it becomes aware that the fugitive has filed a petition for habeas corpus review. Department of State, 7 Foreign Affairs Manual 1634.3(f), "Judicial Review of a Finding of Extraditability" (2005).

The Treaty in this case obligates Mexico and the United States to extradite persons whom the authorities of the country requesting extradition have charged with committing an offense within that country's territory. Treaty art. 1. The country requesting the return of such a person is termed the "requesting country," and the country asked to return such a person is called the "requested country." This mutual obligation to extradite is, however, subject to certain limitations. Those relevant to this case are outlined below.

Article 6 of the Treaty, entitled "Non bis in idem,"[2] is analogous to our constitutional prohibition on double jeopardy. In essence, it prevents a fugitive from being tried for the same offense in two different countries. The provision states that the requested country shall not extradite a fugitive who "has been prosecuted or has been tried and convicted or acquitted" in that country, if that prosecution or trial was "for the offense for which extradition is requested."

The Treaty also restricts the offenses for which a fugitive may be extradited to those that are criminal in both the United States and Mexico. This limitation is known as "dual criminality," and it "ensures that the charged conduct is considered criminal and punishable as a felony in both the country requesting the suspect and the country surrendering the suspect." *Ordinola,* 478 F.3d at 594 n.7. The Treaty's version of the dual criminality requirement is set forth in Article 2, which states that "[e]xtradition shall take place . . . for wilful acts which . . . are punishable in accordance with the laws of both Contracting Parties."

Finally, the Treaty codifies a customary principle of international relations in Article 17, titled "Rule of Specialty." The rule of specialty is premised on a "norm of international comity." *United States v. Day,* 700 F.3d 713, 722 (4th Cir. 2012). The Supreme Court

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[2] In English, this phrase means "not twice for the same thing." Black's Law Dictionary 1150 (9th ed. 2009).

has recognized for more than a century that it is generally accepted that extradited persons, once returned to the requesting country, may be tried only for those offenses for which extradition was granted by the requested country. *See United States v. Rauscher,* 119 U.S. 407, 416-17, 7 S. Ct. 234, 30 L. Ed. 425 (1886). The Treaty makes this rule explicit, stating that "[a] person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted." Treaty art. 17.

II.

Having described the legal landscape in which this appeal arises, we now turn to the facts. Zhenli Ye Gon, a citizen of Mexico, owned and operated pharmaceutical businesses in and around Mexico City, including Unimed Pharm Chem. Beginning in 2003, Unimed legally imported psychotropic substances, including pseudoephedrine, into Mexico, until the Mexican authorities revoked Unimed's authorization to import or manufacture such substances in July 2005. Despite this loss of permission, Ye Gon continued to import these substances, and in October 2005 began construction of a new Unimed pseudoephedrine manufacturing plant in Toluca, Mexico. Once the plant was operational, it manufactured over 600 kilograms a day of a white crystalline powder, which was later tested and found to contain ephedrine,

pseudoephedrine, methamphetamine acetate, and other psychotropic substances under Mexican law.

Believing that he was engaged in the large-scale manufacture and distribution of methamphetamine, a Mexican court issued a warrant for Ye Gon's arrest in June 2007. The next month, the United States government filed a criminal complaint against Ye Gon in the United States District Court for the District of Columbia, charging him with illegally importing drugs into the United States. He was arrested in Maryland on this charge in July 2007 and was transferred to the custody of the United States Marshal in the District of Columbia. The government filed a superseding indictment against Ye Gon in November 2007, charging him with conspiring to aid and abet the manufacture of 500 grams or more of methamphetamine, knowing that it was to be imported into the United States, in violation of 21 U.S.C. §§ 959, 960, and 963, and 18 U.S.C. § 2.

In June 2008, pursuant to the Treaty, Mexico requested Ye Gon's extradition from the United States to face prosecution on charges of organized crime; unlawful firearm possession; money laundering; diversion of essential chemicals; and drug importation, transportation, manufacturing and possession. The government filed an extradition complaint in the District Court for the District of Columbia in September 2008. In June 2009, approximately four months before Ye Gon's criminal trial was scheduled to begin, the government moved to dismiss the charges against Ye Gon to allow for his extradition and

trial in Mexico. The government's stated reasons for requesting this dismissal included Mexico's significant and separate interests in prosecuting the case, the fact that the conduct charged occurred largely within Mexico, and the fact that much of the evidence and witnesses that the government would rely on in prosecuting the case were located in Mexico. The government also stated that it had concerns about the strength of its evidence in light of recent recantations by key witnesses. In August 2009, with the government's consent, the district court dismissed the criminal charge against Ye Gon with prejudice.

Ye Gon's extradition hearing was then held before a federal magistrate judge in the District of Columbia beginning in September 2008. After extensive proceedings, including a multi-day evidentiary hearing, the magistrate judge issued a certification of extraditability. *In re Zhenly Ye Gon,* 768 F. Supp. 2d 69 (D.D.C. 2011). Two days later, Ye Gon filed a petition for a writ of habeas corpus in the Western District of Virginia, where he was then being held. Ultimately, the district court denied the petition. *Zhenli Ye Gon v. Holder,* 985 F. Supp. 2d 733 (W.D. Va. 2013).

In this appeal from the denial of his habeas petition, Ye Gon raises four claims: (1) the D.C. magistrate judge did not have jurisdiction to issue his certification of extraditability because Ye Gon was not "found within" the District of Columbia for purposes of 18 U.S.C. § 3184; (2) the Non Bis In Idem clause of the Treaty prevents his extradition on the Mexican

charges because his United States conspiracy charge has been dismissed with prejudice; (3) the Treaty's dual criminality requirement prevents his extradition because the Mexican crimes with which he is charged are not also criminal in the United States; and (4) the Treaty's rule of specialty provision requires this court to limit the charges on which he can be tried in Mexico to those authorized by the extradition magistrate. For the reasons that follow, we find that none of these claims merits relief and affirm the district court's denial of the habeas petition.

III.

Ye Gon first claims that the magistrate judge who conducted his extradition proceedings lacked jurisdiction over him under 18 U.S.C. § 3184. He contends that he was not "found within [the] jurisdiction" of the D.C. magistrate because he was arrested on criminal charges in Maryland and was then transported to the District of Columbia against his will.

Although we have reviewed many extradition proceedings conducted under Section 3184, we have never elaborated on its jurisdictional requirements. Only one of our decisions, *Atuar v. United States,* 156 Fed. Appx. 555 (4th Cir. 2005) (unpublished), has mentioned even in passing the issue of jurisdiction under § 3184. There, we agreed with the parties' stipulation that the extradition judge, a West Virginia magistrate, had jurisdiction to conduct a § 3184 hearing because "at the time the petition was formally

filed against [the suspect], he was incarcerated in . . . West Virginia." *Id.* at 559 n.5.

The most logical reading of the text of § 3184 supports the view that the fugitive's location at the time extradition proceedings are brought against him determines where he is "found." The statute states that the extradition judge may charge a person "found within his jurisdiction" with having committed a crime in a foreign country in violation of an extradition treaty. The jurisdictional requirement is thus textually linked to the extradition charge. The most natural reading is that the two are temporally linked as well – that is, jurisdiction must be satisfied at the time that the fugitive is charged with having committed an extraditable offense. Section 3184, therefore, apparently requires that a fugitive's extradition hearing be held before a judge with jurisdiction over the place where he was found as a fugitive.

Binding authority on this point is limited to *Pettit v. Walshe,* 194 U.S. 205, 24 S. Ct. 657, 48 L. Ed. 938 (1904). In Pettit, an immigration commissioner in New York issued an extradition warrant for Walshe, a British citizen, and ordered Walshe to be brought to New York to appear before him. Walshe was arrested in Indiana and transported to New York for his extradition hearing. The Supreme Court held, under the terms of the treaty between the United States and Great Britain and a predecessor of § 3184, that the commissioner could not order Walshe to appear in New York; rather, the extradition hearing could properly have been held only in Indiana because "the

evidence of the criminality of the charge must be heard and considered by some judge or magistrate . . . sitting in the state where the accused was found and arrested." *Id.* at 218-19.

The arrest at issue in *Pettit* was made pursuant to an extradition warrant. Here, by contrast, the warrant upon which Ye Gon was arrested in Maryland was for a United States criminal charge. No extradition complaint was filed against Ye Gon until September 2008, when Ye Gon was already in federal custody in the District of Columbia. We read Pettit, consistent with our reading of the statute's text and with our unpublished decision in Atuar, to establish only that a defendant must be tried in the same location where his extradition warrant is executed – in Ye Gon's case, in the District of Columbia. *Pettit* thus provides no support for Ye Gon's argument that the location of his arrest on the drug conspiracy charge is relevant under Section 3184.

Ye Gon argues that the fact that he was moved from Maryland to the District of Columbia against his will precludes the D.C. magistrate from exercising jurisdiction over him. We find no merit in this argument. Under the Ker-Frisbie doctrine, a defendant's involuntary presence in a court is not a bar to personal jurisdiction. *See Frisbie v. Collins,* 342 U.S. 519, 522, 72 S. Ct. 509, 96 L. Ed. 541 (1952) ("This Court has never departed from the rule announced in *Ker v. Illinois,* 119 U.S. 436, 7 S. Ct. 225, 30 L. Ed. 421, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within

the court's jurisdiction by reason of a 'forcible abduction.'"); *United States v. Shibin,* 722 F.3d 233, 243 (4th Cir. 2013) (holding, in an extradition case, that "[u]nder the Ker-Frisbie doctrine, the manner in which the defendant is captured and brought to court is generally irrelevant to the court's personal jurisdiction over him.").[3]

Further, when construing other jurisdiction and venue statutes concerning foreign nationals that, like § 3184, require a defendant to be "found in" a place, we have held that this "found in" requirement is satisfied even when the defendant is brought there against his will. For example, in Shibin, we held that a defendant was "found" in the United States and could be tried here on piracy charges, despite being forcibly removed to the United States from Somalia. 722 F.3d at 244. Likewise, in *United States v. Uribe-Rios,* 558 F.3d 347, 356-57 (4th Cir. 2009), we held that a defendant facing deportation was "found in" and could be tried in the Western District of North Carolina, although he was transferred there after

[3] Ye Gon also argues that he cannot be tried in the District of Columbia because Maryland is, in the words of *Wright v. Henkel,* 190 U.S. 40, 58, 23 S. Ct. 781, 47 L. Ed. 948 (1903), "the place where [he] was found and, in legal effect, the asylum to which he had fled." His reliance on this language is misleading because it was written to explain why state laws, in addition to federal laws, should be examined for purposes of analyzing dual criminality. Ye Gon's use of this phrase to support his personal jurisdiction argument thus takes it out of context and ignores the case's holding, which was that Wright could be detained pending his extradition.

being first detained by immigration authorities in the Eastern District of North Carolina. Accordingly, the D.C. magistrate judge properly exercised personal jurisdiction over Ye Gon under 18 U.S.C. § 3184.

IV.

Ye Gon next argues that the Treaty's Non Bis In Idem provision in Article 6 bars his extradition. As noted, Ye Gon was charged in the United States with criminal conspiracy to aid and abet the manufacture of methamphetamine. He contends that, because this charge was later dismissed with prejudice, he has been prosecuted and acquitted of it. As a result, he argues, he cannot be prosecuted again on the Mexican charges because each Mexican charge arose out of the same acts or transactions underlying the American conspiracy charge.

To succeed on this argument, Ye Gon must show both that he "has been prosecuted or has been tried and convicted" of the American offense, and that the American offense is "the offense for which extradition is requested" by Mexico. We need not decide whether the D.C. district court's dismissal of Ye Gon's conspiracy charge with prejudice satisfies the requirement that he "has been prosecuted or has been tried and convicted or acquitted" by the United States, because we find that the American conspiracy proceedings were not "for the offense[s]" for which Mexico has requested extradition.

We have never established a framework for examining, under a Non Bis In Idem clause, whether an American offense is "the offense" for which the requesting country seeks extradition. The parties now offer competing frameworks. The government urges us to adopt the familiar test from *Blockburger v. United States,* 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), under which we would ask whether the American and Mexican offenses each contain an element that the other does not. Ye Gon, however, urges us to follow the decision in *Sindona v. Grant,* 619 F.2d 167, 178 (2d Cir. 1980), under which we would compare the conduct underlying the American and Mexican offenses to determine whether both arise out of a "single criminal act, occurrence, episode or transaction" (internal citation omitted).

We begin our analysis with the language of the Treaty. Article 6 directs the parties to examine "the offense for which extradition is requested," while the dual criminality provision in Article 2 prevents extradition for crimes unless they are "wilful acts . . . punishable in accordance with the laws of both Contracting Parties" (emphasis added). The use of the word "offense" in this context and "acts" in another signifies that the "offenses" to be compared during the Non Bis In Idem inquiry must be something other than the acts underlying those offenses. The most natural reading of "offense," as distinct from "acts," is that "offense" refers to the definition of the crime itself. This weighs heavily in favor of the government's elements-based Blockburger approach.

Moreover, the State Department has interpreted similar "offense"-based Non Bis In Idem provisions in other treaties to call for a Blockburger analysis. Many of these treaties were signed within a few years of 1978, when the Treaty at issue in this case was signed. *See*, *e.g.*, Extradition Treaty with the Philippines, S. Exec. Rep. No. 104-29, at 10-11 (1996) (Non Bis In Idem clause applies only where the crimes in both countries are "exactly the same"; "[i]t is not enough that the same facts were involved"); Extradition Treaty with Thailand, S. Exec. Rep. No. 98-29, at 4 (1984) ("offense"-based Non Bis In Idem clause was drafted narrowly to ensure that the person extradited can be tried in two countries for two different offenses, even when "the acts are the same"); Extradition Treaty with Costa Rica, S. Exec. Rep. No. 98-30, at 5 (1984) (prosecution in a second country would be permissible for "different offenses . . . arising out of the same basic transaction"). *See also Elcock v. United States,* 80 F. Supp. 2d 70, 83 (E.D.N.Y. 2000) ("[T]he Department of State has clearly expressed its view that "offense" – based double jeopardy provisions . . . apply only where the elements of the crimes charged in the domestic prosecution and the extradition request are the same, regardless of whether the underlying facts are the same.") Such State Department treaty interpretations are entitled to "substantial deference" from the courts. *United States v. Al-Hamdi,* 356 F.3d 564, 571 (4th Cir. 2004).

Turning now to Ye Gon's proposed framework, we do not find persuasive the reasoning of the Second

Circuit in adopting the "same conduct" test. In Sindona, the State Department initiated an extradition proceeding against an Italian businessman for the Italian crime of fraudulent bankruptcy. Before he was extradited, however, he was indicted in the United States on charges of fraudulent conduct that led to a bank collapse. The Second Circuit examined whether the American charges precluded Sindona's extradition under the treaty between the United States and Italy, which prevented extradition if the fugitive had been tried or proceeded against in the United States "for the offense for which his extradition is requested," 619 F.2d at 176, language almost identical to the Non Bis In Idem clause at issue in this case.

In analyzing whether the Italian and American crimes qualified as the same "offense" under this clause, the Second Circuit rejected the Blockburger test, reasoning that foreign countries could not be expected to be aware of its existence. Instead, the court held that the construction of the Non Bis In Idem clause should be "at least as broad" as two other interpretations of double jeopardy. The first of these was Justice Brennan's concurring opinion in *Ashe v. Swenson,* 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), in which he wrote that any charges arising out of a "single criminal act, occurrence, episode or transaction" on which a criminal trial had already been held should be barred by the *Double Jeopardy Clause*. *Id.* at 453-54. The second was the Justice Department's internal Petite policy, named for *Petite*

v. United States, 361 U.S. 529, 80 S. Ct. 450, 4 L. Ed. 2d 490 (1960), which stated that federal prosecutors should not try defendants "for substantially the same act or acts" that have already been tried in a state prosecution. *Sindona,* 619 F.2d at 178-79 (internal citations omitted). Thus, the Second Circuit appeared to adopt a "same conduct" test for determining whether two countries' offenses are equivalent under a Non Bis In Idem clause.

In the years since Sindona was decided, one of the two foundations for this "same conduct" test has been eroded by later Supreme Court rulings. In *United States v. Dixon,* 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), the Court struck down the "same conduct" rule for double jeopardy analysis as "wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy." In doing so, the Court definitively rejected Justice Brennan's interpretation of the *Double Jeopardy Clause* as expressed in his concurring opinion in Ashe v. Swenson. Sindona's other foundation, an internal Justice Department policy, self-evidently carries no legal authority. Cf. *United States v. Jackson,* 327 F.3d 273, 295 (4th Cir. 2003) ("[I]t is well established that the Petite policy and other internal prosecutorial protocols do not vest defendants with any personal rights."); *United States v. Musgrove,* 581 F.2d 406, 407 (4th Cir. 1978) ("[A] defendant has no right to have an otherwise valid conviction vacated because government

attorneys fail to comply with departmental policy on dual prosecutions.").

In addition to its shaky legal foundations, we believe that the *Sindona* "same conduct" rule proves inadequate upon application, as illustrated in the Sindona decision itself. Immediately after it purported to adopt the "same conduct" test, the Second Circuit concluded that the Italian charge of fraudulent bankruptcy and the American charges of fraudulent conduct did not in fact constitute the same "offense" under the treaty's Non Bis In Idem clause. The court reasoned that, although the Italian crime may have been the "but-for cause" of the American crimes, the harms to the two countries were distinct, and the crimes charged by the American prosecutors were "on the periphery" of the Italian crimes. Thus, after endorsing the "same conduct" test in principle, the court then considered additional factors during its application, effectively acknowledging that the "same conduct" test did not satisfactorily resolve the Non Bis In Idem inquiry.

For these reasons, we decline to follow *Sindona*'s "same conduct" framework, and adopt the *Blockburger* "same elements" test as the proper mode of analysis in this context. Ye Gon does not contest that under a Blockburger analysis, the Mexican offenses of organized crime, unlawful firearm possession, money laundering, diversion of essential chemicals, and drug importation, transportation, manufacturing and possession do not constitute the same "offense" as the American charge of conspiracy to aid and abet the

manufacture of methamphetamine. We therefore hold that Article 6 of the Treaty does not bar Ye Gon's extradition.

V.

Ye Gon next argues that the offenses for which Mexico requests his extradition do not also constitute criminal acts in the United States, and therefore the Treaty's dual criminality provision in Article 2 bars his extradition. In *Collins v. Loisel,* 259 U.S. 309, 312, 42 S. Ct. 469, 66 L. Ed. 956 (1922), the Supreme Court held that dual criminality is satisfied "if the particular act charged is criminal in both jurisdictions," even if the name of the offense or the scope of the liability was different in the two countries. This language has been broadly accepted as establishing that dual criminality requires only that the offenses in the two countries punish the same basic evil; it does not require that the offenses contain identical elements. *See*, *e.g.*, *Clarey v. Gregg,* 138 F.3d 764, 766 (9th Cir. 1998); *Peters v. Egnor,* 888 F.2d 713, 719 (10th Cir. 1989); *Shapiro v. Ferrandina,* 478 F.2d 894, 907-08 (2d Cir. 1973).

Ye Gon concedes that to satisfy dual criminality under Collins, the elements of the two countries' crimes need not be exactly the same. Rather, he argues that the acts alleged in the Mexican charging documents must be sufficient, standing alone, to support United States criminal charges. He rests this argument on language from Collins stating that the

"particular act charged" must be criminal in both jurisdictions. 259 U.S. at 312 (emphasis added).

We disagree with Ye Gon's narrow reading of *Collins*. In our view, it is permissible to examine conduct outside that alleged in the requesting country's charging documents in the course of conducting a dual criminality analysis. The elements of Mexican crimes differ from the elements of American crimes, and Mexico thus has no reason to plead in its own charging documents all facts necessary to make out an American criminal charge. Ye Gon's reading therefore essentially reduces to the "same elements test," which he admits was rejected in Collins. The language that Ye Gon cites from Collins is not to the contrary, because Collins did not address the question of the scope of the conduct that may be considered in conducting a dual criminality analysis.

At least two other circuits have implicitly agreed with our broader framework by actually considering conduct outside that alleged in the requesting country's charging documents when performing a dual criminality analysis. *See Clarey,* 138 F.3d at 766 (9th Cir. 1998) (relying on the American district court's factual findings to establish that petitioner's conduct in Mexico satisfied the American felony murder statute); *Lo Duca v. United States,* 93 F.3d 1100, 1112 (2d Cir. 1996) (relying on evidence presented at

petitioner's Italian trial to establish that his conduct satisfied American criminal statutes).[4]

Having thus established the proper framework, we now examine whether the offenses for which Mexico requests Ye Gon's extradition satisfy the Treaty's dual criminality requirement. Taking into consideration all of Ye Gon's alleged conduct, we conclude that each offense is also criminal under United States law.

1. Drug Offenses

Ye Gon claims that the Mexican charges against him for importing, manufacturing, transporting and possessing psychotropic substances do not represent criminal offenses under American law because he imported only the precursors to psychotropic substances, which are not controlled substances in the United States. However, under 21 U.S.C. §§ 843(a)(6)-(7), importing, manufacturing, transporting and possessing such precursors is criminal if the defendant engages in such activity "knowing, intending, or having reasonable cause to believe" that such chemicals will be used to make controlled substances or

[4] Ye Gon also quotes language from *Mironescu,* 480 F.3d at 668, in support of his position. However, that case did not address any dual criminality issues; it concerned whether the district court had jurisdiction to consider the habeas petition of a fugitive whom the State Department had certified for extradition. Ye Gon's reliance on *Mironescu* on this point is therefore inapposite.

listed chemicals. The extradition magistrate found that Ye Gon falsely certified the content and origin of import shipments containing precursors to pseudoephedrine, a "list I chemical" under 21 U.S.C. § 802(34)(K) and 21 C.F.R. § 1310.02(a)(11); that he built a plant capable of manufacturing pseudoephedrine and other psychotropic substances, despite lacking the Mexican permit necessary to do so; that workers in this plant produced over 600 kilograms a day of a "white crystalline powder," and the analyzed samples of this powder contained pseudoephedrine and other psychotropic substances; that despite such production, Ye Gon reported no income for the plant or for Unimed during this time period; that either Ye Gon or his driver transported the powder away from the plant; and that Ye Gon was found to have powdered pseudoephedrine hydrochloride, a salt of pseudoephedrine, in his office ten months after the company was supposed to have sold off all legally acquired inventory of that substance. These findings are sufficient to give rise to the inference that Ye Gon knew that the chemicals he imported, transported, manufactured, and possessed would be used to produce psychotropic substances. Therefore, these Mexican drug offenses are also crimes under the laws of the United States.

2. Diversion of Sulfuric Acid

Ye Gon claims that the Mexican offense of diverting essential chemicals – in this case, sulfuric acid – to produce narcotics is not a criminal offense in the

United States because sulfuric acid is an extremely common, unregulated solvent in America. However, sulfuric acid is a "list II chemical" under 21 U.S.C. § 802(35) and 21 C.F.R. § 1310.02(b)(9), triggering certain reporting and registration requirements under 21 C.F.R. §§ 1310, 1313.

In addition, the Mexican arrest warrant charged Ye Gon with "the use of essential chemical products (sulfuric acid) to produce narcotics," including pseudoephedrine. This charge brings Ye Gon's possession of sulfuric acid within 21 U.S.C. § 843(a)(6)-(7)'s prohibition on possessing any chemical that may be used to manufacture a controlled substance if the person does so "knowing, intending, or having reasonable cause to believe" that the chemical will be used to manufacture such a substance. Thus, Ye Gon's Mexican charge of diverting sulfuric acid to produce psychotropic substances is also criminal in the United States.

