

KARIN J. IMMERGUT, OSB #96314  
United States Attorney

**DWIGHT C. HOLTON, VSB# 40761**  
Assistant United States Attorney

**ETHAN D. KNIGHT, OSB# 99298**  
Assistant United States Attorney

1000 S.W. Third Ave., Suite 600

Portland, OR 97204-2902

Telephone: (503) 727-1000

[Dwight.Holton@usdoj.gov](mailto:Dwight.Holton@usdoj.gov)

[Ethan.Knight@usdoj.gov](mailto:Ethan.Knight@usdoj.gov)

Attorneys for United States of America

REC'D '08 MAR 11 13:19 USDC-ORF

**THE UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF OREGON**

08-MJ-430

**IN THE MATTER OF THE  
EXTRADITION OF  
JAYANT MUKUNDRAY PATEL**

**GOVERNMENT'S MEMORANDUM IN  
OPPOSITION TO RELEASE ON BAIL**

MEMORANDUM OF LAW IN OPPOSITION TO BAIL

**I. Factual Background**

Beginning in approximately December 2002, JAYANT MUKUNDRAY PATEL defrauded officials at a hospital in Bundaberg, Australia into hiring him as a surgeon at the hospital. PATEL, a doctor who had been repeatedly sanctioned for misconduct by licensing officials in the United States, schemed to hide his history of professional misconduct from officials at an Australian hospital and licensing officials in the Australian state of Queensland so that he could get and keep a job as a surgeon at the hospital. Once on staff, PATEL bungled surgeries with tragic results. In November 2006, Australian authorities charged him with killing three patients, injuring two others, and defrauding hospital officials.

Patel trained as a doctor in India and New York, and obtained a license to practice medicine in New York in 1980. Within a few years, however, PATEL had been fired from his job for inappropriate conduct. Then, in May 1984, New York regulators found PATEL guilty of gross negligence and incompetence. PATEL was fined and placed on probation for a period of three years. PATEL subsequently left New York for Oregon.

In 1989, PATEL was licensed to practice in Oregon by the Oregon Board of Medical Examiners ("BME"). PATEL's trouble with licensing authorities continued, however. First, in 1998, his employer, Northwest Permanente limited his scope of practice. Then, in August 2000, the BME formally placed limitations on PATEL's license. Specifically, PATEL was barred from doing certain surgeries and was required to obtain a second opinion, documented in a patient's chart, in any "complicated surgical case."

New York state regulators followed suit and began new disciplinary proceedings against PATEL. Facing the new proceedings, PATEL surrendered his New York State license for good in May 2001.

In the meantime, Oregon hospitals had begun to place limits on what PATEL could do in their operating rooms. For example, Providence Portland Hospital revoked his surgical privileges on May 16, 2001, and other hospitals required that he have a second surgeon present for any surgery.

Also, in May 2001, Northwest Permanente began the process of firing PATEL. Rather than wait for the process to play out, PATEL