3. Money Laundering

Ye Gon argues that his Mexican money laundering charge has no equivalent under United States criminal law because the Mexican arrest warrant alleged only that Ye Gon "maintained funds in Mexican territory with the knowledge that the funds had an illegal source," while the American money laundering statute, 18 U.S.C. § 1956(a)(1), requires not only proof of maintenance of funds but also of a financial transaction. As discussed above, however,

our dual criminality analysis is not limited to the allegations contained in the Mexican arrest warrant or other charging documents. The Mexican prosecutor did cite financial transactions, such as Ye Gon's payment of gambling debts and currency exchange transfers, in his sworn affidavit in support of Mexico's extradition request. This alleged conduct satisfies 18 U.S.C. § 1956(a)(1)'s financial transaction requirement, and therefore, the money laundering with which Ye Gon was charged in Mexico is also criminal in the United States.

4. Organized Crime

Ye Gon's sole objection to the American criminality of his Mexican organized crime charges is that the goals of the alleged criminal organization – namely, drug activity and money laundering – are not criminal under United States law. Because, as discussed above, the Mexican drug charges and money laundering charges do satisfy dual criminality under United States law, that contention lacks merit. Therefore, the Mexican organized crime charges also satisfy dual criminality because they punish acts also punishable under 18 U.S.C. §§ 371, 1956(h) and 21 U.S.C. §§ 846, 848.

5. Possession of Firearms

Finally, Ye Gon argues that the Mexican charge of possessing firearms reserved for use by the armed forces is not a criminal offense under American law –

and, in fact, cannot be criminalized because of the *Second Amendment*. This argument fails because, again, the conduct underlying this charge is criminal in the United States. All but one of the firearms that Ye Gon is charged with possessing were found in a concealed room next to his bedroom in his Mexican residence, which also contained hundreds of millions of dollars in cash in multiple currencies, the alleged proceeds of Ye Gon's illegal drug activity. Because the firearms' proximity to drug proceeds is a factor indicating that they were used in furtherance of drug trafficking, *see United States v. Lomax,* 293 F.3d 701, 705 (4th Cir. 2002), the fact that Ye Gon possessed the firearms in that room is sufficient to charge him under 18 U.S.C. § 924(c) with firearm possession in furtherance of a drug trafficking crime.[5] The only other firearm that Ye Gon is charged with possessing had an obliterated serial number, and its possession is thus criminal under 18 U.S.C. § 922(k).[6]

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[5] We note that Ye Gon's constitutional argument on this point is limited to the assertion that possessing firearms "reserved for the use of the military" cannot be a crime under our *Second Amendment*. We do not reach this question because, as noted above, considering all of Ye Gon's alleged actions, his firearm possession is criminal under 18 U.S.C. § 924(c). Ye Gon does not challenge the constitutionality of that statute.

[6] Again, because Ye Gon does not appear to challenge the constitutionality of 18 U.S.C. § 922(k), we do not rule on that question here.

VI.

Finally, Ye Gon argues that, if we do authorize his extradition, under the Treaty's rule of specialty provision in Article 17, we must limit the crimes with which Mexico may charge him to those for which the State Department will have granted extradition. Ye Gon notes that, in the years since Mexico first requested his extradition in 2008, it has filed additional charges against him, including tax evasion and smuggling charges. Importantly, Mexico has not requested the United States to extradite Ye Gon on these additional charges.

We decline to rule on this final claim for at least two reasons. First, Ye Gon lacks standing to assert this claim.[7] The rule of specialty is a privilege of the asylum state, which it may assert or waive as it so chooses; it is not a substantive right under the Treaty accruing to Ye Gon. *See Shapiro,* 478 F.2d at 906 ("As a matter of international law, the principle

[7] We recognize that there may be other situations in which a defendant who has been extradited to the United States from a foreign country seeks to raise a specialty claim to prevent being charged with additional crimes in our courts. Whether such a defendant has standing to "raise whatever objections the extraditing country would have been entitled to raise" is an issue on which the circuits are split, *Day,* 700 F.3d at 721, and we do not resolve that issue in this circuit today. Our holding on the rule of specialty in this case is limited to the situation in which a fugitive who has not yet been extradited petitions an American court to limit the charges on which he may be tried once returned to the requesting country.

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. Najohn,* 785 F.2d 1420, 1422 (9th Cir. 1986) ("[Rule of specialty] protection exists only to the extent that the surrendering country wishes. . . . The extradited party may be tried for a crime other than that for which he was surrendered if the asylum country consents.") (internal citations omitted) (emphasis in original).[8] Therefore, because Ye Gon has no protected legal interest under Article 17 of the Treaty, he lacks standing to assert this claim. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (standing requires that "the plaintiff must have suffered . . . an invasion of a legally protected interest") (internal citations omitted).

Second, even if Ye Gon did have standing to assert this specialty claim, it is not yet ripe. Despite our ruling in this case that the extradition magistrate properly issued a certification of extraditability, the final decision whether to extradite Ye Gon, and on what charges, rests not with us but with the State Department. *See* 18 U.S.C. § 3186; *Ordinola,* 478 F.3d at 597. As a result, Ye Gon may yet never return to

[8] Ye Gon cites *Day,* 700 F.3d at 721, in support of his argument. Our reasoning in that case does not help him because there, we assumed without deciding that the extradited party had standing to assert a rule of specialty argument. Further, we denied the specialty claim on the merits.

Mexico. Further, even if the State Department does extradite him, it may elect to waive the rule of specialty in his case, permitting Mexico to prosecute him on the additional crimes. *See*, *e.g.*, *Najohn,* 785 F.2d at 1422. Finally, even if Ye Gon is extradited, and the State Department does not waive the rule of specialty, we decline to assume that Mexico will violate its Treaty obligations by trying, detaining, or punishing Ye Gon on the additional charges. Cf. *Kelly v. Griffin,* 241 U.S. 6, 15, 36 S. Ct. 487, 60 L. Ed. 861 (1916) ("We assume, of course, that the government in Canada will respect the convention between the United States and Great Britain, and will not try the appellant upon other charges than those upon which the extradition is allowed."); *Garcia-Guillern v. United States,* 450 F.2d 1189, 1192 (5th Cir. 1971) (court was "not at liberty to speculate" that Peru would not honor its obligations under the rule of specialty). As a result, we will not rule on Ye Gon's specialty claim because the predicate facts are still hypothetical. *See Texas v. United States,* 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.").

VII.

Based on the foregoing, we affirm the denial of Ye Gon's petition for a writ of habeas corpus.

AFFIRMED

ZHENLI YE GON, Petitioner, v. ERIC HOLDER, JR., et al., Respondents.

Case No. 7:11-cv-00575

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION

992 F. Supp. 2d 637*; *2014 U.S. Dist. LEXIS 6427

January 17, 2014, Decided
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For Sheriff Gerald S. Holt, U.S. Marshal for the Western District of Virginia, Respondent: John Philip Dominguez, LEAD ATTORNEY, U.S. ATTORNEY'S OFFICE, Washington, DC; Valinda Jones, LEAD ATTORNEY, U.S DEPARTMENT OF JUSTICE – INTERNATIONAL AFFAIRS, CRIMINAL DIVISION, WASHINGTON, DC.

For Floyd Aylor, Warden of the Central Virginia Regional Jail, Respondent: Alexander Francuzenko, LEAD ATTORNEY, Broderick Coleman Dunn, Lee Brinson Warren, Cook Craig & Francuzenko, Fairfax, VA; John Philip Dominguez, LEAD ATTORNEY, U.S. ATTORNEY'S OFFICE, Washington, DC.

JUDGES: James C. Turk, Senior United States District Judge.

OPINION BY: James C. Turk

OPINION

AMENDED MEMORANDUM OPINION

By: James C. Turk

Senior United States District Judge

Petitioner, Zhenli Ye Gon ("Ye Gon"), filed this petition for habeas corpus under 28 U.S.C. § 2241 challenging the decision to extradite him to Mexico to face criminal charges for drug-related offenses (including importation into Mexico of psychotropic substances, the transportation and manufacture of psychotropic substances, and possession of such substances for the purpose of producing narcotics), participation in organized crime, weapons offenses, and money laundering. The case has been fully briefed and is ripe for disposition. The Court has considered the legal memoranda filed and the applicable law. The Court heard oral argument on the case on November 14, 2013, and also notes the record contains the transcript of the hearing held before Magistrate Judge Ballou on October 9, 2012. For the reasons stated herein, Respondents' Motion to Dismiss Certain Respondents is **GRANTED** and the petition is **DENIED**.

I. FACTUAL FINDINGS AND PROCEDURAL BACKGROUND

A. The Mexican Criminal Charges Against Ye Gon

The D.C. District Court (the "extradition court") gave a detailed and comprehensive discussion of the background of this case, including the factual underpinnings of the Mexican charges against Ye Gon, in its extradition decision. *See In re Extradition of Ye Gon,* 768 F. Supp. 2d 69, 73-79 (D.D.C. 2011). The factual findings of the extradition court are entitled to significant deference on habeas review. *Haxhiaj v. Hackman,* 528 F.3d 282, 287 (4th Cir. 2008). The Court adopts the factual findings of the extradition court as its own, unless otherwise noted herein, and will discuss the facts as needed in the context of the legal arguments raised.

Ye Gon's lengthy legal path began when the United States government filed a criminal complaint on July 16, 2007 in the D.C. District Court charging him with violating American drug laws relating to the importation of illegal drugs. Ye Gon was arrested in Maryland on July 24, 2007, and transferred to the custody of the Marshal in the District of Columbia. He remained in custody during the pendency of the criminal proceedings. The Government filed a superseding indictment on November 16, 2007 charging Ye Gon with a single count of conspiring to aid and abet the manufacture of 500 grams or more of methamphetamine, knowing that it was to be imported into the United States from Mexico, in violation of 21

U.S.C. §§ 959, 960, and 963, and 18 U.S.C. § 2. *See United States v. Ye Gon*, Cr. No. 07-181, Superseding Indictment, Count One (D.D.C. November 6, 2008); ECF No. 42-2, Ex. F-63-65. The Government also sought the forfeiture of all money and property that constituted or derived from the illegal activity alleged in the single-count superseding indictment. *Id*. The criminal case remained pending until 2009 when the Government moved to dismiss all charges without prejudice. Eventually, with the Government's consent, the court dismissed all criminal charges with prejudice under Fed. R. Crim. P. 48(a).

Ye Gon was initially detained during his criminal case in the District of Columbia. While the case was still pending, he was moved to a detention facility in Orange, Virginia, which is located in the Western District of Virginia.

The extradition case began on September 15, 2008 with the Government filing a complaint in the D.C. District Court to extradite Ye Gon to Mexico ("Extradition Complaint") to face prosecution on drug charges, money laundering, and the illegal possession of guns. The extradition court conducted extensive proceedings, including a multi-day evidentiary hearing, before issuing a certificate of extraditability on February 7, 2011. *Ye Gon*, 768 F. Supp. 2d 69.

Ye Gon filed his petition for a writ of habeas corpus in the Western District of Virginia on February 9, 2011, thereby preventing his referral to the Secretary of State for surrender to the Mexican

government. *See* 18 U.S.C. §§ 3184, 3186; *see also* ECF No. 102 at 12-13 & n.5 (explaining policy of the Department of State to suspend its review of an extradition order during the pendency of a habeas petition before the district court). Ye Gon also filed a duplicate petition in the D.C. District Court, which issued the extradition decision. This Court, concluding that both district courts had concurrent jurisdiction, transferred this case to the D.C. District Court, which concluded that it did not have jurisdiction over the habeas action and transferred the action back to this Court. The D.C. District Court held that because Ye Gon was detained in a facility in the Western District of Virginia, a habeas petition could only lie against Ye Gon's immediate custodian – in this case, the warden of the facility in Orange, Virginia. ECF Nos. 33, 34. *See Rumsfeld v. Padilla*, 542 U.S. 426, 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004).

B. Respondents' Motion to Dismiss Certain Respondents

Initially, the Court addresses Respondents' pending motion to Dismiss Certain Federal Respondents, ECF No. 102, in which Respondents seek dismissal of all Respondents except Gerald S. Holt (U.S. Marshal for the Western District of Virginia) and Floyd Aylor (Warden of the Central Virginia Regional Jail where Ye Gon is currently being held). Specifically, they seek dismissal of U.S. Attorney

General Eric Holder, Jr., U.S. Secretary of State Hillary Rodham Clinton,[1] and U.S. Marshal for the District of Columbia Edwin D. Sloane.[2] Respondents contend that Holder, Clinton, and Sloane are not proper Respondents pursuant to Padilla, which held that the proper respondent in a federal habeas petition is generally "the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." 542 U.S. at 435. They also rely on a number of other cases applying Padilla.

Ye Gon does not object to dismissing Eric Holder, Jr., ECF No. 103 at 1 n.1, and Holder is hereby dismissed. As to the other respondents, Ye Gon offers no legal authority to keep U.S. Marshal Sloane and Secretary of State Clinton in this case. Instead, he

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[1] Because the Court concludes that the Secretary of State is not a proper Respondent, it is not necessary to order the substitution of John Kerry for Clinton. Cf. Fed. R. Civ. P. 25(d) (allowing sua sponte substitution for a public officer sued in his official capacity)

[2] Sloane was added as a Respondent *sua sponte* by this Court when it transferred the case to the District of Columbia. *See* ECF No. 16. Respondents explain that even though Ye Gon's warden is his only physical custodian, they do not seek the dismissal of Holt as a respondent since the federal government is Ye Gon's legal custodian. ECF No. 102 at 3, 5. Additionally, in the appeal from the dismissal of Ye Gon's D.C. habeas petition, the United States represented to the U.S. Court of Appeals for the District of Columbia Court that it would not "challenge [the Western District of Virginia's] ability to order Ye Gon's release should it grant his petition on the merits." *Ye Gon v. Sloane*, 496 Fed. Appx. 90 (D.C. Cir. 2012) (citing record of oral argument).

seems to be concerned that the government may intentionally take some action in any short period in which his case is not technically "pending" – e.g., if his habeas petition is denied, during the time between the denial and his filing of a notice of appeal – or that it may transfer him to frustrate efforts to enforce this Court's orders. His first concern is now moot. This Court initially stayed his extradition from the entry of judgment in this case for a thirty-day period to allow him to file a notice of appeal with the agreement of counsel for Respondents, as expressed at the November 14, 2013 hearing. That stay was then temporarily extended until January 31, 2014. *See* ECF No. 126. The Court has now, in a separate opinion entered this same day, extended that stay for the entire pendency of Petitioner's appeal before the Fourth Circuit.

Ye Gon's concern over being transferred is unfounded in light of the "well-established" rule that "jurisdiction attaches on the initial filing for habeas corpus relief, and it is not destroyed by a transfer of the petitioner and the accompanying custodial change." *Sweat v. White.* 829 F.2d 1121 [published in full-text format at 1987 U.S. App. LEXIS 19520], 1987 WL 44445, at *1 (4th Cir. 1987) (unpublished) (citing *Santillanes v. U.S. Parole Comm'n,* 754 F.2d 887, 888 (10th Cir. 1985); *see also United States v. Little,* 392 F.3d 671, 680 (4th Cir. 2004) (jurisdiction is determined at the time the petition is filed). Thus, even if he were transferred after judgment in this case, the Fourth Circuit could still consider his appeal

and enforce orders regarding his custody. Cf. *Sweat, supra.*

In any event, even if his concerns had merit, Padilla and the other cases cited by Respondents show that Sloane and the Secretary of State are not proper Respondents in this case.[3] Accordingly, the Court **GRANTS** the Motion to Dismiss Certain Federal Respondents, ECF No. 102, and **DISMISSES** Attorney General Holder, U.S. Marshal Sloane, and U.S. Secretary of State Clinton from the case. The remaining Respondents are hereby collectively referred to as "the Government" in the Court's analysis below.

II. ANALYSIS AND CONCLUSIONS OF LAW

A. General Standard of Review

The extradition of a person found in the United States to Mexico is governed by the provisions of the federal extradition statutes, 18 U.S.C. §§ 3181 et seq.,

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[3] In a footnote, the Padilla Court declined to address "whether the Attorney General would be a proper respondent to a habeas petition filed by an alien detained pending deportation" but cited to a circuit split on the issue. *See* 542 U.S. at 435 n.8. Since Padilla, however, the only court to find the Attorney General as a proper party (the Ninth Circuit) has withdrawn its opinion. *See Nken v. Napolitano,* 607 F. Supp. 2d 149, 158 (D.D.C. 2009). Accordingly, the D.C. District Court, in its opinion to transfer the case back to this Court, held that Ye Gon's immediate custodian, and not the Attorney General or U.S. Marshal, is the proper respondent in this case. ECF No. 34 at 9 n.5.

and the Extradition Treaty between the United States and Mexico. *See* Extradition Treaty, U.S.-Mex., May 4, 1978, 31 U.S.T. 5059, T.I.A.S. No. 9656 ("Treaty"), attached as ECF No. 41, Ex. C (the "Extradition Treaty"). Every extradition request requires the court to find that: 1) the judicial officer has jurisdiction to conduct an extradition proceeding; 2) the court has jurisdiction over the fugitive; 3) the person before the court is the fugitive named in the request for extradition; 4) there is an extradition treaty in full force and effect; 5) the crimes for which surrender is requested are covered by that treaty; and 6) there is competent legal evidence to support the finding of probable cause as to each charge for which extradition is sought. *In re Extradition of Rodriguez Ortiz,* 444 F. Supp. 2d 876, 881-82 (N.D. Ill. 2006) (citing *Fernandez v. Phillips,* 268 U.S. 311, 312, 45 S. Ct. 541, 69 L. Ed. 970 (1925), *Eain v. Wilkes,* 641 F.2d 504, 508 (7th Cir. 1981). and *In re Extradition of Fulgencio Garcia,* 188 F. Supp. 2d 921, 925 (N.D. Ill. 2002)). Upon finding sufficient evidence to support extraditing the fugitive, the court then certifies him as extraditable to the Secretary of State, who ultimately decides whether to surrender him to the requesting country. 18 U.S.C. §§ 3184, 3186, 3196.

There is no direct appeal from a decision granting a certificate of extradition. Rather, a person certified for extradition files a petition for habeas corpus under 28 U.S.C. § 2241 challenging his detention pending his extradition. A habeas court sitting in review of an extradition decision has a role which is

"quite narrow, [and is] limited to consideration of whether the extradition court properly exercised jurisdiction, whether the crime upon which extradition is sought qualifies under the relevant treaty as an extraditable offense, and whether the record contains sufficient evidence to support the extradition court's probable cause determination." *Haxhiaj,* 528 F.3d 282, 286 (4th Cir. 2008) (citations omitted). Furthermore, a habeas court may consider certain limited constitutional claims. *See Plaster v. United States,* 720 F.2d 340, 348-49 (4th Cir. 1983). In *Mironescu v. Costner,* 480 F.3d 664 (4th Cir. 2007), for example, the Fourth Circuit expressly recognized that a habeas court reviewing an extradition order "unquestionably" has jurisdiction "to adjudicate claims that governmental conduct is in violation of the Constitution." *Id.* at 670. Any constitutional claim must relate to alleged constitutional violations by the United States government. That is, the habeas court cannot consider assertions that "the other country's judicial procedures do not comport with the requirements of our constitution." *Plaster,* 720 F.2d at 349 n.9 (citing *Neely v. Henkel,* 180 U.S. 109, 21 S. Ct. 302, 45 L. Ed. 448 (1901)).

The habeas court gives a highly deferential review to the probable cause determination in the extradition court:

> In reviewing the extradition court's finding of probable cause under § 3184, a federal habeas court applies a standard of review that "is at least as deferential, if not more so,

> than that applied to a magistrate judge's decision to issue a search warrant." *Ordinola [v. Hackman*, 478 F.3d 588, 609-10 (4th Cir. 2007)] (Traxler, J., concurring). "Just as the magistrate judge's underlying determination is not a mini-trial on the guilt or innocence of the fugitive, . . . habeas review should not duplicate the extradition hearing." *Id.* at 610. Accordingly, our limited function in performing habeas review of the decision to issue a certificate of extradition is to determine whether there is "any evidence" in the record supporting the probable cause finding of the magistrate judge.

Haxhiaj, 528 F.3d at 287 (some citations omitted) (emphasis in original).

Legal conclusions by the extradition court, however, are reviewed *de novo* by a habeas court. *See*, *e.g.*, *Ross v. U.S. Marshal for E.D. of Okla.,* 168 F.3d 1190, 1195 (10th Cir. 1999) (issue of whether dual criminality requirement is satisfied is a legal question reviewed *de novo*); *United States v. Merit,* 962 F.2d 917, 919 (9th Cir. 1992) ("We review *de novo* questions regarding interpretation of, and jurisdiction under, the [extradition] treaty, including compliance with dual criminality and specialty requirements.") Accordingly, this Court reviews the factual findings only for clear error but reviews legal conclusions *de novo. See Ordinola,* 478 F.3d at 610 (Traxler, J., concurring) ("We review the extradition court's factual findings for clear error and its conclusions of law *de novo*") (citation omitted).

B. Ye Gon's Claims

Ye Gon asserts five claims for relief in his Corrected Amended Petition. Separately, Ye Gon has asserted two additional claims, 6A and 6B, which are also part of his Petition. The Court placed Claim 6B under seal with the consent of all of the parties. Each of these claims will be considered in order.

1. Claim 1: The Extradition Court Properly Exercised Jurisdiction Over Ye Gon.

In Claim 1, Ye Gon challenges the jurisdiction of the extradition court contending that (a) that the court did not have personal jurisdiction to bring an extradition proceeding in the District of Columbia, (b) a magistrate judge has no constitutional authority to conduct extradition proceedings, and (c) the federal extradition statute, 18 U.S.C. § 3184, is unconstitutional. Each argument fails.

a. The extradition court had personal jurisdiction over Ye Gon.

The jurisdiction of a district court to hear extradition proceedings is set forth in 18 U.S.C. § 3184, which states in relevant part:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), any justice or judge of the United States, or any magistrate

> judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, 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.

Whether the extradition court had personal jurisdiction over Ye Gon to hear the extradition complaint turns on whether he was "found within" the District of Columbia when he was arrested on the extradition complaint. Ye Gon was detained in a D.C. prison facility and undoubtedly in D.C. when the Government filed its extradition complaint. Ye Gon contends, however, that he was never "found" in D.C. because he came there in 2007 against his will, and only after his arrest in Maryland on the federal criminal charges. Ye Gon asserts that he did not flee to or establish D.C. as his place of asylum, and thus that he was not "found" there for purposes of extradition jurisdiction. The extradition court found that it properly had personal jurisdiction over Ye Gon because he was being lawfully held in D.C. such that he was "found" there when the Government filed its extradition complaint. The court reasoned that interpreting § 3184 to extend personal jurisdiction over

persons lawfully detained in a district comports with both the "natural and traditional meaning of the word 'found[,]'" and with traditional principles of territorial jurisdiction. *See Ye Gon,* 768 F. Supp. 2d at 79-80 (*citing Burnham v. Sup. Ct. of Cal.,* 495 U.S. 604, 610, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990) and *Pennoyer v. Neff,* 95 U.S. 714, 733, 24 L. Ed. 565 (1877)).

Both parties rely on *Pettit v. Walshe,* 194 U.S. 205, 24 S. Ct. 657, 48 L. Ed. 938 (1904), to support their respective positions. In Pettit, a New York judicial officer (a commissioner) issued an arrest warrant on an extradition complaint for Walshe, a British national, who had been convicted in Great Britain of murder and other crimes, but had escaped prison and fled to the United States. *Id.* at 214-15. The U.S. Marshal arrested Walshe in Indiana intending to return him directly to New York to answer the extradition complaint. Walshe filed a habeas petition in Indiana challenging his removal to New York. The Indiana circuit court held that under the treaty between the United States and Great Britain and the extradition statute (the predecessor to § 3184), only an Indiana court, where Walshe was found and arrested, had jurisdiction to consider the evidence of criminality and rule on the extradition request. The Supreme Court affirmed:

> By that proviso it is made the duty of a marshal arresting a person charged with any crime or offense to take him before the nearest circuit court commissioner or the nearest

> judicial officer, having jurisdiction, for a hearing, commitment, or taking bail for trial in cases of extradition. The commissioner or judicial officer here referred to is necessarily one acting as such within the state in which the accused was arrested and found. So that, assuming that it was competent for the marshal for the district of Indiana to execute Commissioner Shields' warrant within his district, as we think it was, his duty was to take the accused before the nearest magistrate in that district, who was authorized by the treaties and by the above acts of Congress to hear and consider the evidence of criminality. If such magistrate found that the evidence sustained the charge, then, under § 5270 of the Revised Statutes, it would be his duty to issue his warrant for the commitment of the accused to the proper jail, there to remain until he was surrendered under the direction of the national government, in accordance with the treaty.

Id. at 219-20. In concluding that the New York tribunal lacked jurisdiction to order Walshe's extradition to Britain, the Court noted that extradition proceedings may be held "where the accused was found and arrested." *Id.* at 218. The commissioner or judicial officer authorized to act on an extradition request is "necessarily one acting . . . within the state in which the accused was arrested and found." *Id*. at 219.

Ye Gon argues that Pettit requires holding extradition hearings only in the place where the extraditee is arrested, or what he calls the place of asylum. *See*

ECF 63 at 23 (*citing* to ***Pettit*** and *Wright v. Henkel,* 190 U.S. 40, 58, 23 S. Ct. 781, 47 L. Ed. 948 (1903) as describing the place found as "the asylum to which he had fled"). Ye Gon thus contends that the Government could bring extradition charges in Maryland only – where he was initially arrested on the U.S. criminal charges – and that he was not "found" in the District of Columbia, where he was brought by authorities after his arrest on the criminal charges.

The United States lawfully arrested Ye Gon and transferred him to D.C. to face the criminal charges pending at that time. Ye Gon was lawfully detained in D.C. on the federal criminal charges in D.C. when the Government filed its extradition complaint. Section 3184 vests the court with the jurisdiction to hear an extradition proceeding "upon complaint made, under oath, charging any person found within his jurisdiction, with having committed [an extraditable offense in the requesting country]." Here, Ye Gon was "found" in the District of Columbia when the Government filed the extradition complaint, thereby vesting the D.C. District Court with the jurisdiction to hear the proceedings.

Ye Gon suggests, without factual support, the Government acted in bad faith by bringing the criminal charges in D.C. as a means to seek a favorable forum in the extradition case, especially on the dual criminality issue. The Court refuses to embrace the pure conjecture required to accept Ye Gon's argument that the Government tactically planned to bring the criminal charges in D.C. so that it would have a

favorable forum in an extradition proceeding. Ye Gon's theory seems particularly improbable given that the Government filed the extradition complaint a year after it initiated the criminal case against Ye Gon. Instead, applying *Pettit*, the Court concludes that the proper jurisdiction for Ye Gon's extradition proceeding, and where he was "found" under § 3184, is where he was physically present when arrested on the extradition complaint. *See also Atuar v. United States,* 156 F. App'x 555, 559 n.5 (4th Cir. 2005) (unpublished) (agreeing with the parties' stipulation that West Virginia had jurisdiction over the extradition hearing because Atuar was incarcerated there at the time the extradition proceedings were initiated, and citing Pettit). Therefore, the D.C. District Court had jurisdiction over Ye Gon under § 3184 to hear this extradition matter.

b. A U.S. Magistrate Judge has constitutional and statutory authority to conduct extradition proceedings.

Courts have nearly uniformly held that U.S. magistrate judges are authorized to conduct extradition proceedings. In particular, while a judge on the D.C. Court of Appeals, Justice Ginsburg stated that § 3184 allows "any magistrate authorized so to do by a court of the United States" to "preside over and decide international extradition proceedings." *Ward v. Rutherford,* 921 F.2d 286, 287, 287 U.S. App. D.C. 246 (D.C. Cir. 1990); *accord Lo Duca v. United States,* 93

F.3d 1100, 1108-09 (2d Cir. 1996). The local rules of the extradition court expressly state that U.S. Magistrate Judges "shall have the duty and the power to . . . [c]onduct international extradition proceedings pursuant to 18 U.S.C. § 3181 et seq." D.D.C. Crim. Rule 57.17(a)(6).

Allowing a magistrate judge to perform this function does not violate the U.S. Constitution. The issue in an extradition proceeding "is not punishability, but prosecutability," *Lo Duca,* 93 F.3d at 1104 (citations omitted). The determination of whether an individual is subject to extradition to a foreign country is "an assignment in line with [a magistrate judge's] accustomed task of determining if there is probable cause to hold a defendant to answer for the commission of an offense." *Id*. (quoting *Ward,* 921 F.2d at 287). For these reasons, the Court rejects Ye Gon's contention that a U.S. Magistrate Judge does not have the constitutional authority to conduct extradition proceedings.

c. Ye Gon lacks standing to assert that the federal extradition statute is unconstitutional because it violates the separation of powers doctrine.

Ye Gon relies upon *Lobue v. Christopher,* 893 F. Supp. 65 (D.D.C. 1995), *vacated* 82 F.3d 1081, 317 U.S. App. D.C. 277 (D.C. Cir. 1996), to assert that the federal extradition statutory scheme is unconstitutional

and violates the separation of powers doctrine. Ye Gon asserts that the extradition statute improperly vests the Secretary of State with the authority to review the decisions of extradition courts and to choose not to extradite a person for whom a court has issued a certificate of extradition. In Lobue, two prospective extraditees, who were wanted in Canada and were in the constructive custody of the marshal for the Northern District of Illinois, brought a challenge in the D.C. District Court to the constitutionality of the extradition statute and attempted to assert their claims on behalf of a class. 893 F. Supp. at 66-67. The district court found the statute unconstitutional. *Id.* at 75-76, 78. On appeal, the circuit court vacated that decision, and held that the D.C. District Court did not have subject matter jurisdiction to issue the declaratory judgment because the prospective extradites were in the custody of the marshal in the Northern District of Illinois and that any challenge to the statute should be in that district. *Lobue,* 82 F.3d at 1082. Ye Gon can point to no case which has followed *Lobue*, and the Court is not inclined to follow a vacated decision that has no precedential value.

The Court also finds that Ye Gon does not presently have standing to raise the separation of powers claim. *In re Extradition of Lang,* 905 F. Supp. 1385 (CD. Cal. 1995), holds that essentially no injury or harm can come to a potential extraditee from a review by the Secretary of State because either: (a) a federal judge declines to order extradition, in which

case the Secretary cannot extradite him; or (b) a federal judge orders extradition, and the Secretary declines to extradite him, in which case no harm to him occurs. *Lang,* 905 F. Supp. at 1391-92. Based on this, the Lang Court reasoned that the possibility of a "separation of powers" violation is illusory, and that no petitioner can ever have standing to assert it.

Ye Gon argues a third possibility exists – that the Secretary of State may change "the charges of extradition." He cites as an example a hypothetical case where a certificate of extraditability is issued on some charges but not others, and asserts that the Secretary of State's decision could then require a review of the judicial decision. *See* ECF No. 71 at 8 n.6. Even if Ye Gon were correct and such a result could give rise to a separation of powers argument, that has not yet happened in this case, since the Secretary has not yet ordered Ye Gon's removal. Accordingly, this argument is premature. As to this portion of Claim 1, therefore, the Court denies it without prejudice. The remainder of Claim 1 is denied with prejudice.

2. Claim 2: The *non bis in idem* provision in Article 6 of the Treaty does not bar extradition.

Ye Gon contends that under Article 6 of the extradition treaty, the United States cannot extradite him, at least on the drug charges, because the voluntary dismissal with prejudice of the criminal indictment in the D.C. District Court amounts to a

prosecution and acquittal of those charges. Article 6 of the extradition treaty between Mexico and the United States, entitled "Non bis in idem," states as follows:

> Extradition shall not be granted when the person sought has been prosecuted or has been tried and convicted or acquitted by the requested Party for the offense for which extradition is required.

ECF No. 41, Ex. C, Treaty, at 6. The Latin term "non bis in idem" means "not twice for the same thing," Black's Law Dictionary 1150 (9th ed. 2009), and is a principle of international law, akin to the Fifth Amendment's prohibition on double jeopardy. *United States v. Jeong,* 624 F.3d 706, 711 (5th Cir. 2010).

a. Ye Gon was not "prosecuted or . . . tried and convicted or acquitted. . . ." in the criminal case in the United States.

The threshold question under Article 6 is whether Ye Gon "has been prosecuted or has been tried and convicted or acquitted" of the criminal charges in the D.C. District Court. When interpreting the language of a treaty, the Court must

> begin with the language of the Treaty itself. . . . [T]he clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the

> intent or expectations of its signatories. . . . To the extent that the meaning of treaty terms are not plain, we give great weight to the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement.

Iceland S.S. Co.-Eimskip v. U.S. Dep't of the Army, 201 F.3d 451, 458, 340 U.S. App. D.C. 1 (D.C. Cir. 2000) (internal citations and quotation marks omitted); *Plaster,* 720 F.2d at 347 (stating virtually identical standards and relying on *Sumitomo Shoji Am., Inc. v. Avagliano,* 457 U.S. 176, 180, 102 S. Ct. 2374, 72 L. Ed. 2d 765 (1982)). The Court should also construe the Treaty "to effect [its] purpose, namely, the surrender of fugitives to be tried for their alleged offenses." *See Ludecke v. U.S. Marshal,* 15 F.3d 496, 498 (5th Cir. 1994) (citations and internal quotation marks omitted).

Ye Gon contends that he was "prosecuted" for purposes of extradition under Article 6 when the Government charged him criminally in the District of Columbia, vigorously pursued those charges through two years of proceedings, and then elected to dismiss the criminal action with prejudice. The Government counters that Article 6 does not apply unless Ye Gon has actually been "convicted or acquitted." In essence, the intent imbedded in the Treaty could not have meant that merely charging a defendant in the United States invokes the protections of Article 6, and that reading the Treaty so broadly "effects a result

inconsistent with the intent or expectations of its signatories." *See Iceland S.S. Co.-Eimskip,* 201 F.3d at 458.

The Government filed criminal charges against Ye Gon in this country and pursued them for two years. It contested the attempts of Ye Gon to obtain a bond for his pre-trial release, and otherwise actively sought to convict him of the criminal charges. The exact reasons the Government elected not to prosecute Ye Gon remain unclear. Initially, the Government told the court it sought dismissal because it had "evidentiary concerns" in light of changed circumstances, including a recanting witness and another who was reluctant to testify. *See* ECF No. 42-2 at Ex. F-82. The Government elaborated on its reasons in a supplemental filing, explaining:

> As set forth in our motion to dismiss, the [G]overnment has concluded, after balancing the relative strengths and weaknesses of the American and Mexican prosecutions as well as the strong interest of Mexico in pursuing its charges against its own citizens for conduct occurring in Mexico, that it is preferable to defer to Mexico's extradition request and allow that country's case to take precedence. In reaching this decision, and in setting forth in full the basis for the [G]overnment's motion to dismiss these charges, we have in no way meant to suggest that we have any doubts about the defendant's guilt or that we believe we do not have a provable case. We submit only that, as between the two

> countries' prosecutions, there are sufficient reasons . . . to defer to Mexico's request for the return of its citizens for trial there.

ECF No.75, Ex. Q at 7 (Supp. Gov't Mot. to Dismiss dated June 24, 2009). After a hearing, the presiding judge in the criminal case entered a written order, prepared by the Government, dismissing the indictment with prejudice, but the court never stated reasons for dismissing the criminal charges with prejudice.

At least one district court has interpreted Article 6 of the Extradition Treaty and refused to read it broadly to prevent extradition to Mexico of a defendant who pled guilty to criminal charges in the United States and faced different criminal charges in Mexico arising from the same incident. *In re Extradition of Montiel Garcia,* 802 F. Supp. 773 (E.D.N.Y. 1992), involved a defendant (Garcia) who allegedly sexually assaulted a seven-year old relative while in Mexico and took pictures of the victim's exposed genitalia. 802 F. Supp. at 775. Garcia then brought the camera and film back to the United States, where he attempted to have the pictures developed. *Id*. Garcia pled guilty in a New York federal court to transporting child pornography in interstate or foreign commerce. *Id*. While the federal criminal charges were pending, Mexico requested Garcia's extradition to face sexual assault charges. *Id*. Garcia challenged his extradition to Mexico claiming that during the course of the plea discussions, the prosecution indicated that if he did not plead guilty to the

transportation charge, the United States would charge him under 18 U.S.C. § 2251(a) with inducing, enticing, or coercing the victim to engage in sexually explicit conduct. *Id*. Garcia claimed that Article 6 of the Extradition Treaty barred his extradition to Mexico because he was subject to prosecution on the child obscenity charges in the United States, and the prosecutor had threatened to file charges under § 2251(a), but ultimately choose not to pursue them. *Id.* at 779. The court rejected Garcia's argument, stating that it "decline[d] to hold that a decision not to prosecute on certain charges is the functional equivalent of a prosecution on those charges for purposes of a double jeopardy claim." *Id*.

The fundamental purpose of an extradition treaty is to return persons to the requesting country to face trial on certain criminal charges. Extradition treaties are read broadly to achieve this goal.[4] Ye Gon's broad interpretation of Article 6 to prohibit the extradition of any person merely charged, but never tried and convicted or acquitted, would substantially undermine the intent of the treaty. Instead, the interpretation of the treaty by the contracting parties is entitled to great weight. *See Iceland S.S. Co.-Eimskip,* 201 F.3d at 458; *Ordinola,* 478 F.3d at 603

[4] Both parties expend great effort in explaining the meaning of Article 6 and how it should read depending upon where punctuation could be inserted. The plain meaning of the language requires no grammatical editing, and the Court will not alter or otherwise change the punctuation in the treaty language just to achieve a particular conclusion.

(in determining definition of "political offense" in a treaty, "we must afford 'great weight' to the meaning attributed to the provision by the State Department, as it is charged with enforcing" it). Here, the proper reading of the treaty language requires that a person have gone through the criminal process and either been convicted or acquitted. Accordingly, the Court concludes that a prosecution alone is insufficient to trigger the protections of Article 6 and instead that both: (1) a prosecution or a trial is required; and (2) a conviction or an acquittal is required.

Alternatively, Ye Gon argues that dismissal of the federal criminal charges with prejudice is an acquittal because double jeopardy bars prosecuting him again in the United States on the same charges. The Supreme Court held in *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977) that for jeopardy to attach in a criminal prosecution which is dismissed prior to trial, the dismissal must represent a "resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 571. The "key issue" as to whether jeopardy has attached before a trial on the merits "is whether the disposition of an individual's indictment entailed findings of fact on the merits such that the defendant was placed in genuine jeopardy by the making of such findings." *United States v. Dionisio,* 503 F.3d 78, 83 (2nd Cir. 2007). The Fourth Circuit recognized that even a dismissal with prejudice before evidence at trial began was insufficient for jeopardy to attach. *United States v. Cooper,* 77 F.3d

471 [published in full-text format at 1996 U.S. App. LEXIS 2338], 1996 WL 67171 at *4-*5 (4th Cir. Feb. 15, 1996) (collecting cases holding that double jeopardy did not prohibit a second prosecution where the first prosecution ended before the court heard any evidence, or that a dismissal with prejudice did not implicate jeopardy).

Here, the Government dismissed the federal criminal case against Ye Gon with prejudice pursuant to Rule 48(a). The exact reason the Government dismissed its case is subject to some debate – either its evidence was weak or it chose to defer to a Mexican prosecution of Ye Gon. Ultimately, the reason for this dismissal is of no consequence, because the district court never addressed the elements of the criminal charges in the United States, and Ye Gon was never in jeopardy of a finding of guilt on the merits. In short, Ye Gon was never placed in jeopardy of being convicted and the dismissal did not actually represent a "resolution . . . of some or all of the factual elements of the offense charged." Cf. *Serfass v. United States,* 420 U.S. 377, 389, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975) (jeopardy did not attach to a pretrial dismissal of an indictment); *Dionisio,* 503 F.3d at 83. Thus, this Court declines to hold that the dismissal under Rule 48(a) here is the equivalent of an acquittal under the Treaty. Ye Gon's alternative claim that he was effectively "acquitted" under the Treaty, therefore, is unpersuasive.

b. Mexico and the United States charged Ye Gon with different offenses, and thus, Article 6, the *non bis in idem* clause, does not apply.

The Government argues that the *non bis in idem* clause does not bar Ye Gon's extradition for the additional reason that the U.S. and Mexican charges are not the same, and Article 6 prevents his extradition to Mexico to face criminal prosecution only for the same criminal offense for which he was prosecuted or tried and either convicted or acquitted. Analysis of this argument requires a comparison of the offenses charged in both countries. Here, the charges are clear enough, but the test to compare them is not well established.

The superseding indictment in the federal criminal case charged Ye Gon with a single count of violating 21 U.S.C. §§ 959, 963, and 960, and 18 U.S.C. § 2, alleging that he aided and abetted "in the manufacture of 500 grams or more of a mixture and substance containing a detectable amount of methamphetamine, intending and knowing that it would be unlawfully imported into the United States from Mexico, and elsewhere, outside of the United States . . . ." ECF No. 42-1, Pet. Ex. F at 15. The indictment also includes a forfeiture request. *See id*.

The Mexican arrest warrant submitted as part of the extradition request charged Ye Gon with:

1. Participation in organized crime, for the purpose of repeatedly committing drug crimes and operations with illegal funds;

2. Drug-related offenses in the forms of:

a. importation into Mexico of psycho tropic substances, namely, N-acetyl pseudoephedrine acetate and ephedrine acetate, derivatives of pseudoephedrine,

b. transportation of psycho tropic substances, namely, N-acetyl pseudoephedrine, a derivative of pseudoephedrine,

c. manufacture of psycho tropic substances, namely, pseudoephedrine, ephedrine, pseudoephedrine hydrochloride, and methamphetamine hydrochloride,

d. possession of psycho tropic substances for the purpose of producing narcotics,

e. diversion of essential chemical products, namely sulfuric acid, to produce narcotics;

3. Violations of the Federal Law on Firearms and Explosives in the form of possession of firearms reserved for the exclusive use of the Army, Navy and Air Force; and

4. Money laundering, by himself or through an intermediary, by having custody of funds within Mexico, knowing that the

> funds have their source in an illegal activity, with the intention to impede knowledge of their source, location, destination, or ownership.

See ECF No. 50, Ex. 1 (Translated Mexican Arrest Warrant) at 6-7. The elements of each offense in the Mexican arrest warrant are listed after each charge. *Id*. at 7-9.

The Government asserts that the Court should compare the charges under the well-recognized "same elements" test announced in *Blockburger v. United States,* 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932) for resolving double jeopardy challenges. "Under the Blockburger analysis, successive prosecutions do not violate the *Double Jeopardy Clause* if 'each offense contains an element not contained in the other.'" *United States v. Hall,* 551 F.3d 257, 267 (4th Cir. 2009) (*quoting United States v. Dixon,* 509 U.S. 688, 696, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993)). The application of Blockburger to the charges from both countries necessarily yields the conclusion that Mexico has charged Ye Gon with different offenses from those he faced in the United States. Simply put, the respective nations' offenses are not identical – each includes an element that the other would not. Thus, if Blockburger is the proper test, clearly Article 6 would not bar Ye Gon's extradition.

Ye Gon counters, however, that the Blockburger test is inapplicable in the extradition context and instead argues that the Court must take a broader approach, rather than narrowly considering the

specific elements of each offense. Ye Gon urges the Court to analyze the different criminal charges under the test articulated in *Sindona v. Grant,* 619 F.2d 167 (2d Cir. 1980),[5] which he contends more accurately reflects the intent of the treaty drafters.

The extradition court adopted Blockburger as the appropriate test,[6] and rejected Sindona, concluding that the authorities relied on in Sindona have since been rejected in U.S. double jeopardy case law and thus, "the theoretical underpinning of the Sindona decision – that as a matter of domestic law, a same conduct test defines the reach of the *double jeopardy clause* under American law – has not survived." *Ye Gon,* 768 F. Supp. 2d at 92. The Government relies heavily on *Elcock v. United States,* 80 F. Supp. 2d 70 (E.D.N.Y. 2000) to dispute Sindona's application to analysis of the criminal charges in this case. *See* ECF No. 63, at 62-67. Notably, other than Elcock and Sindona and a few other less helpful cases, there are

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[5] Ye Gon offers specific arguments as to why extradition for the money laundering charges, drug and conspiracy charges, and organized crime charges are all barred by Article 6, although he admits that extradition on the firearms challenges would not be prohibited by Article 6. *See* D.E. 63, at 35-37; ECF No. 71, Reply at 23-26; *see* especially D.E. 63, at 36 n.9 (not challenging extradition for the firearms charges on this ground).

[6] The extradition court first set forth its conclusion that the Blockburger same elements test should apply in a May 2009 opinion, reported at *In re Extradition of Ye Gon,* 613 F. Supp. 2d 92, 97-98 (D.D.C. 2009). It then reaffirmed that conclusion in its later final opinion issued in February 2011. *Ye Gon,* 768 F. Supp. 2d 69.

few cases on the topic as to the proper test to be applied,[7] and the parties have cited to no cases from either the Fourth Circuit or the D.C. Circuit that directly address this issue. Thus, the proper test to be applied is an open issue.

In *Sindona*, the Italian government sought the extradition of Michele Sindona, an Italian businessman charged with a number of crimes related to "fraudulent bankruptcy" arising from the collapse of an Italian bank that Sindona had formed from the merger of two banks he controlled. Italy charged that Sindona hid "an enormous mass of the financial assets" of the two pre-merger banks and that he financed the business ventures of a group of foreign and Italian corporations by placing funds from the two banks on time deposits with foreign banks and by falsifying balance sheets and books. *Id.* at 170.

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[7] As noted in a leading treatise on international extradition, as of 2007, there were only "four reported federal decisions and one state decision" referring to the doctrine of *ne bis in idem* and of those, only two-Sindona and *Montiel Garcia v. United States,* 802 F. Supp. 773 (E.D.N.Y. 1993) "have any substantive discussion whatsoever of the doctrine." M. Cherif Bassiouni, International Extradition: United States Law and Practice, at 756 n.386 (5th ed. 2007). Later in his treatise, Bassiouni also discusses Elcock. The Court's additional research has found some additional reported and unreported decisions, some of which are cited by the Government at ECF No. 65, at 71 n.33. None of these additional cases contain extensive analysis informing the specific issues here.

The United States also brought charges against Sindona alleging "many of the same generic forms of fraudulent conduct described in the Italian reports, although in connection with" two United States banks that had also filed for bankruptcy. *Id.* at 171. The charges included alleged acts and fraudulent transactions between the two Italian banks and the U.S. banks, as well as a conspiracy to harm and defraud American investors. *Id.* at 171-72. Those charges remained pending without final adjudication on the merits when the Second Circuit considered the appeal of the decision to extradite Sindona to Italy.

Sindona argued that the *non bis in idem* clause in the extradition treaty between Italy and the United States prevented his return to face the same charges filed in the United States. *Id.* at 176. The Government urged the court to adopt the Blockburger test to guide its *non bis in idem* analysis. The Sindona court rejected the Blockburger test in the context of an international extradition, finding that Blockburger did not mark the outermost protections of the Fifth Amendment protection against double jeopardy, that foreign governments would not be aware of Blockburger, and that criminal statutes in the United States and foreign countries would almost invariably not have the same elements, thus rendering the treaty provision ineffective. *Id.* at 178. The court affirmed the use of a modified and flexible test of "whether the same conduct or transaction underlies the criminal charges." *Id*. In describing this test, the court looked to two sources: (1) Justice Brennan's

concurrence in *Ashe v. Swenson,* 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), which required combining into one prosecution "all the charges against a defendant which grow out of a single criminal act, occurrence, episode or transaction"; and (2) the Department of Justice's so-called Petite Policy,[8] which "prohibit[s] a subsequent prosecution 'for substantially the same act or acts.'" *Id*. In essence, the Sindona court determined that in the context of an international extradition, the rigid comparison of the elements of the offense as required under Blockburger reads the *non bis in idem* clause too narrowly. Instead, it ruled courts must look at the offenses much more broadly to determine whether both countries seek to prosecute the defendant for the same underlying criminal conduct. Ultimately, the Sindona court concluded that the Italian and United States prosecutors sought to punish different conduct:

> The Italian prosecutor charged a gigantic fraud perpetrated on the Italian banks which generated funds that permitted Sindona to engage in allegedly criminal activities in Italy and other countries including the United States. The concern of the Republic of Italy is the harm done to depositors in the Italian banks; that of the United States is the damage to American depositors and investors. The crimes charged in the American indictment, while serious, are on the

[8] *Petite v. United States,* 361 U.S. 529, 530-31, 80 S. Ct. 450, 4 L. Ed. 2d 490 (1960).

> periphery of the circle of crime charged by the Italian prosecutors. Although the alleged Italian crime may have been the "but-for" cause of the alleged American offenses in providing Sindona with the wherewithal, it is not the crime for which the United States is proceeding against him . . . [The *non bis in idem* provision] of the Treaty could not have been intended to have the consequence that substantial elements of crime should be left unpunishable.

Sindona, 619 F.2d at 179.

Even if the Court were to apply Sindona here, the broader, more flexible test announced in Sindona does not afford Ye Gon the protection he seeks under Article 6. A close view of the particular charges in both the United States and Mexican indictments reveals that the "more flexible" test announced in *Sindona* is more limited than Ye Gon suggests. He emphasizes the Government's statements – in the federal criminal case against him – that its evidence "would be the same evidence that . . . Mexico would use in its prosecution of the defendant," and that Ye Gon has been "charged with . . . similar offenses in Mexico." *Id*. at ECF No. 63. Ex. F-19. These apparent concessions, however, do not mean that the charges in the two countries are the same, even under Sindona.

The single charge in the U.S. indictment is for conspiracy to manufacture and import methamphetamine, a controlled substance, into the United States. This federal criminal charge is "on the periphery of

the circle of crime charged by [Mexican] prosecutors," *see Sindona,* 619 F.2d at 179, and the Mexican charges extend far beyond the narrow focus of the federal criminal case against Ye Gon. Mexico has charged Ye Gon with importing into its country the precursor elements necessary for the manufacture of methamphetamines, money laundering, and the illegal possession of weapons – acts which the United States never attempted to prosecute. Put simply, the acts for which Mexico seeks to prosecute Ye Gon are significantly broader than the U.S. charge. They are not "substantially the same act or acts." Cf. *Sindona, 619* F.2d at 178.

Furthermore, the reasoning in *Sindona* that Italy sought to punish a different harm than the United States applies equally here. The focus of the federal criminal prosecution was on the harm caused by the manufacture of illegal drugs for importation into the United States. The Mexican prosecution, in contrast, had a much broader focus on the importation of the precursors of illegal drugs to use in the manufacture of illegal drugs, the alleged illegal possession of guns, and laundering money to hide this illegal activity in Mexico. So, as in Sindona, the harms to the two countries are distinct.

The Sindona court also noted that neither sovereign could prosecute Sindona for the bulk of the matters charged in the other country's indictment and concluded that the *non bis in idem* clause "could not have been intended to have the consequences that substantial elements of crime should be left

unpunishable." *Id.* at 179. Again, the same is true here. It is unlikely that the United States would have jurisdiction to prosecute Ye Gon for the entire scope of the Mexican charges, e.g., the possession of illegal weapons in Mexico, the importation of precursor substances for the purpose of manufacturing illegal drugs,[9] and money laundering using Mexican or other non-United States financial institutions. In short, barring Ye Gon's extradition to Mexico based upon the federal criminal prosecution would leave "substantial elements of crime . . . unpunishable." *See id*. This is a result never intended by the Extradition Treaty drafters under Article 6.

For all of these reasons, Claim 2 of the Petition is denied.

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[9] The Government in the federal criminal case suggested that all the drugs Ye Gon was manufacturing were likely destined for the United States. *See* ECF No. 72-5, Pet. Ex. J, Transcript of September 7, 2007 Bond Hearing, at pages 69-73. The Government based this statement primarily on the fact that Ye Gon allegedly received U.S. currency and that most Mexican drug traffickers send methamphetamine to the United States and not to other countries. But to prosecute Ye Gon, the U.S. Government had to prove that Ye Gon knew or should have known that his methamphetamine would be imported into the United States. The Mexican government, by contrast, could prosecute Ye Gon for any and all of the methamphetamine, regardless of where it was distributed.

3. Claim 3: The Dual Criminality Requirements of the Treaty are Met.

In his third claim, Ye Gon challenges his extradition on the grounds that the Mexican charges do not satisfy the Extradition Treaty's "dual criminality" requirement, which generally requires that Ye Gon's alleged criminal activity be a crime in both nations.

The dual criminality requirement of the Extradition Treaty is set forth in Article 2, which states:

> 1. Extradition shall take place, subject to the Treaty, for wilful acts which fall within any of the clauses of the Appendix and are punishable in accordance with the laws of both Contracting Parties by deprivation of liberty the maximum of which shall not be less than one year.
>
> 2. . . .
>
> 3. Extradition shall also be granted for wilful acts which, although not being included in the Appendix, are punishable, in accordance with the federal laws of both Contracting Parties, by a deprivation of liberty the maximum of which shall not be less than one year.
>
> 4. Subject to the conditions established in paragraphs 1, 2 and 3, extradition shall also be granted:
>
> (a) For the attempt to commit an offense; conspiracy to commit an

> offense; or the participation in the execution of an offense; . . .

ECF No. 41, Ex. C, Treaty at 4.

Each charged offense must be evaluated separately to determine if it satisfies dual criminality. Notably, the law requires that the act charged be criminal in both countries, not that the offenses are named the same or have the same elements. *Collins v. Loisel,* 259 U.S. 309, 312, 42 S. Ct. 469, 66 L. Ed. 956 (1922) (dual criminality is satisfied "if the particular act charged is criminal in both jurisdictions"). Thus, this Court rejects many of Ye Gon's arguments regarding dual criminality, which erroneously look to the ***elements*** of each offense, because the question for purposes of Article 2 is much broader, i.e., whether the ***acts*** for which Mexico seeks to prosecute Ye Gon constitute a felony in both countries. *See id*. Ye Gon relies upon Collins to argue that the only "acts" that are permitted to be reviewed for purposes of dual criminality are those contained in the Mexican charging document. But this is really a variation of the argument that the Court should look to the elements of the particular offenses, since a charging document often might contain only the limited facts required to set forth the elements of a crime. It is also inconsistent with the way courts have interpreted *Collins*. *See, e.g., Clarey v. Gregg,* 138 F.3d 764 (9th Cir. 1998) (discussing dual criminality under the U.S.-Mexico Treaty and noting that "although some analogy is required . . . differences between statutes aimed at the same category of conduct do not defeat dual

criminality;" instead, dual criminality is satisfied where both countries' laws are directed to "the same basic evil") (citations omitted); *United States v. Sensi,* 879 F.2d 888, 894, 279 U.S. App. D.C. 42 (D.C. Cir. 1989) (noting that "the central focus [of the dual-criminality rule] is on the defendant's acts" and that "it is the facts or underlying conduct supporting the charges which must correlate"). Here, the facts found by the extradition court, which this Court must adopt unless clearly erroneous, support the finding that Ye Gon's acts constitute crimes in both countries.

The extradition court, as summarized by the Government in its brief, ECF No. 50 at 29-31, found the following evidence supported the Mexican drug charges:

> (1) in September 2003, Petitioner, [through one of his companies, Unimed Pharm Chem ("Unimed")] contracted with the Chinese company Chifeng Arker to purchase large quantities of an intermediate chemical that could be used to manufacture pseudoephedrine and pseudoephedrine hydrochloride, and to obtain technical assistance from Chifeng Arker in how to manufacture those substances, Findings ¶¶ [1-2], 5-7; (2) Petitioner began to obtain property for, and to build, a pharmaceutical manufacturing plant in Toluca shortly after signing the Chifeng Arker contract, *id*. ¶ 13; (3) Chinese workers helped with the start-up of that plant, as contemplated by the Chifeng Arker contract, *id*. ¶ 13; (4) Petitioner lost

his lawful ability to import psychotropic substances in July 2005, ¶¶ 11-12; (5) between December 2005 and December 2006, Petitioner unlawfully imported N-acetyl-pseudoephedrine on three occasions and ephedrine acetate (which is a controlled substance under U.S. law) on a fourth, ¶¶ 14-18, 22-26, 29-33; (6) at least one of the unlawful and clandestine shipments of N-acetyl-pseudoephedrine was sent to the Toluca plant, ¶ 28; (7) that chemical, when treated with heated hydrochloric acid, produces pseudoephedrine hydrochloride, a controlled substance under Mexican and U.S. law, ¶ 36; (8) according to workers at the plant, the plant received daily shipments of a white hard chemical substance that was heated with hydrochloric acid to obtain a white crystalline powder, ¶ 35; (9) also according to plant workers, at the end of the day, that powder was bagged and driven away by Ye Gon or his personal driver, ¶ 46; (10) according to a Unimed employee, Ye Gon's driver was seen entering the premises of Unimed's warehouse and office in Mexico City after work hours and disabling the security cameras, ¶ 47; and, (11) in a search of Ye Gon's office at the Unimed warehouse in March 2007, law enforcement agents found a dozen bags of a white powder substance that was tested and found to be pseudoephedrine hydrochloride, ¶48.

In addition, the extradition magistrate credited evidence that Ye Gon tried to conceal his manufacturing activities: i.e., according to a former Unimed accountant, the

> product from the Toluca plant was not recorded in Ye Gon's inventory, ¶50; according to the accountant and other Unimed employees, transactions involving the plant were conducted in cash, and envelopes of cash from apparent sales of that product were delivered personally to Ye Gon, ¶¶ 52-53. A search of the plant discovered, on the equipment and work surfaces, traces of chemicals that could be used in the production of methamphetamine, such as pseudoephedrine, ephedrine, and ephedrine acetate, and the equipment in the plant could be used to produce such psychotropic substances, ¶¶ 40-42. Ye Gon did not have permission to manufacture psychotropic substances of any kind. ¶¶ 9, 43. Those activities are fully consistent with the importation and manufacturing contract that Ye Gon entered into with Chifeng Arker in September 2003, before he lost the ability to import the necessary chemicals lawfully.

ECF No. 50 at 29-31 (citing to numbered paragraphs in "Findings of Fact," *Ye Gon*, 768 F. Supp. 2d at 73-79).

The Mexican weapons charges were based on the seizure of firearms from Ye Gon's home and office. "First, firearms were seized from a locked, hidden room off the master bedroom in Ye Gon's home, where [agents also discovered] millions of U.S. dollars and other currency. There, Mexican authorities seized an AK-47 assault rifle, two 9mm semi-automatic pistols, and a .45-caliber pistol. Second, firearms were seized from Ye Gon's private office in Mexico City, where

Mexican authorities also found 12 bags of unauthorized pseudoephedrine hydrochloride as well as a 9 mm pistol." *Ye Gon,* 768 F. Supp. 2d at 86.

With regard to the criminal conspiracy charge, the extradition court found that Ye Gon "worked closely with four other" named individuals and that there was probable cause "to believe that not only did Ye Gon act in concert with these individuals to violate Mexican drug and money laundering laws, but that he directed the activities of this criminal conspiracy. *Id.* at 84; *see also id*., Findings of Fact at ¶ 65.

Finally, as to the money laundering charges, the extradition court concluded that there was probable cause to believe Ye Gon had "engaged in money laundering of proceeds from his illegal drug activity, in part by hiding millions of dollars in a closet, and in part by tunneling cash proceeds through Mexican money exchanges in order to pay suppliers of equipment and raw materials for his unlawful chemical manufacturing plant in Toluca, Mexico. This accumulation of unexplained wealth [occurred] at the same time that Ye Gon was engaged in illegal drug importation and manufacturing; his surreptitious handling of receipts and payments involving the illegal Toluca plant; plus his use of Mexican money exchanges to disguise payments to Chifeng Arker." *Id.* at 86; *see also id*., Findings of Fact at ¶¶ 49-63.

a. Drug charges

Ye Gon argues that dual criminality related to the drug charges is lacking for a number of reasons. First, he contends that N-acetyl-pseudoephedrine, the substance found in the first three unlawful shipments, is not a controlled or listed substance under United States law. He further notes that the U.S. Government itself has admitted that N-acetyl pseudoephedrine is not a controlled or listed substance in the United States. Second, he argues that his expert chemist stated that the Mexican test result, which found ephedrine acetate in the fourth shipment, does not conclusively prove that the substance was the kind of ephedrine acetate that is listed as an illegal chemical under U.S. law.

Ye Gon argues that the extradition court erred in concluding that Mexico's charges were sufficiently analogous to similar provisions in American law that dual criminality was satisfied. He contends that "[t]his 'close enough' approach failed to honor the legal requirements of dual criminality." ECF No. 63 at 43-44.

As to the bags of pseudoephedrine hydrochloride found in Ye Gon's office in Mexico City, Ye Gon relies on the fact that the quantity of these items was never alleged. He thus argues that the possession of those bags could, under United States laws, be a charge of simple possession, which would only be a misdemeanor offense in the United States, and thus would not satisfy dual criminality.

The Government counters that the extradition court offered "two equally valid reasons" why dual criminality was satisfied for the drug offenses. ECF No. 65 at 32. First, the evidence showed that Ye Gon engaged in the unlawful importation, transportation, and possession of N-acetyl pseudoephedrine and ephedrine acetate to manufacture other prohibited substances. Those charged acts are punishable as felonies under 21 U.S.C. §§ 843(a)(6) and (a)(7), which make it unlawful to import "any . . . chemical" which may be used to manufacture a "listed chemical." Affirming the extradition decision on this basis requires an implicit rejection of the testimony of Ye Gon's chemistry expert that the ephedrine acetate found in the fourth shipment was not a salt or isomer of ephedrine that would be listed as a chemical under United States law.

Second, the Government contends that the extradition court properly concluded that even if none of the illegal shipments contained a controlled substance or listed chemical under U.S. law, both countries have drug laws directed at the same "basic evil" and both seek to regulate the importation of chemicals that can readily be converted to methamphetamine precursors and ultimately methamphetamine.

Having reviewed the record and the arguments of the parties, the Court concludes that the first ground given by the extradition court is sufficient to establish dual criminality for the drug charges. *See* ECF No. 41, Ex. B, at 24-29 n.10. That is, there was enough evidence to find that the Ye Gon's acts forming the

basis of the Mexican drug charges would violate 21 U.S.C. §§ 843(a)(6) and (a)(7).[10] Thus, dual criminality exists for all the drug charges, including the charge of diverting sulfuric acid for the unlawful production of psychotropic substances.[11]

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[10] Ye Gon contends that the extradition court misquoted the U.S. law's requirements, by omitting the crucial element that the defendant import "knowing, intending or having reasonable cause to believe, that [the precursor drug] will be used to manufacture a controlled substance or listed product." ECF No. 63 at 47 n.12. The facts as found by the extradition court, to which this Court defers, could clearly give rise to an inference that Ye Gon knew or intended that the importation of the substance that is not otherwise illegal in the United States would be used to manufacture a controlled substance or listed product. Thus, the drug charges have a U.S. felony counterpart.

[11] In addition to asserting individual challenges to the dual criminality of most of the remaining charges, Ye Gon also challenges the dual criminality of all of the remaining charges as a group on the grounds that all the remaining charges are dependent on the drug charges being a valid predicate offense. That is, the money laundering depends on the money being the proceeds of illegal drugs, organized crime depends on illegal drug dealing and money laundering, and the only theory of dual criminality for the firearms charges requires a nexus and connection between illegal drugs and the firearms. Because the Court concludes there is dual criminality as to the drug charges, the Court rejects Ye Gon arguments that are based on the "dependence" of the other crimes.

b. Possession of Firearms[12]

Ye Gon claims that the Mexican weapons charges are not crimes under United States law, because they are brought under laws that criminalize the mere possession of certain weapons. He also contends that the only evidence linking the guns to illegal drugs is that four firearms were found near money that was allegedly drug proceeds, and a fifth gun was found near bags of a drug in a quantity that would give rise only to a simple possession charge in the United States. Ye Gon further asserts that even if the guns were found near drugs or drug money, the requirement that the firearm be used "in furtherance of a 'drug trafficking crime'" under 18 U.S.C. § 924(c) is not met here. Thus, the acts charged do not constitute a felony under United States laws. Moreover, the "in furtherance of requirement is not a part of the Mexican charges.

The Government argues that the evidence credited by the extradition court sufficiently establishes that the weapons were near drug money and were in the same office in which illegal substances were found. The court also found that there was a silencer

[12] At the extradition hearing, the Government represented to the magistrate that weapons charges also constituted a crime under the laws of the District of Columbia because one of the weapons Ye Gon possessed was an AK-47, which is a prohibited "machine gun." The Government does not rely upon District of Columbia law as a basis for a finding of dual criminality, relying instead only on federal law. *See* ECF No. 65, Resp. at 45.

among the arsenal of weapons and an obscured serial number on the handgun in the office, all of which support the inference that the weapons were used or intended to be used to protect the contraband. *See, e.g.*, *United States v. Perry,* 560 F.3d 246, 254 (4th Cir. 2009) (affirming § 924(c) conviction and noting the factors that should be considered as to whether a firearm was used in furtherance of a drug trafficking crime, include accessibility of the firearm, the proximity to drugs or gun profits, the type of weapon, whether it is stolen, and the circumstances under which the gun is found).

Ye Gon is alleged to have possessed a number of weapons that were illegal in his country, and those weapons were found in close proximity to illegal drugs and substantial amounts of cash, which amounts are alleged to be the proceeds of drug trafficking. Under Fourth Circuit precedent and cases in other circuits, these facts would be sufficient to constitute a Section 924(c) violation. *See, e.g.*, *Perry,* 560 F.3d at 255 (weapons found in close proximity to drug paraphernalia sufficed to support § 924(c) conviction); *United States v. Snow,* 462 F.3d 55, 63 (2d Cir. 2006) (evidence supported 924(c) charge where illegally possessed guns were found in apartment bedroom in the same dresser as $6,000 cash and where drug paraphernalia and trace amounts of drugs were in the kitchen of the same apartment); *id.* at 63 n.8 (collecting similar authority). For all of these reasons, the Court concludes that dual criminality exists with regard to the weapons charges.

c. Money Laundering Charge

Ye Gon argues that dual criminality is not met for several reasons as to the money laundering charge. First, he challenges the reliance on facts that showed money transfers, because those acts were not those "charged" in Mexico's offense, which simply alleges that Ye Gon and others "maintained funds in Mexican territory." Second, he contends there was no evidence that Ye Gon or others knew that any of the funds maintained had an illegal source. Third, and most importantly, he claims that dual criminality is lacking because the Mexican money laundering statute does not require a financial transaction, while the U.S. statute does.

Again, Ye Gon's arguments place an undue emphasis on the elements of the offense, where dual criminality does not require identical elements of the offense. Instead, a dual criminality analysis simply requires that the acts or underlying conduct are criminal in both places. *See Sensi,* 879 F.2d at 895 ("[t]he central focus [of the dual-criminality rule] is on the defendant's acts.") The act of hiding the proceeds of illegal drug activity is illegal in both countries. Thus, dual criminality is met for this offense as well.

For the foregoing reasons, Claim 3 of the Petition is denied.

4. Claim 4: Extradition Is Not Barred By Articles 3 or 10 of the Treaty Due to the Alleged Procedural Insufficiency of the Evidence.[13]

Ye Gon's fourth claim is essentially that the evidence presented to the extradition court does not meet the procedural requirements set forth in the Treaty. He relies on Articles 3 and 10 of the Treaty. Article 3 provides:

> Extradition shall be granted only if the evidence be found sufficient according to the laws of the requested Party . . . to justify the committal for trial of the person sought if the offense of which he has been accused had been committed in that place.

ECF No. 63, Ex. C, Treaty. For a person who has not yet been convicted (such as a conviction in absentia), Article 10, Subdivision 3, also requires that the request for extradition be accompanied by:

> a) a certified copy of the warrant of arrest issued by a judge or other judicial officer of the requesting Party;
>
> b) Evidence, which, in accordance with the laws of the requested Party, would justify the apprehension and commitment for trial

[13] Although the heading in the petition references Articles 2 and 10, Ye Gon quotes to and is clearly relying on Article 3. *See, e.g.*, ECF No. 63, at 63.

> of the person sought if the offense had been committed there.

ECF No. 63, Ex. C at 8-9.

Citing to these two provisions, Ye Gon argues that much of the evidence presented by the Government at the extradition hearing is not sufficiently reliable because it consists of excerpts of exhibits, rather than complete copies, and because the exhibits themselves do not indicate who determined what portions would be "relevant," what grammatical changes would be, or what constituted a reliable "summary." ECF No. 63 at 63-65. Ye Gon repeatedly points to the testimony of his expert witness, Professor Saltzburg, for the proposition that, in the absence of the background information regarding who made the changes and what changes were made from the originals, such excerpts are inherently unreliable.

Ye Gon also relies on Professor Saltzburg's testimony that the quoted portion of Article 10, Subdivision 3 requires something more than a simple summary of what is in the arrest warrant and that the arrest warrant alone is insufficient. ECF No. 63 at 65-66. Ye Gon claims that subsections (a) and (b) set out "separate and independent requirements" and that they were not met here.

Ye Gon further appears to challenge the accuracy of some of the translations of documents in Spanish and, in particular, the fact that some supplemental documents were sent without any English translations at all. Finally, he contends that the extradition

court erred in finding that "all of the evidence submitted by Mexico has been authenticated in accordance with 18 U.S.C. § 3190" and that "complete statements of witnesses" were "certified to be authenticated by a Department of State official." To the contrary, Ye Gon contends, Section 3190's automatic authentication does not apply, because the certificate, not a copy, had to be offered as proof and never was.

Summarizing all of his procedural insufficiency arguments, Ye Gon contends:

> At bottom, the Government's extradition [sic] submissions failed to satisfy the procedural requirements of the U.S.-Mexico extradition treaty – both with respect to Article 10 Section 3's requirement that there be evidence separate from the arrest warrant, and Article 3's requirement that the evidence be found "sufficient according to the laws of the requested Party." Mexico's almost universally-excerpted submissions did not satisfy Article 3, and its later submissions were never certified by an original certificate of the U.S. Department of State, with complete versions of Mexico's accounting and forensic reports also never submitted at all "accompanied by a translation in the language of the requested Party," as required by Article 10 Section 5. The Magistrate Judge erred in considering and relying on this evidence, in violation of the U.S.-Mexico treaty, and in denying Petitioner such process. The procedural expectations for extradition set forth in Article 3 (entitled "Evidence Required") and Article 10

> (entitled "Extradition Procedures and Required Documents") were not satisfied, and the procedural flaws in Petitioner's extradition hearing warrant habeas relief under § 2241 & 2243.

D.E. 63, Pet. at 74-75, ¶ 186.

Ye Gon has failed to make a showing that there was error as to procedural sufficiency. The Government correctly notes that the evidentiary requirements in extradition hearings are minimal. *See Haxhiaj,* 528 F.2d at 285-86 ("[T]he magistrate judge has a great amount of latitude in considering evidentiary support for an extradition request."). Indeed, the Supreme Court has recognized that "unsworn 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." *Collins,* 259 U.S. at 317. Cases applying that principle have allowed extradition on evidence consisting of unsworn statements that do not comply with the inapplicable Federal Rules of Evidence. *See, e.g*., *Afanasjev v. Hurlburt,* 418 F.3d 1159, 1163-66 (11th Cir. 2005) (unsworn bill of indictment that was over 100 pages long and contained "detailed" summaries of witness statements and other hearsay evidence was "sufficiently reliable evidence" on which to base probable cause finding); *Zanazanian v. United States,* 729 F.2d 624, 627 (9th Cir. 1984) (extradition court could rely on unsworn hearsay because "[n]either the applicable treaty nor United States law requires evidence offered

for extradition purposes be made under oath"); *Bovio v. United States,* 989 F.2d 255, 259-61 (7th Cir. 1993) (sworn statement from foreign investigator recounting evidence was sufficient to establish probable cause, even though his statement did "not indicate how he obtained the information on which the [witness] statements are based, whether witnesses were under oath, and whether there are any original notes or recordings of witness interviews"); *In re Extradition of Sainez,* 2008 U.S. Dist. LEXIS 9573, 2008 WL 366135, at *15 (S.D. Cal. Feb. 8, 2008) (addressing extradition request from Mexico and concluding that it was proper to "consider all of the . . . evidence in its probable cause determination, whether sworn or unsworn, or whether the evidence consists of an actual statement given by a witness or a summary thereof).

The Government is not required to provide certified translations of the charging documents. *See, e.g., In re Extradition of David,* 395 F. Supp. 803, 806 (D. Ill. 1975) ("[Translations must be presumed to be correct unless [the fugitive] presents some convincing evidence otherwise."); *Ntakirutimana v. Reno,* 184 F.3d 419, 430-31 (5th Cir. 1999) (if translated documents are authenticated in accordance with 18 U.S.C. § 3190, an "extradition court need not independently inquire into the accuracy of the translations submitted with a formal extradition request, because such a requirement would place an unbearable burden upon extradition courts and seriously impair the extradition process") (internal quotation and citations omitted).

Instead, the accuracy of translations are presumed to be correct, unless shown to contain material errors. *See David,* 395 F. Supp. at 806. In sum, the Court concludes that the evidence is sufficiently reliable to support a finding of probable cause and therefore **DENIES** Claim 4.

5. Claim 5: The Extradition Court's Finding of Probable Cause Was Not Clearly Erroneous.

Ye Gon's fifth challenge is essentially a challenge to the evidence against him, which he claims shows a lack of probable cause. Having reviewed the record and reviewed both Ye Gon's specific challenges and his more general challenges to probable cause, the Court disagrees. Ye Gon acknowledges the deferential standard this Court must give to the factual findings of the extradition court. *See Haxhiaj,* 528 F.3d at 287. Ye Gon's arguments in this claim, however, largely ignore the deference required. Ye Gon may be innocent of the Mexican charges against him, and he will have the opportunity to vigorously contest those charges in the country where they have been brought. But neither the extradition court's role, nor this Court's role, is to evaluate or weigh the evidence proffered in support of the charges. Instead, the extradition court's role is simply to ask whether there is probable cause to support the charges and this Court's role is to determine whether there is "any evidence" to support a finding of probable cause. *See id*. Having fully reviewed the record, the Court

concludes that the evidence submitted supports the finding of probable cause. Accordingly, the Court **DENIES** Claim 5.

6. Claim 6A: This Court Does Not Have Jurisdiction to Consider Whether The Risk of Torture to Ye Gon Should Bar His Extradition.

Ye Gon's Claim 6A, which is that he would be subject to torture if extradited, is foreclosed by the Fourth Circuit's decision in *Mironescu v. Costner,* 480 F.3d 664, 670-71 (4th Cir. 2007).[14] In Mironescu, the Fourth Circuit first noted that the Convention Against Torture ("CAT"), which is not self-executing, is implemented only through the FARR Act.[15] *See also Turkson v. Holder,* 667 F.3d 523, 526 n.3 (4th Cir. 2012) (noting same). The Mironescu Court concluded

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[14] There is (or at least was) a split in the circuits on this issue. *See, e.g., Prasoprat v. Benov,* 622 F. Supp. 2d 980, 984-85 & n.3 (CD. Cal. 2009) (noting split); *Omar v. Geren,* 689 F. Supp. 2d 1, 5-6 (D.D.C. 2009) (noting split and that Fourth Circuit and D.C. Circuit follow the same rule); but *see* ECF No. 84, US Resp. to Claim 6A, at 14-15 (discussing issue and noting that the sole circuit on the other side of the split was the Ninth, who recently issued *Trinidad y Garcia v. Thomas,* 683 F.3d 952 (9th Cir. 2012), which overruled its prior case to the extent that it held courts had the ability to review the substance of the Secretary's decision to extradite in the face of a torture claim.) Any circuit split aside, this Court is bound by the Fourth Circuit's pronouncements on the subject, which are clear.

[15] Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, Div. G, 112 Stat. 2681-82 (Oct. 21, 1998).

that Section 2242(d) of the FARR Act deprived the district court of jurisdiction to consider the petitioner's claims that he would be tortured if extradited. 480 F.3d at 675; *see also Munaf v. Geren,* 553 U.S. 674, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008) (in addressing claims of military detainees in Iraq who challenged their transfer to Iraqi officials for prosecution, it would be improper for courts to review the executive branch's determination regarding the likelihood of torture after transfer, because it was a decision for the "political branches," not the courts).[16] Based on these authorities, the Court **DENIES** Claim 6A.

Ye Gon has requested that, if this Court denies his torture claim at this time, that it do so without prejudice to his ability to raise such arguments at a later time in any subsequent proceedings. (D.E. 82 at 10.) The Government, although for different reasons, seems to agree that a dismissal without prejudice would be appropriate. That is, the Government contends that Ye Gon's claim is premature in any event because it could be mooted by the Secretary of

[16] Ye Gon cursorily asserts that, to the extent Mironescu bars his claim regarding torture, that bar violates the U.S. Constitution's Suspension Clause and that issue was never addressed by the Mironescu court. Respondents counter that the Suspension Clause is not violated because the writ of habeas corpus never existed to begin with; thus, no right to habeas was ever "suspended." *See* D.E. 84, Resp. to Claim 6A at 22-24). Based on Ye Gon's failure to adequately brief this argument, the Court does not consider it.

State's extradition decision, which has not yet been made. It does not seem that a denial of this claim here would preclude the Secretary of State from considering the claim, and thus the Court is uncertain what benefit, if any, a denial without prejudice would serve, but nonetheless **DENIES** the claim without prejudice to Ye Gon's ability to raise it before the Secretary of State in subsequent proceedings.

7. SEALED Claim 6B: Ye Gon Is Not Entitled To Relief On Claim 6B.

In his final claim, Claim 6B, Ye Gon seeks relief from extradition on the grounds that there has been outrageous government conduct in this case constituting a due process violation, which he contends has put his life and the lives of his family members at risk and also demonstrates that the Mexican government cannot be trusted to protect him if he is extradited. The Court has carefully considered Ye Gon's final claim and the arguments of the parties concerning it. There is no evidence in the record that the allegedly "outrageous conduct" committed here was by, or on behalf of, any U.S. official. Accordingly, it does not give rise to a due process claim under the United States Constitution, which does not govern the conduct of foreign officials. *See Prushinowski v. Samples,* 734 F.2d 1016, 1018 (4th Cir. 1984) ("It is established that constitutional questions of deprivation of rights are addressed only to the acts of the United States Government and not to those of a foreign nation, at least for purposes of determining

questions of extraditability."); *Plaster,* 720 F.2d at 349 n.9 (habeas petition challenging extradition "must claim that the conduct of our government is violating his constitutional rights").

This claim is therefore **DENIED**.

III. CONCLUSION

For the reasons set forth supra at 3-5, Respondents' Motion to Dismiss Certain Federal Respondents, ECF No. 102, is hereby **GRANTED** and Attorney General Eric Holder, Jr., U.S. Marshal Edwin D. Sloane, and the U.S. Secretary of State are hereby **DISMISSED** from the case.

Additionally, for the reasons set forth above and for the reasons set forth in the Memorandum Opinion granting in part and denying in part Petitioner's Motion to Amend/Correct, entered this same day, the Court **DENIES** Ye Gon's Amended Petition for a Writ of Habeas Corpus Pursuant to 18 U.S.C. § 2241 (ECF Nos. 63, 82 (Claim 6A) and 91 (Claim 6B)). The third part of Claim 1 and Claim 6A are **DENIED WITHOUT PREJUDICE** and the remaining claims are **DENIED WITH PREJUDICE**.

Additionally, for the reasons set forth in its Memorandum Opinion granting the motion for stay, entered this same day, the Court hereby **STAYS** the extradition of Ye Gon during the pendency of his appeal before the United States Court of Appeals for the Fourth Circuit.

ENTER: This 17th day of January, 2014.

/s/ James C. Turk

James C. Turk

Senior United States District Judge

AMENDED ORDER AND FINAL JUDGMENT

By: James C. Turk

Senior United States District Judge

For the reasons set forth in the accompanying Amended Memorandum Opinion, Respondents' Motion to Dismiss Certain Federal Respondents, ECF No. 102, is hereby **GRANTED** and Attorney General Eric Holder, Jr., U.S. Marshal Edwin D. Sloane, and the U.S. Secretary of State are hereby **DISMISSED** from the case.

Additionally, the Court **DENIES** Petitioner's Amended Petition for a Writ of Habeas Corpus Pursuant to 18 U.S.C. § 2241 (ECF Nos. 63, 82 (Claim 6A) and 91 (Claim 6B)), **ENTERS FINAL JUDGMENT** in favor of Respondents and **STRIKES** this case from the Court's active docket. The third part of Claim 1 and Claim 6A are **DENIED WITHOUT PREJUDICE** and the remaining claims are **DENIED WITH PREJUDICE**. The basis for the Court's rulings are set forth in both the accompanying Amended Memorandum Opinion and the Memorandum Opinion addressing Petitioner's Motion to Amend/Correct, entered this same day.

Additionally, the Court hereby **STAYS** the extradition of Petitioner during the pendency of his appeal before the United States Court of Appeals for the Fourth Circuit.

ENTER: This 17th day of January, 2014.

/s/ James C. Turk

James C. Turk

Senior United States District Judge

ZHENLI YE GON, Petitioner, v. GERALD S. HOLT, U.S. Marshal for the Western District of Virginia, and FLOYD AYLOR, Warden of the Central Virginia Regional Jail, Respondents.

Case No. 7:11-cv-00575

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION

2014 U.S. Dist. LEXIS 6084

January 17, 2014, Decided
January 17, 2014, Filed

COUNSEL: For Zhenli Ye Gon, Petitioner: Gregory Stuart Smith, LEAD ATTORNEY, PRO HAC VICE, Law Offices of Gregory S. Smith, Washington, DC; John C. Lowe, John Christian Lowe, LEAD ATTORNEYS, JOHN LOWE, P.C., Bethesda, MD.

For Sheriff Gerald S. Holt, U.S. Marshal for the Western District of Virginia, Respondent: John Philip Dominguez, LEAD ATTORNEY, U.S. ATTORNEY'S OFFICE, Washington, DC; Valinda Jones, LEAD ATTORNEY, U.S DEPARTMENT OF JUSTICE – INTERNATIONAL AFFAIRS, CRIMINAL DIVISION, WASHINGTON, DC.

For Floyd Aylor, Warden of the Central Virginia Regional Jail, Respondent: Alexander Francuzenko, LEAD ATTORNEY, Broderick Coleman Dunn, Lee Brinson Warren, Cook Craig & Francuzenko, Fairfax, VA; John Philip Dominguez, LEAD ATTORNEY, U.S. ATTORNEY'S OFFICE, Washington, DC.

JUDGES: James C. Turk, Senior United States District Judge.

OPINION BY: James C. Turk

OPINION

MEMORANDUM OPINION

By: James C. Turk

Senior United States District Judge

By Memorandum Opinion and Order entered November 25, 2013, this Court denied Petitioner Zhenli Ye Gon's ("Ye Gon") petition for habeas corpus under 28 U.S.C. § 2241. ECF No. 117, 118. On December 5, 2013, Ye Gon filed a Motion to Alter, Amend or Correct Final Judgment, ECF No. 120, in which he requests that this Court amend or clarify its prior Memorandum Opinion regarding several specific issues, addressed herein. *See* ECF No. 121. The Respondents (hereinafter "the Government") has filed a response. ECF No. 129, and Petitioner has filed a reply, ECF No. 133. The parties have agreed to the submission of the motion without a hearing, *see* ECF No. 120 at 1, and therefore it is ripe for disposition. For the reasons set forth herein, the motion is **GRANTED IN PART** and **DENIED IN PART**.

Petitioner seeks clarification or amendment of the Court's prior opinion and order as to three issues. First, he seeks a specific ruling on "whether Mexico's separate criminal charge related to sulfuric acid may be prosecuted[,]" or whether extradition is improper

on this separate Mexican criminal charge because dual criminality is lacking. ECF No. 121 at 1-2 (citing his prior argument at ECF No. 63 at 48-50). Second, he requests a ruling on whether "the legal rule that declares that all 'contradictory' evidence must be excluded in extradition proceedings, expressly applied by U.S. Magistrate Judge Facciola, violates constitutional due process." ECF No. 121 at 2 (citing his prior argument at ECF No. 63 at 93-94). Third, Petitioner requests an amendment of "its Order and Memorandum Opinion to clarify that only charges on which this Court has authorized extradition may be prosecuted by Mexican officials." ECF No. 121 at 2-3. Finally, in a footnote, Petitioner also correctly notes that the docketed copy of the Opinion contains two page different versions of page 31 and that only the second of these should appear in the opinion.

Rule 60(a) allows a court to correct "a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." Fed. R. Civ. P. 60(a). Clearly, the error concerning page 31 is a clerical mistake and the Government agrees that an Amended Order would be appropriate to correct this error.[1] Accordingly, the Court will docket an Amended Opinion

[1] Likewise, the Government correctly notes that the docketed version of the Opinion is missing page 38 and contains instead two copies of page 39. *See* ECF No. 18. This error, too, will be corrected with the Court's Amended Opinion.

consistent with its rulings herein and also incorporating its separate ruling on Petitioner's Motion to Stay.

With regard to the more substantive issues raised by Petitioner, the Court addresses each of them in the order in which they were raised, after first addressing a procedural argument half-heartedly raised by the Government.

I. Whether Fed. R. Civ. P. 59 or 60 Are Available in Extradition Proceedings

In its response to Petitioner's motion, the Government begins with the couched statement that "Petitioner's invocation of Federal Rules of Civil Procedure 59(e) and 60 may be misplaced." ECF No. 129 at 1 (emphasis added). It is unwilling to say "that the Rules of Civil Procedure can never be used in a habeas proceeding involving an extradition decision[,]" but argues that "the broad use of either Rule 59 or Rule 60 to reopen the completed habeas proceeding should be avoided." *Id.* at 2-3. The Court does not interpret Petitioner's motion – which was narrowly drawn, brief, and mostly asked for clarification of the Court's rulings – as any such "broad" attempt to "reopen the completed habeas proceeding." In any event, both because the Court largely denies the relief sought by Petitioner and because the Government has not expressly argued that Rule 59(e) and Rule 60 are inapplicable here, the Court will assume, without deciding, that it has authority under both or either of those rules to address Petitioner's motion.

II. Sulfuric Acid Drug Charge

Turning now to Petitioner's specific requests, he first asks for a specific ruling on "whether Mexico's separate criminal charge related to sulfuric acid may be prosecuted[,]" or whether extradition is improper on this separate Mexican criminal charge because dual criminality is lacking. By way of additional background, one of the charges against Ye Gon encompassed a claim that he diverted sulfuric acid, which is treated as an "essential chemical product" under Mexican law, for the unlawful production of psychotropic substances. *See* ECF No. 50, Ex. 1 at 5 (including in the listed drug offenses "Diversion of essential chemical products (sulfuric Acid) to produce narcotics"). The extradition court made factual findings that "traces" of sulfuric acid had been found in the Toluca pharmaceutical plant, and other factual findings suggesting that sulfuric acid may have been used to produce illegal narcotics.

Petitioner contends that the possession or use of sulfuric acid to manufacture a controlled substance is not a violation of U.S. law, and thus that dual criminality is lacking as to the charge of diversion. He further points to the testimony of Dr. Lectka before the extradition court that sulfuric acid is a widely-available, common chemical substance found in virtually every operating chemical lab. ECF No. 63 at 49.

In is Answer to his habeas petition, the Government did not reference any specific arguments regarding the sulfuric acid, nor did it make any

argument that sulfuric acid is a controlled substance or a listed chemical under U.S. law. *See* generally ECF No. 65 at 29-37 (arguing that dual criminality is met for the drug-related charges). Instead, it simply argued that dual criminality is satisfied for the diversion charge because the "same basic evil" is proscribed under United States law, as well, i.e., the use of precursor chemicals to create illegal substances. It continues: "That the United States chooses to regulate a slightly smaller subset of that category of chemicals goes more to the elements of the offense than to the criminal nature of the underlying conduct, and, thus, that difference should not defeat dual criminality." *Id.* at 35 (citing *Choe v. Torres,* 525 F.3d 733, 738 (9th Cir. 2008)).

In its response to the Motion to Alter or Amend Judgment, the Government again makes no argument that the diversion of sulfuric acid specifically would be illegal in the United States. Instead, it argues that this Court sufficiently addressed the charge of diverting sulfuric acid by "adopting the factual findings of the extradition court as its own," which included facts supporting extradition on the sulfuric acid charge. ECF No. 129 at 4-6. The Government also suggests a revision to one sentence of this Court's opinion regarding this issue, if the Court wishes to make its holding "abundantly clear." ECF No. 129 at 6.

In the Court's view, Defendant's arguments that dual criminality on this specific charge is lacking may be stronger than its other dual criminality challenges.

Nonetheless, the Court intended for its prior opinion to include a rejection of this argument. Thus, the Court agrees with the Government that the best course is simply for the Court to amend its prior opinion to make clear its intended ruling, which is that all of the drug charges satisfy the dual criminality requirement. Accordingly, the Court will amend page 30 of its prior opinion to include the following underlined language, so that it will now read: "the first ground given by the extradition court is sufficient to establish dual criminality for all of the drug charges, including the charge of diverting sulfuric acid for the unlawful production of psychotropic substances."

III. The Contradictory Evidence Rule

In his Amended Petition, Petitioner argued that his constitutional due process rights were violated when the Extradition Court refused to consider allegedly "contradictory evidence" that he offered. In response, the Government first contends that Petitioner failed to make or preserve a due process challenge to the rule against contradictory evidence because he made "only passing reference to that claim in the extradition proceeding and his habeas petition." ECF No. 129 at 6. It argues that, in any event, the extradition magistrate did not exclude any of Petitioner's evidence on this basis and further, that the claim fails "in light of the longstanding Supreme Court cases that created the rule against the introduction of contradictory evidence." ECF No. 129 at 7.

In its prior Memorandum Opinion, the Court did not expressly state that the contradictory evidence rule does not violate due process. To the extent that the Extradition Court applied the contradictory evidence rule at all, however, the Court concludes that Petitioner has failed to show that the application of that rule violated his due process rights. In particular, as the Government correctly notes, there is ample authority that holds that the rule prohibiting the introduction of contradictory evidence is applicable in extradition proceedings. *See*, *e.g.*, ECF No. 129 at 10-12. Thus, the Court denies Plaintiff's motion insofar as it requests a ruling that the contradictory evidence rule violated his constitutional right to due process.

IV. Rule of Specialty Request

Petitioner's third and final request seeks an order from this Court clarifying "that only charges on which this Court has authorized extradition may be prosecuted by Mexican officials." ECF No. 121 at 2-3. This appears to be a reference to the rule of speciality, a "doctrine of international comity" that states the "requesting state, which secures the surrender of a person, can prosecute that person only for the offense for which he or she was surrendered by the requested state or else must allow that person an opportunity to leave the prosecuting state to which he or she has been surrendered." *Gallo-Chamorro v. United States,* 233 F.3d 1298, 1305 (11th Cir. 2000) (citations omitted); *United States v. Day,* 700 F.3d 713, 722 (4th Cir.

2012) (describing the doctrine and noting that the extradition treaty between the United States and Mexico "prohibits the trial of a person for 'an offense' for which extradition has not been granted"). Petitioner notes that he has seen press reports from Mexico claiming that "the Mexican government has filed additional, separate charges against Mr. Ye Gon – including one report of alleged tax violation charges, and another more recent press report describing new 'smuggling' charges." ECF No. 121 at 2. He further notes that no extradition has even been sought by Mexico on these other charges and thus "[a] risk . . . exists that, if extradited to Mexico on the charges this Court has authorized, Mr. Ye Gon might then also face prosecution on these other, separate charges on which no extradition was ever sought or obtained." *Id.* at 2-3.

The Government first responds that Petitioner failed to preserve any rule of specialty argument in his habeas proceedings. Specifically, after the extradition proceeding, Petitioner filed a motion to dismiss the extradition case on the grounds that Mexico had reportedly brought additional criminal charges against him and intends to prosecute him on those charges without requesting extradition, in violation of Article 17 of the Treaty. The Extradition Court denied the motion. *See* In re Extradition of Zhenli Ye Gon, Misc. No. 08-596, (D.D.C.), ECF Nos. 162, 173. Petitioner did not challenge the denial of that motion in these proceedings. The Government further argues

that, even if the argument has been properly preserved and raised before this Court, it is meritless.

The Court does not deem the argument waived, but in considering it, it concludes that Petitioner is not entitled to the relief he seeks. Obviously, the Court's Memorandum Opinion and its rulings in this proceeding relate only to the charges for which extradition has already been sought. Nonetheless, the Court agrees with some of the Government's arguments set forth in its response, ECF No. 129 at 12-17, and thus declines to amend its order to include a specific statement that "only charges on which this Court has authorized extradition may be prosecuted by Mexican officials." Most notably, the issue of whether or not Mexico could prosecute Petitioner for additional charges is not yet ripe, as Article 17 of the Treaty is triggered after extradition, which has not yet occurred. Additionally, there are circumstances set forth in the treaty pursuant to which an extradited person may be prosecuted for charges outside those for which he was originally extradited. *See*, *e.g.*, Treaty at Article 17(1) (allowing prosecution if extradited person leaves the Requesting Party (here, Mexico) after his extradition and voluntarily returns to it, or if he does not leave the territory of the Requesting Party within 60 days after being free to do so). Thus, the Court declines to amend its order to protectively issue on order prohibiting another sovereign country from taking an action that it has not even indicated it intends to take. *See*, *e.g.*, *Kelly v. Griffin,* 241 U.S. 6, 15, 36 S. Ct. 487, 60 L. Ed. 861

(1915) (declining to modify extradition documents before extradition because the Court "assume[s], of course, that the government in Canada will respect the convention between the United States and Great Britain, and will not try the appellant upon other charges than those upon which the extradition is allowed"); *see also In Re Sainez,* 2008 U.S. Dist. LEXIS 9573, 2008 WL 36615 (S.D. Cal. Feb. 8, 2008) (declining to require Mexico to provide advance assurances that it will comply with Rule of Specialty).

V. Conclusion

For the reasons explained in this Memorandum Opinion, Petitioner's Motion to Alter, Amend or Correct Final Judgment, ECF No. 120, is **GRANTED IN PART** and **DENIED IN PART**. The Court will issue an Amended Opinion to correct the noted clerical errors. The Court's rulings in this Memorandum Opinion, combined with the Amended Opinion entered herewith, shall constitute the final opinion of the Court in this case.

ENTER: This 17th day of January, 2014.

/s/ James C. Turk

James C. Turk

Senior United States District Judge

ORDER

By: James C. Turk

Senior United States District Judge

For the reasons explained in this Memorandum Opinion, it is hereby **ORDERED** that Petitioner's Motion to Alter, Amend or Correct Final Judgment, ECF No. 120, is **GRANTED IN PART** and **DENIED IN PART**.

ENTER: This 17th day of January, 2014.

/s/ James C. Turk

James C. Turk

Senior United States District Judge

In the Matter of the Extradition of Zhenly Ye Gon, a/k/a Zhenli Ye Gon, a/k/a Zhenli Ye, a/k/a El Chino.

Misc. No. 08-596 (JMF)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

768 F. Supp. 2d 69*; *2011 U.S. Dist. LEXIS 12559*; *69 A.L.R. Fed. 2d 633

February 9, 2011, Filed

COUNSEL: For IN THE MATTER OF THE EXTRADITION OF ZHENLY YE GON, In Re: Gregory S. Smith, LEAD ATTORNEY, GREGORY S. SMITH, ATTORNEY AT LAW, Washington, DC.

For UNITED STATES OF AMERICA, Petitioner: John Philip Dominguez, LEAD ATTORNEY, U.S. ATTORNEY'S OFFICE, Washington, DC; Valinda Jones, LEAD ATTORNEY, U.S. DEPARTMENT OF JUSTICE, Office of International Affairs, Washington, DC.

For DISTRICT OF COLUMBIA, Interested Party: Lucy E. Pittman, LEAD ATTORNEY, OFFICE OF THE GENERAL COUNSEL, Child and Family Services Agency, Washington, DC.

For ZHENLY YE GON, also known as ZHENLI YE GON, also known as EL CHINO, also known as ZHENLI YE, Respondent: Manuel J. Retureta, LEAD

ATTORNEY, RETURETA & WASSEM, PLLC, Washington, DC; Gregory S. Smith, GREGORY S. SMITH, ATTORNEY AT LAW, Washington, DC.

JUDGES: JOHN M. FACCIOLA, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: JOHN M. FACCIOLA

OPINION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case is before me for a certificate of extraditability. On September 15, 2008, the United States, acting on behalf of the Government of the United Mexican States ("Mexico"), pursuant to its formal request for the extradition of Zhenly Ye Gon ("Ye Gon"), filed a complaint. Complaint For Arrest With a View Towards Extradition (18 U.S.C. § 3184) [#1] ("Compl."). Hearings were held before me on February 2, May 14, and June 3, 2010.

BACKGROUND

Extradition proceedings are governed by 18 U.S.C. § 3184, *et. seq.*,[1] and the terms of the extradition treaty between the country requesting extradition

[1] All references to the United States Code or the Code of Federal Regulations are to the electronic versions that appear in Westlaw or Lexis.

and the country in which the individual is found – here, the extradition treaty between Mexico and the United States. *See* Extradition Treaty, U.S.-Mex., May 4, 1978, 31 U.S.T. 5059, T.I.A.S. No. 9656 ("Treaty"). When presented with a complaint for extradition, by statute, a judge or magistrate judge must hold a hearing to consider the evidence of criminality presented by the requesting country and to determine whether it is "sufficient to sustain the charge[s] under the provisions of the proper treaty or convention." 18 U.S.C. § 3184. If the judge finds the evidence sufficient, he or she must "certify the same" to the Secretary of State, who makes the final decision whether to surrender the individual "according to the stipulations of the treaty." *Ward v. Rutherford*, 921 F.2d 286, 287, 287 U.S. App. D.C. 246 (D.C. Cir. 1990). Significantly, "[a]n extradition hearing is not the occasion for an adjudication of guilt or innocence." *Messina v. United States*, 728 F.2d 77, 80 (2d Cir. 1984) (internal quotation marks and citations omitted). Rather, it is a preliminary examination, similar to that conducted by a magistrate judge in the context of a criminal defendant being held on a domestic charge,[2] "to determine whether a case is made out which will justify the holding of the accused and his surrender to the demanding nation." *United States v. Kember*, 685 F.2d 451, 455, 222 U.S. App. D.C. 1 (D.C. Cir. 1982), *cert.*

[2] *See* 18 U.S.C. § 3142; Fed. R. Crim. P. 5.1; *Ward*, 921 F.2d at 287.

denied, 459 U.S. 832, 103 S. Ct. 73, 74 L. Ed. 2d 72 (1982).

An extradition certification is in order, therefore, where: 1) the judicial officer is authorized to conduct the extradition proceeding; 2) the court has jurisdiction over the fugitive; 3) the applicable treaty is in full force and effect; 4) the crimes for which surrender is requested are covered by the applicable treaty; and 5) there is sufficient evidence to support a finding of probable cause as to each charge for which extradition is sought. *See Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S. Ct. 541, 69 L. Ed. 970 (1925); *see also Foster v. Goldsoll*, 48 App. D.C. 505, 517 (1919). Based on the following findings of fact, I conclude that those requirements are satisfied in this case.

FINDINGS OF FACT[3]

1. Ye Gon is a Chinese national with Mexican citizenship who owned and operated businesses in

[3] The Court's findings are based on the following documents, which have been authenticated in accordance with 18 U.S.C. § 3190: 1) Diplomatic Note 04507 [from the Ambassador of Mexico to the Secretary of State], 2) Affidavit of Federal Public Prosecutor Jorge Joaquin Diaz Lopez, Attorney at Law With Appendices ("Aff."), 3) Appendix A: Arrest Warrant of De Zhenli Ye Gon ("Apdx. A"), 4) Appendix B: Substantive Law – Crimes and Penalties ("Apdx. B"), 5) Appendix C: Statutes of Limitations, 6) Appendix D: Evidence ("Apdx. D"), 7) Appendix E: Identification Information of Zhenli Ye Gon, 8) Haydee Chavez Sanchez Affidavit [#90-1], and 9) Declaration of David O. Buchholz ("Buchholz Decl.").

and around Mexico City, Mexico. Aff. ¶¶ 32-36; Apdx. D at D-1, D-2(a), D-2(b), D-3, D-4.

2. Among those businesses was a pharmaceutical importing and brokering company named Unimed Pharm Chem ("Unimed"). Aff. ¶¶ 32-35; Apdx. D at D-2(a), D-2(b), D-3.

3. From 2003 to July 2005, Unimed legally imported 33.875 tons of ephedrine, pseudoephedrine, and pseudoephedrine hydrochloride pursuant to a permit from COFEPRIS.[4] Aff. ¶ 37; Apdx. D at D-5(a), D-5(b).

4. Ephedrine, pseudoephedrine, and pseudoephedrine hydrochloride are classified as psychotropic substances under Mexican health laws, and it is unlawful to import, transport, possess with intent to manufacture, or manufacture such psychotropic substances without a COFEPRIS permit. Apdx. B at 4-9; Apdx. D at D-49.

5. On September 24, 2003, Ye Gon contracted with a Chinese company named Chifeng Arker Pharmaceutical Technology Co., Ltd. ("Chifeng Arker") to buy an "intermediate" chemical identified as "hydroxy benzyl-N-methylacetethamine"[5] which, according to

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[4] COFEPRIS is the acronym, based on its initials in Spanish, for the Federal Commission Against Risks to Public Health. Aff. ¶ 16.

[5] The term "hydroxy benzyl-N-methylacetethamine" is an incomplete chemical designation that actually corresponds to

(Continued on following page)

the contract, was a precursor chemical that could be used to produce pseudoephedrine or pseudoephedrine hydrochloride. Aff. ¶¶ 37-40; Apdx. D at D-6(a).

6. Ye Gon and his senior chemist, Bernardo Mercado Jimenez ("Jimenez"), both signed the contract on behalf of Unimed. Apdx. D at D-6(a).

7. According to the terms of the contract, Chifeng Arker agreed to sell and Unimed agreed to purchase a minimum of 50 tons of the chemical annually. Aff. ¶ 38; Apdx. D at D-6(a).

8. The contract also called for Chifeng Arker to provide technical support to aid Unimed in the actual production of pseudoephedrine, to include "workshop housing design." Aff. ¶ 39; Apdx. D at D-6(a), D-6(b).

9. The Mexican government never issued a permit to Unimed or Ye Gon to manufacture psychotropic substances such as pseudoephedrine. Aff. ¶ 35; Apdx. D at D-5(a).

10. In 2003, when Ye Gon entered into this contract, Unimed was the fifth largest out of 19 importers of pseudoephedrine and ephedrine in Mexico; the next year, 2004, his company had more than doubled its pseudoephedrine and ephedrine imports, and had risen to third largest among 23 importers. *See* Ye Gon Trial Exhibit 199 at 17.

"N-acetyl-pseudoephedrine," a psychotropic substance. May 14, 2010 Hearing Transcript ("5/14/10 Tr.") at 14-16, 58.

11. In 2004, the Mexican government determined that there was being imported into Mexico much more ephedrine and pseudoephedrine than was needed for lawful medical purposes and that, to prevent diversion of those substances for unlawful use, the amount permitted to be imported should be reduced. Aff. ¶¶ 43-44; Apdx. D at D-5(c).

12. Consistent with this policy change, on July 1, 2005, the Mexican Secretary of Health, acting through COFEPRIS, eliminated Unimed and seven other companies as authorized importers of psychotropic substances, including ephedrine and pseudoephedrine. Aff. ¶ 45; Apdx. D at D-9(a).[6]

13. Despite the loss of permission to import psychotropic substances in July 2005, and despite the fact that he had not been authorized to manufacture psychotropic substances, in October 2005, Ye Gon began to build and equip a manufacturing plant in Toluca, Mexico, with the help of Chinese advisors, as contemplated by the September 2003 contract with Chifeng Arker. Aff. ¶¶ 53, 55-60; Apdx. A ¶¶ 82, 137; Apdx. D at D-6(a), D-19, D-20.

14. Ye Gon also knowingly imported psychotropic substances from China without the required permits on at least four occasions between December 2005 and December 2006. Aff. ¶¶ 63, 66, 72, 75; Apdx.

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[6] Unimed was permitted to sell what it had on hand as of July 2005. Aff. ¶ 45 n.4; Apdx. D at D-9(b), D-9(c).

D at D-21(a), D-21(b), D-21(c), D-21(d), D-23(a), D-23(b), D-23(c), D-28(a), D-29(a), D-29(b), D-30(a), D-30(b), D-30(c), D-30(d), D-31(a), D-31(b), D-31(c), D-31(e).

15. On December 5, 2005, a shipment for Unimed arrived at the port of Manzanillo. Aff. ¶ 63.

16. Unimed officials, including Ye Gon and the senior company chemist, Jimenez, certified that the shipment contained 20,000 kilograms of a chemical described as "N-methly-acetilamino" from a Hong Kong company called Emerald Import & Export. Aff. ¶ 63; Apdx. D at D-21(a), D-21(b), D-21(c), D-21(d).

17. The shipment was stopped at customs, however, and the Mexican authorities took samples and ascertained that the certification was false; the substance was not "N-Methly-Acetilamino" but "N-Acetyl Pseudoephedrine." Aff. ¶ 65; Apdx. D at D-22.

18. Under Mexican law, "N-acetyl pseudoephedrine" is a regulated psychotropic substance because it can be used to make pseudoephedrine hydrochloride, which is used for the clandestine formulation of amphetamines. Aff. ¶ 108; Apdx. B at 6-7; Apdx. D at D-22, D-24, D-29(a), D-29(b).

19. The substance "N-methly-acetilamino" is not a recognized chemical substance, but an incomplete name that corresponds to "N-acetyl-pseudoephedrine." 5/14/10 Tr. at 14-15.

20. Chinese authorities indicated that there is no company by the name of Emerald Import & Export registered in Hong Kong. Aff. ¶ 108; Apdx. D at D-38.

21. Ye Gon falsely represented under oath to Mexican customs authorities that Emerald Import & Export was a supplier based in Hong Kong. Apdx. D at D-21(d).

22. On January 3, 2006, another shipment of approximately 29,400 kilograms arrived in Manzanillo for Unimed from Emerald Import & Export. Aff. ¶ 66.

23. The contents were described as "N-methly-acetilamino" in a document certified by Jimenez, although a chemical analysis by Mexican customs authorities indicated that the substance was in fact the same psychotropic substance as the one in the December 2005 shipment. Aff. ¶¶ 66, 68; Apdx. D at D-23(a), D-23(b), D-23(c), D-24.

24. On July 3, 2006, a shipment of a substance that Jimenez certified to be "Hydroxy Benzyl-N-Methyl Acetethamine" arrived from Hong Kong, again sent by Emerald Import & Export. Aff. ¶¶ 72-73; Apdx. D at D-28(a), D-28(b), D-28(c), D-28(d).

25. "Hydroxy benzyl-N-methyl acetethamine" is the name of the intermediate chemical that Ye Gon contracted to buy from Chifeng Arker in September 2003 to use to produce pseudoephedrine and pseudoephedrine hydrochloride. Aff. ¶ 38; Apdx. D at D-6(a).

26. Tests of samples from the July 3, 2006 shipment revealed that the substance was again actually

"N-acetyl-pseudoephedrine" and not "hydroxy benzyl-N-methyl acetethamine." Aff. ¶¶ 75, 108; Apdx. D at D-29(a), D-29(b).

27. After samples were obtained from the December 2005 and January 2006 shipments, both shipments were released to a cargo company hired by Ye Gon to transport the shipments to the Unimed warehouse in Mexico City. Aff. ¶¶ 63, 66, 71.

28. Similarly, after samples were obtained from the July 2006 shipment, the shipment was released for transportation by a cargo company to Ye Gon's manufacturing plant in Toluca. Aff. ¶¶ 64, 66, 71-75; Apdx. A ¶¶ 59, 66; Apdx. D at D-26; D-27, D-28(a), D-31(e).

29. In November 2006, Mexican authorities intercepted yet another shipment to Unimed, again purportedly from Emerald Import & Export Co. Aff. ¶¶ 120-122.

30. The shipment, which was intended for delivery to the Toluca plant, was detained and samples of its contents were taken. Aff. ¶¶ 120-122; Apdx. A ¶¶ 59, 62, 66; Apdx. D at D-25(b), D-26, D-27, D-40(a), D-40(b), D-41(a).

31. Expert analysis determined that its contents, which were certified by Jimenez to contain 19,797 kilograms of "hydroxy benzyl N-methyl acetethamine," were instead a chemical mixture containing ephedrine acetate. Aff. ¶¶ 122-123; Apdx. D at D-40(c), D-41(b).

32. Under Mexican law, ephedrine acetate is a psychotropic substance. Aff. ¶ 123; Apdx. B at 6-7; Apdx. D at D-41(b).

33. In a statement dated July 2007, Ye Gon said that this fourth shipment, which was seized by Mexican authorities, was from Chifeng Arker, pursuant to Unimed's contract with Chifeng Arker. Respondent's Request for Hearing and Opposition to Government's Request for Certificate of Extraditability [#112], Exhibit 1 at 3.

34. The Tuluca plant was operational by April 2006. Aff. ¶ 61.

35. According to a plant worker, the plant received daily shipments of a white hard chemical substance that was then heated with hydrochloric acid to form a white crystalline powder. Aff. ¶¶ 61, 83-84; Apdx. A ¶¶ 215, 286; Apdx. D at D-16, D-32.

36. According to Mexican chemical experts, "N-acetyl-pseudoephedrine," which Ye Gon had been secretly importing and transporting to the Unimed warehouse or directly to the Toluca plant, can be converted to pseudoephedrine hydrochloride by treating it with heated hydrochloric acid. Aff. ¶ 65; Apdx. D at D-22.

37. Certain machinery used in that process, and certain areas of the plant, were off limits for many plant personnel. Aff. ¶ 79; Apdx. A ¶ 286; Apdx. D at D-32.

38. That equipment and those areas seemed to be handled exclusively by Jimenez and one or two Chinese consultants. Aff. ¶ 79; Apdx. A ¶ 286; Apdx. D at D-32.

39. In March 2007, Mexican authorities searched the Toluca plant, taking samples from the machines, tanks, barrels, and bags that had been described by plant workers as the place where they produced over 600 kilograms daily of a "white crystalline powder." Aff. ¶ 138; Apdx. D at D-48.

40. In the analyzed samples, Mexican chemical experts identified the presence of ephedrine, pseudoephedrine and ephedrine acetate, as well as methamphetamine acetate, which Mexican law classifies as psychotropic substances. Aff. ¶ 138; Apdx. D at D-48.

41. Under Mexican law, the first three substances are considered to be essential chemical precursors of methamphetamine. Aff. ¶ 138; Apdx. D at D-48.

42. The machinery at the Toluca plant was appropriate for the manufacture of psychotropic substances, such as pseudoephedrine, ephedrine, and ephedrine acetate. Apdx. D at D-49.

43. Ye Gon did not have a permit to produce psychotropic substances in Mexico. Aff. ¶¶ 35, 98; Apdx. A ¶ 274; Apdx. D at D-5(a), D-15.

44. In addition, traces of sulfuric acid were found in the Toluca plant. Aff. ¶ 138; Apdx. D at D-48, p. 6, Sample 40.

45. Because sulfuric acid is classified as an "essential chemical product" by Mexican law, its diversion for the unlawful production of psychotropic substances is a criminal violation of Mexican health laws. Aff. ¶ 138; Apdx. B at 9; Apdx. D at D-48.

46. According to workers at the Toluca plant, the white crystalline powder produced at the plant was bagged and driven away by Ye Gon or his personal driver at the end of the work day. Aff. ¶¶ 81, 85; Apdx. A ¶¶ 215, 286; Apdx. D at D-16; D-32.

47. During the same period of time, the driver was seen arriving at the warehouse and office of Unimed in Mexico City in the evening, where he disabled security cameras. Aff. ¶ 87; Apdx. A ¶ 207; Apdx. D at D-12.

48. In a March 2007 search of Unimed offices in Mexico City, Mexican authorities discovered a dozen plastic bags of a pseudoephedrine hydrochloride in Ye Gon's office, ten months after the company was supposed to have sold off all legally acquired inventory of that psychotropic substance. Aff. ¶¶ 45 n.4, 137; Apdx. D at D-5(c), D-9(b), D-47(a), D-47(c).

49. Despite producing and transporting away approximately 600 kilograms per day of a "final product" from the Toluca plant, Ye Gon reported no income for that plant, or Unimed. Aff. ¶ 102; Apdx. D at D-4, D-17(a).

50. A former Unimed sales manager told authorities that, although something was being produced at

the Toluca plant in May and June 2006, nothing new was being recorded in company inventory. Aff. ¶ 86; Apdx. A ¶ 207; Apdx. D at D-12.

51. Similarly, according to a former accountant for Unimed, the company did not keep accurate records of known sales of chemical products from Toluca, and she was unable to get complete information about sales or deposits from Ye Gon's close associates so that she could satisfy various accounting requirements. Aff. ¶¶ 99-100; Apdx. D at D-14.

52. Former Unimed employees stated that business at the Toluca plant was conducted in U.S. dollars and Mexican currency, suppliers were paid in U.S. dollars, and envelopes of cash from apparent sales were received and delivered directly to Ye Gon. Aff. ¶ 101; Apdx. A ¶¶ 207, 260; Apdx. D at D-12, D-14.

53. Employees also were paid in cash. Aff. ¶ 101; Apdx. A ¶ 207; Apdx. D at D-12, D-33.

54. At the same time as he was unlawfully producing psychotropic chemicals at the Toluca plant, Ye Gon accumulated hundreds of millions in U.S. currency, as well as currency from other countries. Aff. ¶¶ 131, 134; Apdx. D at D-45(a).

55. In a March 2007 search of Ye Gon's home in Mexico City, Mexican authorities found, in a concealed, locked room off Ye Gon's master bedroom, the following amounts, in cash: 1) 205,564,763 U.S. Dollars; 2) 201,460 Euros; 3) 17,306,520 Pesos; 4) 113,260

Hong Kong Dollars; and 5) 180 Canadian Dollars. Aff. ¶¶ 131, 134; Apdx. D at D-45(a).

56. During the same time period, Ye Gon arranged to move hundreds of thousands of U.S. dollars, Euros, and Mexican pesos through Mexican money exchanges ("casas de cambio") to bank accounts outside Mexico. Aff. ¶¶ 103-105; Apdx. A ¶ 229; Apdx. D at D-34(a), D-35(a).

57. In addition, the U.S. Drug Enforcement Agency reported that records from American casinos in Las Vegas, Nevada showed that between 2004 and 2007, Ye Gon paid over $125,000,000 to those casinos. Aff. ¶ 106; Apdx. D at D-36.

58. He was also maintaining at least two homes, one in Mexico City and one in China, and living a lavish lifestyle. Aff. ¶ 135.

59. Ye Gon concealed the source and purpose of his money transfers from representatives of the money exchanges. Aff. ¶¶ 102-104; Apdx. A ¶ 229; Apdx. D at D-34(a), D-35(a).

60. He told one money exchange, which he used to exchange or transfer hundreds of thousands of U.S. dollars per week, that the source of the money was a company dedicated to producing raw materials used in making veterinary medicines and that the money was being used to pay his suppliers for that business in U.S. dollars. Aff. ¶¶ 102-104; Apdx. A ¶ 229; Apdx. D at D-34(a), D-35(a).

61. Records show that much of the money moved through the money exchanges was actually being used to pay for materials and supplies for the unlawful Toluca plant. Aff. ¶¶ 102-104; Apdx. A ¶ 229; Apdx. D at D-34(a), D-35(a).

62. Some payments also corresponded to scheduled payments for the intermediate chemical that Ye Gon had contracted to purchase from Chifeng Arker in 2003, that was to be used to produce pseudoephedrine. Aff. ¶¶ 38, 107; Apdx. D at D-6(a), D-28(b), D-30(b), D-31(b), D-35(b).

63. One money exchange transferred three payments totaling approximately $2 million to Chifeng Arker on dates corresponding to the times that Unimed purportedly received, from Emerald Imports & Exports, shipments of "hydroxy benzyl-N-methyl acetethamine," the intermediate substance named in the contract with Chifeng Arker. Aff. ¶¶ 38, 107; Apdx. D at D-6(a), D-28(b), D-30(b), D-31(b), D-35(b).

64. At least one of those shipments, in July 2006, was sampled and shown to be N-acetyl pseudoephedrine. Aff. ¶ 75; Apdx. D at D-29(a).

65. Ye Gon engaged in his unlawful importation and manufacturing businesses with the knowing assistance of a "trusted team"[7] of associates, including the following individuals:

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[7] Aff. ¶ 48.

a. Bernardo Mercado Jimenez was a registered chemist who worked for Unimed. Aff. ¶ 40. Ye Gon and Jimenez signed the pseudoephedrine-production contract between Unimed and Chifeng Arker. Aff. ¶ 40; Apdx. D at D-6(a). Jimenez also falsely certified the chemical identities of the controlled substances illegally imported by Unimed. Aff. ¶¶ 63, 66, 73, 122; Apdx. D at D-21(c), D-23(c), D-28(c), D-40(c). He was aware that the permits to import psychotropic substances had been withdrawn. Aff. ¶ 45, 45 n.4; Apdx. A ¶ 268; Apdx. D at D-13. Jimenez was one of Ye Gon's trusted associates, and had access to otherwise restricted areas of the Toluca plant. Aff. ¶ 79; Apdx. A ¶ 286; Apdx. D at D-32.

b. Maria Eugenia Mayorga Cano is Ye Gon's sister-in-law, and was in charge of credit and collections for Unimed. Aff. ¶ 48. Cano falsely certified illegal shipments of controlled substances. Aff. ¶¶ 73, 122; Apdx. D at D-28(d), D-40(c); contracted with a currency exchange house in early 2006 on behalf of Ye Gon's companies, and, in just one transfer, personally deposited almost one million U.S. dollars in cash into that account, Aff. ¶ 103; Apdx. A ¶ 229; Apdx. D at D-34(a); and was trusted by Ye Gon to manage his businesses while he traveled to China in July 2005, Aff. ¶ 52; Apdx. A ¶¶ 268, 274; Apdx. D at D-5(d), D-13, D-15.

c. Susana Gomez was an engineer for Unimed and a confidante of Ye Gon's. Apdx. A

¶ 166. When the seizure of the November 2006 shipment became public, Gomez gathered company documents concerning the shipment and took them to Ye Gon, after which employees were told that the shipment did not belong to the company. Aff. ¶ 125; Apdx. A ¶ 166; Apdx. D at D-39. When a company lawyer suggested going to investigate the charge that the November 2006 shipment was illegal, Gomez threatened him, saying, "You're a real fool, or you have a lot of money to fix this matter, because I have already fixed it with the lawyers, and if you want to keep your life and liberty, keep behind the line." Aff. ¶ 127; Apdx. A ¶ 166; Apdx. D at D-39.

d. Jose Obed Olvera Salguero was Ye Gon's personal driver. Aff. ¶ 85. At the end of each work day, Salguero would drive to the Toluca plant and pick up the 600 kilograms of a white crystallized substance produced that day. Aff. ¶ 85; Apdx. A ¶ 215; Apdx. D at D-16. He was seen later on at least two occasions arriving at the Unimed warehouse in Mexico City, long after work hours, and disabling security cameras, in order to conceal his illicit activities. Aff. ¶ 87; Apdx. A ¶207; Apdx. D at D-12.

66. Ye Gon was the sole administrator of the companies that he used for his illegal activities. Aff. ¶¶ 34, 36, 53; Apdx. D at D-3, D-4, D-17.

67. He closely managed every aspect of these companies, including personally interviewing the

candidates for jobs before hiring them, Aff ¶¶ 50-51, 77-78; Apdx. A ¶¶ 207, 268, 260, 215, 286; Apdx. D at D-12, D-13, D-14, D-16, D-32, and firing employees whom he perceived as a threat to his illegal operation, Aff. ¶¶ 108-119; Apdx. A ¶¶ 207, 268, 215, 286; Apdx. D at D-12, D-13, D-16, D-32.

68. Ye Gon did not tell those employees not on his "trusted team" what they were really doing in the plant. Aff. ¶¶ 94-100, 111; Apdx. A ¶¶ 268, 274, 215, 82, 286; Apdx. D at D-13, D-15, D-16, D-20, D-32.

69. When he was out of the country, Ye Gon maintained control over his businesses, relaying instructions in frequent telephone calls to employees such as Cano. Aff. ¶¶ 52, 118, 126; Apdx. A ¶¶ 268, 274; Apdx. D at D-13, D-15.

70. The Mexican charges for which extradition is sought are:

> 1. Participation in organized crime, for the purpose of repeatedly committing drug crimes and operations with illegal funds, in violation of Mexican law;
>
> 2. Drug-related offenses in the forms of:
>
> > a. importation into Mexico of psychotropic substances;
> >
> > b. transportation of psychotropic substances;
> >
> > c. manufacture of psychotropic substances;

d. possession of psychotropic substances for the purpose of producing narcotics; and

e. diversion of essential chemical products, namely sulfuric acid, to produce narcotics;

3. Violations of the federal law on firearms and explosives in the form of possession of firearms reserved for the exclusive use of the Army, Navy and Air Force; and

4. Money laundering, by himself or through an intermediary, by having custody of funds within Mexico, knowing that the funds have their source in an illegal activity, with the intention to impede knowledge of their source, location, destination, or ownership.

Aff. ¶ 19; Apdx. A at 635-40.

CONCLUSIONS OF LAW

I. The Court Has Jurisdiction Over the Respondent

Pursuant to federal statute, a judicial officer "may, upon complaint made under oath, charging any person found within his jurisdiction . . . issue [its extradition] warrant for the apprehension of the person so charged." 18 U.S.C. § 3184; *see also Pettit v. Walshe*, 194 U.S. 205, 219, 24 S. Ct. 657, 48 L. Ed. 938 (1904). At the time the extradition complaint was filed in this case, Ye Gon was being held in custody in the District of Columbia pursuant to a detention

order issued by this Court on August 6, 2007, in a criminal case. *See* Detention Memorandum [#6] (No. 07-CR-181-EGS). Although the respondent was originally arrested in Maryland on the warrant issued in that case, the respondent was properly brought to the District to face those criminal charges, which were based on an indictment returned by a grand jury in this District. Therefore, despite the respondent's contention that he was never "found" in the District of Columbia, he was unquestionably lawfully being held in the District of Columbia at the time the Mexican arrest warrant and request for extradition was filed. Surely that interpretation of the events comports with 1) the natural and traditional meaning of the word "found" in 18 U.S.C. § 3184 and 2) the traditional principle that the exercise of jurisdiction over a person who is in the territorial jurisdiction of the court satisfies due process. *Burnham v. Sup. Ct. of California*, 495 U.S. 604, 610, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990); *Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L. Ed. 565 (18 77). As a result, this Court has jurisdiction to conduct extradition proceedings against him.

II. The Treaty Under Which Extradition Is Sought Is In Full Force and Effect

Extradition is authorized when there is an extradition treaty between the country requesting extradition and the United States. 18 U.S.C. § 3184. According to the declaration of David O. Buchholz, Attorney Adviser in the Office of the Legal Adviser for

the Department of State, the extradition treaty between the United States and Mexico is in full force and effect. *See* Buchholz Decl. ¶3; Treaty. The Department of State's determination as to the validity of a treaty is entitled to deference, *see Kastnerova v. United States*, 365 F.3d 980, 985-87 (11th Cir. 2004), as is their determination as to extraditions generally, *see Casey v. Dep't of State*, 980 F.2d 1472, 1478, 299 U.S. App. D.C. 29 (D.C. Cir. 1992).

III. The Criminal Acts For Which Extradition Is Sought Constitute "Extraditable Offenses" Under the Treaty

The extradition treaty between the United States and Mexico authorizes the return of individuals charged with or convicted of an "extraditable offense." Treaty, art. 1. Extraditable offenses are defined as "wilful acts which fall within any of the clauses of the Appendix and are punishable in accordance with the laws of both Contracting Parties by deprivation of liberty the maximum of which shall not be less than one year." *Id.*

As certified by the Department of State, the wilful acts that underlie the offenses for which extradition is sought come within the Treaty's list of extraditable offenses. *See* Buchholz Decl. ¶ 5; Treaty, art. 2; Treaty, appdx. ¶¶ 12, 14, 15, 19, 21, 22. The State Department also certified that the acts on which the Mexican charges are based are "punishable in accordance with the laws of both contracting parties by

deprivation of liberty for a period of at least one year," as also required by Article 2 of the Treaty. *See* Buchholz Decl. ¶ 5; Treaty, art. 2. As noted above, the State Department's determination is entitled to deference. *See Factor v. Laubenheimer*, 290 U.S. 276, 293-94, 54 S. Ct. 191, 78 L. Ed. 315 (1933). In this case, the Court finds that the State Department's determinations are sound.

Article 2 of the Treaty permits the extradition of a person who has wilfully committed acts, punishable by more than one year, "in accordance with the laws of both Contracting Parties." Treaty, art. 2(1). It is clear that this does not oblige either sovereign to establish that their laws are identical. In other words, under this section of the Treaty, a Blockburger[8] comparison of the elements of the requesting and requested states' charges is not appropriate. In *Collins v. Loisel*, 259 U.S. 309, 42 S. Ct. 469, 66 L. Ed. 956 (1922), the petitioner argued that British law, then applicable in India, punished the crime of cheating while the law of Louisiana had no such offense but instead punished, in traditional common law fashion, the crime of taking property by false pretenses. First, the Supreme Court noted that English law defined the offense by condemning "[w]hoever cheats and thereby dishonestly induces the person deceived [sic] to deliver any property to any person" while Louisiana law condemned "[w]hoever,

[8] *Blockburger v. United State*s, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

by any false pretense, shall obtain, or aid and assist another in obtaining from any person, money or any property with intent to defraud him of the same." *Id.* at 311-12 (internal quotations and citations omitted). Nevertheless, the Court, per Justice Brandeis, indicated that one looked at the crimes actually charged and at the facts underlying those charges to ascertain whether the crime charged by the demanding state was also a crime in the requested state. *Id.* at 312. In other words, the treaty term that defined what is now known as "dual criminality" was to be construed not on the basis of the elements of the crime but on whether the conduct charged was a crime in both jurisdictions:

> The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.

Id. at 312.

In *United States v. Sensi*, 879 F.2d 888, 279 U.S. App. D.C. 42 (D.C. Cir. 1989), the court of appeals for this Circuit was confronted with the argument that the defendant's extradition was invalid because a British magistrate had not specifically found that the defendant had committed mail fraud, the charge he was indicted on in the United States pursuant to 18 U.S.C. § 1341. Under British law, the prosecution must establish that the defendant succeeded in

taking something from someone, while under the law of the United States, one can violate the mail fraud statute without actually stealing anything. *Id.* at 893. According to Sensi, this meant that had he committed the United States crime of mail fraud, "he would not *necessarily* have been committed for trial for theft under United Kingdom law." *Id.* That, according to the court, would have led to the conclusion that "mail fraud is *never* an extraditable offense . . . an absurd result, given that the criminal laws of two countries are rarely an exact match." *Id.* Instead, the court's analysis properly began with the realization that Sensi was accused of stealing from his employer; use of the mails was merely a means of committing it and both countries, of course, punished theft: "The fact that a hypothetical person could be convicted of mail fraud in the United States *absent a theft* is irrelevant to this case, in which the "offense" *was* theft." *Id.* at 893-94. The court then approvingly quoted the Restatement (Third) of Foreign Relations Law of the United States § 476 for its emphasis on "the acts of the defendant, and not on the legal doctrines of the country requesting extradition." *Id.* Thus, as indicated in the Restatement, and as held by the Supreme Court in Collins, the focus must be on the defendant's acts, rather than on the legal doctrines or specific requirements of proof in the two jurisdictions. *Id.* In that case, since the act charged, theft, was a crime in England as it was in America, the dual criminality requirement of the extradition treaty was satisfied. *Id.*

The holding in Sensi is consistent with that of other federal courts although the manner in which they phrase the test may differ. *See, e.g.*, *Clarey v. Gregg*, 138 F.3d 764, 766 (9th Cir. 1998) (sufficient if "'the laws of the both the requesting and the requested party appear to be directed to the same basic evil.'") (internal quotation omitted). Indeed, exhaustive research discloses precious few cases in which a federal court held there was not dual criminality. *E.g., United States v. Khan*, 993 F.2d 1368, 1372-73 (9th Cir. 1993) (dual criminality not satisfied because there was nothing in Pakistani law that was sufficiently analagous to 21 U.S.C. § 843, which criminalizes the use of a telephone to perpetrate a drug felony). In all other instances, the federal courts have examined the acts charged and found dual criminality when they have found that the acts as charged in the demanding state's papers would be also be a crime in the requested state because, putting aside the titles and specific elements of the acts, the laws of both states would punish them. *E.g., Kelly v. Griffin*, 241 U.S. 6, 14, 36 S. Ct. 487, 60 L. Ed. 861 (1916) (dual criminality satisfied although Canada did not require that perjured statements be material and American law did); *Manta v. Chertoff*, 518 F.3d 1134, 1141 (9th Cir. 2008) (irrelevant that elements of crime, scope of liability and name of crime are not identical; that the statutes are "substantially analogous" suffices) (internal quotations and citations omitted); *De Silva v. DiLeonardi*, 125 F.3d 1110, 1114 (7th Cir. 1997); *Spatola v. United States*, 925 F.2d 615, 619 (2d Cir. 1991) (laundering proceeds of narcotics

transactions and conspiring to export narcotics "falls within the proscriptions of United States law prohibiting money laundering, 18 U.S.C. § 1956, and prohibiting aiding and abetting or conspiring to engage in narcotics trafficking, 21 U.S.C. §§ 841(a)(1), 846, 953, 963."); *United States v. Levy*, 905 F.2d 326, 328-29 (10th Cir. 1990), *cert. denied*, 498 U.S. 1049, 111 S. Ct. 759, 112 L. Ed. 2d 778 (1991) (accused leader of cocaine trafficking operation deemed extraditable even though elements of America crime of operating continuing criminal enterprise had no equivalent in Hong Kong law); *In re Manzi*, 888 F.2d 204, 208 (1st Cir. 1989) (elements of two crimes need not be identical; Italian charge of acquiring or receiving car "*knowing of its unlawful provenance*" would be receiving stolen property under Massachusetts law) (internal quotation and citation omitted); *Matter of Extradition of Russell*, 789 F.2d 801, 803-04 (9th Cir. 1986) ("each element of the offense purportedly committed in a foreign country need not be identical to the elements of the similar offense in the United States.").

Certainly, as will be established in more detail below, the Mexican offenses charged against the respondent are, to put it mildly, analogous to similar provisions in American law and both strike at the same evils. The Mexican government charges that the respondent and his confederates conspired to illegally import various chemicals into Mexico to create substances that are themselves illegal and then possessed large quantities of these substances, even

though that very possession was illegal. Mexico also charges that the respondent impeded the authorities from ascertaining the true source of the proceeds from these activities and that he illegally possessed various firearms. Viewed as a whole, the Mexican indictment reads like those filed on a daily basis in United States federal and state courts. This case is nothing like Khan, where the court concluded that there was nothing whatsoever in Pakistani law equivalent or analogous to the American crime of using a phone to perpetrate a drug felony. Instead, it is exactly like all of those cases in which federal courts have readily concluded that, elements and names to one side, the laws of the two countries punished similar, equivalent, or analogous acts. Surely, no one familiar with the federal criminal code would dare say that Mexican laws outlawing the acts of illegally importing chemicals used to make psychotropic drugs and then disguising the proceeds realized from that manufacture and protecting them with illegal firearms in an illegal drug lab have no analogues in the federal code, or do not strike at the same evils as the federal statutes that deal with the precise same acts.

It is in this sense that respondent's testimonial evidence from a chemist misses the mark. The respondent offered the testimony of Dr. Thomas Lectka, a professor of chemistry at Johns Hopkins University in Baltimore, Maryland, as an expert in the fields of synthetic and physical organic chemistry. 5/14/10 Tr. at 9, 12.

First, Dr. Lectka testified that the first of the four shipments imported by the respondent in this case were designated as containing "N-acetyl pseudophedrine." *Id.* at 13. He further testified that this designation was not a complete chemical name. *Id.* at 15. More specifically, he testified that while it was not an inaccurate designation, "it represents only part of the molecular structure of this substance." *Id.* Dr. Lectka's testimony was the same as to the substances contained in the remaining three shipments. *Id.* at 15-17. Second, Dr. Lectka testified that, according to the United States Code of Federal Regulations, the substance in the first three shipments, identified as "N-acetyl pseudoephedrine," is not a controlled substance or List 1 chemical under U.S. law. *Id.* at 20-22, 23. Third, Dr. Lectka testified that the fourth shipment contained two substances identified as ephedrine acetate and N-2-acetyloxy-1-methyl-2-phenylethyl-N-methyl. *Id.* at 25. According to Dr. Lectka, while the first substance is considered a controlled substance under Mexican law, the chemical designation "ephedrine acetate" was simply too ambiguous to be conclusive: "I think the name [ephedrine acetate] could represent more than one chemical structure that could be reasonably described as ephedrine acetate that would be different than the chemical structure right here." *Id.* at 28. Fourth, Dr. Lectka testified that in all likelihood, the chemical substance that was found at the Toluca plant was the result of a botched chemical process or a "bad batch," something that was "a very common occurrence in organic chemistry." *Id.* at 31, 36. Fifth, Dr. Lectka

testified that DEA testing of chemicals found in the Toluca plant revealed that they were not the type of chemicals typically used in the production of methamphetamine. *Id.* at 48. Finally, Dr. Lectka testified that it was common for pharmaceutical companies to keep sample batches of their final products. *Id.* at 50-51.

That on a given day the substances found in the lab by Mexican authorities were, as claimed by the respondent, not substances prohibited by Mexican law, goes to whether or not he is guilty of the crimes charged. It has nothing whatsoever to do with the legal question of whether the Mexican charges have substantial equivalents in American law. Conspiring to evade legal restrictions on the importation of certain chemicals, manufacturing illegal psychotropic substances, laundering the proceeds of the sale of those substances and possessing illegal firearms most assuredly do.

Finally, as the government has correctly pointed out on several occasions, Mexico relies on evidence showing that the respondent was importing N-acetyl pseudoephedrine chemicals and ephedrine acetate in order to manufacture drugs that are controlled by United States law, i.e., pseudoephedrine hydrochloride, and other pseudoephedrine and ephedrine substances. Government's Legal Memorandum in Support of Second Proposed Findings of Fact and Conclusions of Law [#157] at 4; Memorandum In Support of Extradition [#6] at 44-45; Memorandum In Opposition to Ye Gon's Preliminary "Explanation" and Motion to

Vacate Order of Arrest [#11] at 16. Since pseudoephedrine and ephedrine and their salts, optical isomers, and salts of optical isomers are controlled substances under American law,[9] importation and transportation of any chemical for that purpose would also be a felony under American law. 21 U.S.C. § 843(a)(7). The United States and Mexico therefore both have laws that prohibit the unauthorized importation of chemicals that can be converted into methamphetamine precursors, such as pseudoephedrine, and ultimately methamphetamine itself.

I will now engage in a more detailed analysis of why the specific offenses charged by Mexico have substantial equivalents in American law.

A. Organized Crime

First, Mexico alleges that Ye Gon acted in concert with at least three other persons for the purpose of repeatedly violating Mexican laws concerning narcotics and controlled psychotropic substances and/or money laundering. Such collaborative conduct is analogous to conduct punishable as a felony under the federal laws of the United States, such as those prohibiting criminal conspiracies generally, *see* 18 U.S.C. §371; conspiracies to violate drug laws, *see* 21 U.S.C. § 846; money-laundering conspiracies, *see* 18

[9] *See* 21 U.S.C. § 802(34)(C) and (K); 21 C.F.R. §§ 1310.02(a)(3) and (a)(11).

U.S.C. § 1956(h); and continuing criminal enterprises to violate drug laws, *see* 21 U.S.C. §848.

The evidence shows that Ye Gon worked closely with four other individuals: 1) Jimenez, 2) Cano, 3) Gomez, and 4) Salguero. The Court therefore finds probable cause to believe that not only did Ye Gon act in concert with these individuals to violate Mexican drug and money laundering laws, but that he directed the activities of this criminal conspiracy.

B. Drug Offenses

Second, Mexico alleges that Ye Gon unlawfully 1) imported and transported the regulated (under Mexican law) psychotropic substances N-acetyl-pseudoephedrine and ephedrine acetate; 2) possessed and/or manufactured the regulated psychotropic substances pseudoephedrine, ephedrine, pseudoephedrine hydrochloride, and methamphetamine hydrochloride; and 3) diverted the "essential chemical" sulfuric acid, in order to produce narcotics such as N-acetyl-pseudoephedrine acetate, ephedrine acetate, ephedrine, pseudoephedrine, and methamphetamine.

As explained above, each of these kinds of criminal conduct would be punishable as a felony under 21 U.S.C. §§ 843(a)(6) and (a)(7), which together make it a crime to possess, manufacture, distribute, or import "*any . . . chemical*, product, or material which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a

controlled substance or listed chemical" (emphasis added). Pseudoephedrine and ephedrine, and their salts, optical isomers, and salts of optical isomers, are "listed chemicals" for purposes of Section 843. *See* 21 C.F.R. §§ 1310.02(a)(3) and (a)(11). Pseudoephedrine hydrochloride is a salt of pseudoephedrine.

In addition, both Mexico and the United States have enacted laws to prohibit the unauthorized importation, distribution and manufacture of chemicals that can be readily converted to dangerous drugs such as methamphetamine. In other words, both countries' laws are directed to "the same basic evil." *See Clarey*, 138 F.3d at 766 (internal quotation marks and citations omitted). Thus, while the two countries' laws may not regulate exactly the same chemicals, the underlying criminal conduct being targeted is the same, and therefore the requisite dual criminality is present.[10]

The evidence shows that Ye Gon and his senior chemist, Jimenez, knowingly entered into a contract to purchase and import a psychotropic chemical for

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[10] Although Ye Gon contends that N-Acetyl-pseudoephedrine and the form of ephedrine acetate imported by him are not controlled substances and are not listed chemicals under United States law, and that therefore, their importation and transportation would not be unlawful in the United States, because federal law prohibits the possession, manufacture, distribution, and importation of "any . . . chemical" which may be used to manufacture a "listed chemical" such as pseudoephedrine, pseudoephedrine hydrochloride, or ephedrine, his argument is without merit.

the purpose of manufacturing pseudoephedrine and ephedrine. When they lost the ability to import such chemicals lawfully, they nonetheless continued to import them surreptitiously using a misleading chemical name and a false supplier. Ye Gon himself admitted that the fourth shipment, which Unimed had certified as coming from Emerald Imports, came instead from Chifeng Arker in conformity with the contract to import pseudoephedrine precursors. The Court therefore finds probable cause to support the drug importation and transportation charges.

C. Money Laundering

Third, Mexico alleges that Ye Gon knowingly possessed funds derived from illegal activity, that is, unlawful importation, transportation, possession, and manufacture of controlled psychotropic substances, with the intent to obscure the source, location, destination, or ownership of those funds. Under U.S. law, 18 U.S.C. § 1956(a)(1), it is a felony offense to conduct a financial transaction, knowing that the property involved represents the proceeds of an unlawful act, which in fact involves the proceeds of the specified unlawful act, while, *inter alia*, 1) having the intent to promote the carrying out of the specified unlawful activity, or 2) with the knowledge that the transaction was designed to disguise the nature, location, source, ownership, or control of the proceeds.

The evidence shows that Ye Gon engaged in money laundering of proceeds from his illegal drug

activity, in part by hiding millions of dollars in a closet, and in part by funneling cash proceeds through Mexican money exchanges in order to pay suppliers of equipment and raw materials for his unlawful chemical manufacturing plant in Toluca, Mexico. This accumulation of unexplained wealth at the same time that Ye Gon was engaged in illegal drug importation and manufacturing; his surreptitious handling of receipts and payments involving the illegal Toluca plant; plus his use of Mexican money exchanges to disguise payments to Chifeng Arker, establish probable cause to believe that Ye Gon engaged in money laundering as charged.

The Court notes further that this finding of dual criminality is no less valid even though the Mexican money laundering statute does not require a financial transaction, while the U.S. statute does. Ultimately, as established above, such a conclusion is not based on a review of the elements of the offense. Rather, as stated by the court in *Russell*, 789 F.2d at 803, "to satisfy the 'dual criminality' requirement, each element of the offense purportedly committed in a foreign country need not be identical to the elements of a similar offense in the United States." Rather, as noted above, "the central focus is on the defendant's *acts*." *Sensi*, 879 F.2d at 894 (emphasis added). In this case, the money laundering statutes of both the United States and Mexico are addressed to the same evil; that is, the ability of criminals to profit from their wrongdoing and to use proceeds to further their criminal activities. That the U.S. statute adds the

element of a financial transaction does not change this shared purpose. In any event, Ye Gon's acts did involve various "financial transactions."

Under the U.S. money-laundering statute, financial transactions include the purchase, sale, loan, pledge, gift, transfer, delivery or other disposition of property between parties. *See* 18 U.S.C. § 1956(c)(3). With respect to financial institutions, these transactions include deposits, withdrawals, transfers between accounts, exchanges of currency, loans, extensions of credit, use of a safe deposit box, or any other payments, transfers, or deliveries by, through, or to a financial institution. *Id.* In this case, qualifying financial transactions would include the following: 1) Ye Gon's use of his illegal proceeds to pay off gambling debts,[11] 2) Ye Gon's use of other Unimed employees, such as Cano, to transfer hundreds of thousands of U.S. dollars to the casas de cambio,[12] and 3) Ye Gon's own use of casas de cambio to transfer money to pay for equipment and supplies at the Toluca plant, and to pay Chifeng Arker for the chemicals used in the illegal manufacture of pseudoephedrine hydrochloride.

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[11] *See United States v. Iacaboni*, 363 F.3d 1, 4 (1st Cir. 2004).

[12] *See United States v. Short*, 181 F.3d 620, 626 (5th Cir. 1999).

D. Unlawful Possession Of Firearms

Finally, Mexico alleges that Ye Gon's conduct violated two separate provisions of the laws prohibiting unlawful possession of firearms reserved for the use of the military. Those charges were based on the discovery of firearms in two locations. First, firearms were seized from a locked, hidden room off the master bedroom in Ye Gon's home, where Ye Gon also stashed millions of U.S. dollars and other currency. There, Mexican authorities seized an AK-47 assault rifle, two 9mm semi-automatic pistols, and a .45-caliber pistol. Second, firearms were seized from Ye Gon's private office in Mexico City, where Mexican authorities also found 12 bags of unauthorized pseudoephedrine hydrochloride as well as a 9mm pistol.

Where, as here, the Treaty defines extraditable offenses in terms of the "laws of both Contracting Parties,"[13] dual criminality may be determined according to "similar criminal provisions of federal law or, if none, the law of the place where the fugitive is found." *Cucuzzella v. Keliikoa*, 638 F.2d 105, 107 (9th Cir. 1981) (internal citations omitted). In this case, the Court finds probable cause to believe that Ye Gon unlawfully possessed firearms under both federal and District of Columbia law.

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[13] *See* Treaty, art. 2.

Under federal law, the location, number, and nature[14] of firearms found in or beside the hidden room off Ye Gon's bedroom compel the inference that they were strategically placed there to be used to protect the vast quantities of money found in the same location. Possession of those firearms would therefore be a felony under 18 U.S.C. § 924(c). That law punishes the act of possessing a firearm in furtherance of a drug trafficking crime, which has been held to include the possession of firearms under circumstances suggesting that the weapons were strategically located to protect drugs and the illegal proceeds of drug trafficking. *See, e.g.*, *United States v. Wahl*, 290 F.3d 370, 375-77, 351 U.S. App. D.C. 284 (D.C. Cir. 2002). For the same reasons, Ye Gon's constructive possession of the 9mm Pietro Beretta pistol found in his private office at Unimed, where bags of pseudoephedrine hydrochloride also were found, would also violate 18 U.S.C. § 924(c). Finally, the pistol had an obliterated serial number, the possession of which would violate 18 U.S.C. § 922(k).

Under District of Columbia law, the possession of dangerous weapons, including "machine guns," is prohibited except for members of the U.S. military. *See* D.C. Code § 22-4514(a) ("No person shall within the District of Columbia possess any machine gun . . . provided, however, that machine guns . . . may be possessed by the members of the Army, Navy, Air Force,

[14] One of the 9mm semi-automatic pistols had a silencer. Aff. ¶ 136; Apdx. D at D-46(b).

or Marine Corps of the United States . . . "). District of Columbia law thus has essentially the same effect as Mexico's law with respect to certain weapons; that is, members of the military may possess such weapons, but few others may do so.

For purposes of the prohibition on dangerous weapons, the term "machine gun" is defined in D.C. Code § 22-4501, which, in turn, adopts by reference the definition of "machine gun" in another regulatory provision, D.C. Code § 7-2501.01(10) ("'Machine gun' means any firearm which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger."). An AK-47 has been found to be a machine gun under another D.C. statute that incorporates the definition of "machine gun" contained in D.C. Code § 7-2501.01. *See District of Columbia v. Beretta U.S.A. Corp*., No. 2000-CV-428B, 2006 D.C. Super. LEXIS 8, 2006 WL 1892023, at *3 (D.C. Super. May 22, 2006) (finding that an AK-47 qualifies as either an "assault weapon" or a "machine gun" under the Assault Weapon Manufacturing Strict Liability Act of 1990, D.C. Code § 7-2551.01 *et seq*., a statute which adopts the definition of a "machine gun" found in D.C. Code § 7-2501.01).

IV. The Evidence Submitted By Mexico is Sufficient and Properly Authenticated

A. Mexico's Evidence

The Court has reviewed the documentary evidence submitted by Mexico in support of its extradition request, which consists of the following:

1. A diplomatic note 04507 from the Ambassador of Mexico to the Secretary of State.

2. The Affidavit of Federal Public Prosecutor, Jorge Joaquin Diaz Lopez. This document contains 148 numbered paragraphs detailing the evidence that the Mexican government has uncovered and collected in its investigation of the respondent. The affidavit contains statements by Lopez that summarize what law enforcement agents found or learned from their sources of information and the statements given to his office or to other law enforcements agents.

3. Appendices to Lopez's affidavit as follows:

   A. Reproductions of the pertinent Mexican laws.

   B. An Affidavit of an agent of the Federal Public Prosecutor who is a Mexican lawyer who explains the applicability of the pertinent statutes and the applicable statutes of limitation.

> C. Exhibits D-1 through D-49 which are (1) documentary evidence and (2) statements of witnesses. As to the latter, the agent states the following: "What follows are the reliable excerpts of the complete text of the witness' statement and they are parts relevant to the request for extradition of ZHENLI YE GON. In the text of the statement extracts, where words were omitted, ellipses were inserted and sentences and paragraphs were formulated with grammatical changes to facilitate the reading thereof." Apdx. D at D-13, page 1 n.1.
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> D. Identification information pertaining to the respondent.

Ye Gon has suggested that the witness statements on which Mexico relies for its extradition request are unreliable because 1) they are only excerpted in the exhibits attached to the Mexican prosecutor's affidavit, 2) the excerpts have been edited by an unknown author, 3) there is no indication that the statements were made under oath, and 4) although all of the evidence formally submitted by Mexico has been translated into English, those translations were not certified.

These arguments utterly misstate the nature of what has been submitted by the Mexican government. First, the Mexican arrest warrant is not equivalent to an arrest warrant that I would issue, finding

probable cause based on a sworn declaration by a police officer. Instead, it is an extraordinarily detailed set of findings of fact that is 641 pages long and contains hundreds of findings of fact based on the evidence given to a Mexican judicial officer who is not merely taking the attestation of a police officer and determining probable cause, but who is instead making detailed findings of fact as to relator's guilt of the crimes charged. It is much more like the findings of fact that an American judge would make after trial in accordance with Rule 52 of the Federal Rules of Civil Procedure. As such, it must be viewed as the judicial determination by a sovereign and signatory to a treaty. There is nothing in the treaty that requires that proof submitted be of a particular kind, but all would agree that the treaty cannot possibly be interpreted to permit the requested states to render null and void judicial findings merely because the court that issued them choose to excerpt the statements of witnesses upon which it was relying as opposed to setting them forth in full and did not attach the complete sworn statements. That would be as irrational as a party's moving to vacate my findings of fact in a case before me simply because I chose to paraphrase a witness' statement, used quoted excerpts from it, and did not attach the complete statement to my findings. It is inconceivable that the signatory parties would intend that judicial findings sufficient in themselves in either country would somehow not be sufficient to warrant extradition from one to the other. *Cf. Haxhiaj v. Hackman*, 528 F.3d 282, 289-91 (4th Cir. 2008) (excerpts of Italian appeals court

decision that contained detailed description of evidence against fugitive sufficed).

In this context, it is hardly surprising that federal courts have found that foreign indictments that contained detailed summaries of witness' statements and other evidence sufficient. *See, e.g., Afanasjev v. Hurlburt*, 418 F.3d 1159, 1163-66 (11th Cir. 2005) (unsworn 106-page foreign bill of indictment, which contained "detailed" summaries of witness statements and other hearsay evidence, was "sufficiently reliable evidence" on which to base probable-cause finding); *Bovio v. United States*, 989 F.2d 255, 259-61 (7th Cir. 1993) (investigator's sworn statement recounting evidence sufficient); *Emami v. United States District Court*, 834 F.2d 1444, 1447 (9th Cir. 1987) (affidavit detailing summaries of witness statements sufficient even if witnesses not under oath); *Zanazanian v. United States*, 729 F.2d 624, 627 (9th Cir. 1984) (summaries of witness statements and other evidence contained in police reports sufficed); *United States v. Justik*, No. 805MJ319TEAJ, 2005 U.S. Dist. LEXIS 29944, 2005 WL 3185966, at *9-10 (M.D.Fla. Nov. 29, 2005) (finding probable cause based on description of evidence in foreign arrest warrant and summary report of evidence collected by prosecution). Surely, if these instruments were deemed sufficient, the judicial findings and summary of evidence provided by the Mexican prosecutor are sufficient.

In any event, the Court does not need to rely on the challenged excerpts. The same witness's statements are provided, in an unedited format, in the

Mexican arrest warrant and although the warrant does not appear to contain complete statements for every witness, it does contain lengthy portions of the statements on which Mexico relies. Furthermore, the statements recounted in the warrant are not conclusory summaries whose reliability might be questioned; rather, they are detailed, first-person narratives of the activities on which the Mexican charges are based, made by persons who had first-hand knowledge of those activities. Such witness statements therefore constitute sufficiently reliable evidence.

Additionally, the Treaty does not require that witness statements be sworn in order to be received or credited. *Collins*, 259 U.S. at 317 ("unsworn statements of absent witnesses may be acted upon by the committing magistrate"). *See also In re Sainez*, No. 07-MJ-177, 2008 U.S. Dist. LEXIS 9573, 2008 WL 366135, at *20 (S.D.Cal. Feb. 8, 2008) (Mexican extradition treaty does not require sworn statements therefore unsworn statements are permissible), *habeas denied sub nom*, *Sainez v. Safford*, 08-CV-819, 2008 U.S. Dist. LEXIS 65150, 2008 WL 392564 (S.D. Cal. Aug. 25, 2008), *denial aff'd*, *Sainez v. Venables*, 588 F.3d 713 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3399, 177 L. Ed. 2d 312 (2010).

Nevertheless, the United States represents that it has made available to the respondent's counsel copies of the original statements of the 16 witnesses whose statements were taken by the public prosecutor. I have examined them and asked the Court's

official interpreter to translate those portions that appear to me to be attestations of the truth by the witness of what we now know to be the complete statements. The Court interpreter reviewed the witnesses' statements with me and explained me that each begins with a statement by Vazquez, the Public Prosecutor, that the witness appeared before him in a certain place and identified himself or herself by presenting a form of identification that displayed the witness' photograph. The Public Prosecutor then advised the witness of her right to consult with an attorney and of the penalties that would attend her not telling the truth. The witness statement then follows and at its conclusion, there appear the following words: "I attest that the above is a true account of my statement, wherefore I ratify and affirm it by duly signing below and on the margin." This is followed by the witness' signature. The invocation of the deity ("So help me God"), familiar to the common law, is not permitted under the Mexican constitution as a result of the anti-clerical aspects of its political system. Specifically, the Mexican Constitution provides:

> A simple promise to tell the truth and to fulfill obligations that are contracted is binding on the one who so promises, and in the event of failure to do so, he shall be subject to the penalties that the law prescribes for this purpose.

Mexico Constitution Article 130.

A commentator explains:

> Since constitutionally Mexico is a secular state, any invocation to God, or any other expression of a religious creed, is not permitted at any official ceremonies. The same principle applies to the taking of an oath before Mexican courts or public authorities. Thus, Article 130 provides that a simple promise to tell the truth and to fulfill contractual obligations is legally binding on the individual. In the event of failure to do so, the individual in question shall be subject to the corresponding penalties imposed by the law.

Jorge A. Vargas, Freedom of Religion and Public Worship in Mexico: A Legal Commentary on the 1992 Federal Act on Religious Matters, 1998 B.Y.U. L. Rev. 421, 431 (1998).

In any event, all of the evidence submitted by Mexico has been authenticated in accordance with 18 U.S.C. § 3190, which requires simply that "the principal diplomatic or consular officer of the United States resident in such foreign country" certify as to the documents' authenticity. In this case, Buchholz submitted a sworn affidavit in which he declared the following:

> The documents submitted by the Government of Mexico in support of its extradition request were certified on May 29, 2008, by Edward McKeon, Minister Counselor for Consular Affairs at the U.S. Embassy in

> Mexico, in accordance with Title 18, United States Code, Section 3190. Mr. McKeon, at the time he certified the documents, was the principal consular officer of the United States in Mexico.

Buchholz Decl. at 2. Once that authentication has occurred, "[t]he usual rules of evidence do not apply" and the only requirement for admission of the evidence is that it be authenticated. *Manta v. Chertoff*, 518 F.3d 1134, 1146 (9th Cir. 2008). An objection therefore that unsworn statements are not admissible in extradition hearings is incorrect. *Id.*

Finally, although the Treaty provides that all documents presented under Article 10 must be submitted with a translation in the language of the requested country, it does not require that those translations be certified. *See* Treaty, art. 10(2)(5). "[T]ranslations must be presumed to be correct unless [the respondent] presents some convincing evidence otherwise." *In re David*, 395 F.Supp. 803, 806 (E.D. Ill. 1975); *accord Ntakirutimana v. Reno*, 184 F.3d 419, 430 (5th Cir. 1999) ("The extradition court need not independently inquire into the accuracy of the translations submitted with a formal extradition request, because such a requirement would place an unbearable burden upon extradition courts and seriously impair the extradition process.") (internal quotation marks and citation omitted).

Thus, there are before the court complete statements of witnesses, affirmed to be true in accordance with Mexican law and certified to be authenticated by

a Department of State official. The respondent's objection on the grounds that the Prosecutor excerpted them is a meaningless quibble that is, in any event, incorrect; the witness' statements are complete and sworn to in perfect accordance with Mexican law.

V. Non Bis In Idem

In analyzing whether the respondent can be extradited, two concepts must be distinguished, as they are premised on different treaty provisions and serve different interests.

As explained above, the obligation that the offenses charged "be punishable in accordance with the law of both Contracting Parties" (Treaty, Art 1) bespeaks an intention to subject a person to extradition only if the acts that are the premise of the request for his extradition are punishable in both the requested and requesting states. *Sensi*, 879 F.2d at 894. Under another provision of the treaty, however, "[e]xtradition shall not be granted when the person sought has been prosecuted or has been tried and convicted or acquitted by the requested Party for the offense for which extradition is requested." Treaty, art. 6.

Article 6 does not bar relator's extradition for several reasons. First, writing in May 2009, I indicated that the phrase "has been prosecuted" is in the past tense and could not apply merely because a prosecution had been commenced in the Producing State, the United States. *In re Extradition of Zhenly Ye Gon*, 613 F. Supp. 2d 92, 96 (D.D.C. 2009). Now, of

course, the indictment in this Court has been dismissed with prejudice. Clearly, defendant was not tried and convicted or acquitted "for the offense for which extradition is requested." The question presented therefore is whether the phrase "has been prosecuted" would apply here, where an indictment was returned and dismissed. Fortunately, that question need not be reached if the indictment in the United States did not charge "the offense for which extradition is requested."

In my May 2009 opinion, I found in the court of appeals' decision in *Rezaq v. United States*, 134 F.3d 1121, 1127-28, 328 U.S. App. D.C. 297 (D.C. Cir.), *cert. denied*, 525 U.S. 834, 119 S. Ct. 90, 142 L. Ed. 2d 71 (1998), support for the proposition that the court of appeals would use the familiar Blockburger analysis in interpreting the prohibition in the Treaty against prosecution in the demanding state for the offense that had been prosecuted in the requested state. As will be recalled in Rezaq, the court of appeals concluded that the United States' prosecution was for an offense that contained elements that the Maltese authorities were not obliged to establish in their prosecution of the defendant. *Rezaq*, 134 F.3d at 1128.

Morever, the applicability of the Blockburger analysis to questions of prior prosecution was confirmed by the court of appeals in 2009 when, after applying the Blockburger analysis, it concluded that prosecution in the District of Columbia for a gun offense was not prohibited under the double jeopardy clause by a prosecution in Maryland of another

offense involving the same gun because the elements of the crimes charged in the two jurisdictions were different. *United States v. Kelly*, 552 F.3d 824, 830, 384 U.S. App. D.C. 171 (D.C. Cir. 2009). Additionally, in *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), the Supreme Court overruled *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990) insofar as the court looked to a "same conduct" test of offenses rather than the Blockburger analysis when ascertaining whether prosecution for one offense barred prosecution for another. Thus, as a matter of the domestic law of the United States, one of the parties to the treaty, it could hardly be clearer that its courts would use the Blockburger analysis in ascertaining whether the offenses charged in the United States and the demanding state were the same. Given that tradition, and the absence of any testimony from experts in Mexican law that Mexican law is decidedly to the contrary, the Blockburger analysis certainly seems to provide a controlling rule.

The respondent relies instead on the Second Circuit's decision in *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980), in which the court did not use the Blockburger analysis but instead invoked Justice Brennan's concurring opinion in *Ashe v. Swenson*, 397 U.S. 436, 453-54, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), wherein he interpreted the Double Jeopardy Clause to require the prosecution "to join at one time all the charges against a defendant which grow out of a single criminal act, occurrence, episode[,] or transaction."

Sindona, 619 F.2d at 178 (quoting *Ashe*, 397 U.S. at 453-54).

First, it is clear that Justice Brennan's concurring opinion did not survive the Supreme Court's decision in Dixon, that rejected a same conduct test for double jeopardy in favor of the Blockburger analysis. Thus, the theoretical underpinning of the Sindona decision – that as a matter of domestic law, a same conduct test defines the reach of the double jeopardy clause under American law – has not survived.

Second, it is important not to emphasize the now discredited dictum in the Sindona opinion over its holding. After all, the Second Circuit permitted the respondent's extradition on the grounds that the Italian prosecution was not for the same conduct for which he was to be punished in America:

> While believing that the standard to be applied in construing Art. VI(1) of the Treaty should be at least as broad as that expressed in Mr. Justice Brennan's concurring opinion in *Ashe v. Swenson, supra*, or in the Petite policy, we do not accept the conclusion Sindona would have us draw from it. Broadly speaking, the Italian prosecutor charged a gigantic fraud perpetrated on the Italian banks which generated funds that permitted Sindona to engage in allegedly criminal activities in Italy and other countries including the United States. The concern of the Republic of Italy is the harm done to depositors in the Italian banks; that of the United States

> is the damage to American depositors and investors. The crimes charged in the American indictment, while serious, are on the periphery of the circle of crime charged by the Italian prosecutors. Although the alleged Italian crime may have been the "but-for" cause of the alleged American offenses in providing Sindona with the wherewithal, it is not the crime for which the United States is proceeding against him. Indeed, principles of territorial jurisdiction make it extremely doubtful that this country could proceed against Sindona for the overwhelming bulk of the matters being charged in Italy or that Italy could prosecute him for most of the charges in the American indictment. Article VI(1) of the Treaty could not have been intended to have the consequence that substantial elements of crime should be left unpunishable. We thus reject Sindona's argument that Article VI(1) confers immunity from extradition.

Sindona, 619 F.2d at 179. *See also In Re: Extradition of Gambino*, 421 F. Supp. 2d 283, 311 (D. Mass. 2006) (even a "same acts" or "same facts" interpretation in a non bis in idem context does not bar extradition when the Italian and American prosecutions differed in terms of the duration of the conspiracies, the quantities and dates of narcotics shipments, the geographical centers of the racketeering enterprises, the co-defendants, and the overt acts).

In my May opinion, I specified the differences between the Mexican and American charges:

The Mexican charges are as follows:

1. Participation in organized crime, for the purpose of repeatedly committing drug crimes and operations with illegal funds;

2. Drug-related offenses in the forms of:

a. importation into Mexico of psycho tropic sub-stances, namely, N-acetyl pseudoephedrine acetate and ephedrine acetate, derivatives of pseudoephedrine,

b. transportation of psycho tropic substances, namely, N-acetyl pseudoephedrine, a derivative of pseudoephedrine,

c. manufacture of psycho tropic substances, namely, pseudoephedrine, ephedrine, pseudoephedrine hydrochloride, and methamphetamine hydrochloride,

d. possession of psycho tropic substances for the purpose of producing narcotics,

e. diversion of essential chemical products, namely sulfuric acid, to produce narcotics;

3. Violations of the Federal Law on Firearms and Explosives in the form of possession

> of firearms re-served for the exclusive use of the Army, Navy and Air Force; and
>
> 4. Money laundering, by himself or through an intermediary, by having custody of funds within Mexico, knowing that the funds have their source in an illegal activity, with the intention to impede knowledge of their source, location, destination, or ownership.
>
> *See* Aff. 19; Apdx. A [Mexican arrest warrant] at 636-39.
>
> The United States indictment, on the other hand, charges a single count of conspiring to aid and abet the manufacture of 500 grams or more of methamphetamine, knowing that it was to be imported into the United States from Mexico. *United States v. Zhenly Ye Gon*, Cr. No. 07-181, Indictment, Count One.

In re Extradition of Zhenly Ye Gon, 613 F. Supp. 2d 92, 97 (D.D.C. 2009).

As I further noted in my May opinion, the American and Mexican crimes of conspiracy are comprised of different elements. *Id.* at 98. Conspiracy under U.S. law requires proof of an agreement between the co-conspirators whereas conspiracy under Mexican law requires proof that the individual engaged in any of the specific acts identified in the law, such as the importation, transportation, or possession with the intent to distribute the controlled substance at issue. *Id.* In addition, under Mexican law, a further showing

must be made that the individual did not have permission from the Mexican government to perform the specific act. *Id.*

Thus, as the Sindona case, the differences between the foreign charges and the American indictment clearly demonstrate that the respondent would not be punished for the same crime in Mexico as he would be for the crime charged in the American indictment. Hence, his attack on the Mexican government's request for his extradition fails, whether one uses what I believe to be the proper analysis, the Blockburger test, or the broader test suggested by the dictum in the Sindona case.

CONCLUSION

Mexico has established probable cause for each of the charges for which extradition has been requested and met the other requirements for extradition under the Treaty. A Certificate of Extraditability and Order of Commitment will therefore be issued in conformity with these Findings of Fact and Conclusions of Law.

/s/ John M. Facciola
JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

FILED: February 27, 2015

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-6102
(7:11-cv-00575-JCT)

ZHENLI YE GON

Petitioner-Appellant

v.

GERALD S. HOLT, U.S. Marshal for the Western District of Virginia; FLOYD G. AYLOR, Warden of the Central Virginia Regional Jail

Respondents-Appellees

and

ERIC H. HOLDER, JR., Attorney General of the United States; HILLARY RODHAM CLINTON, United States Secretary of State; EDWIN D. SLOANE, United States Marshal for the District of Columbia

Respondents

ORDER

Upon consideration of submissions relative to the motion to stay mandate, the court grants the motion.

Entered at the direction of Judge Shedd with the concurrence of Judge Floyd and Senior Judge Davis.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: February 13, 2015

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ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Shedd, Judge Floyd and Senior Judge Davis.

For the Court

/s/ Patricia S. Connor, Clerk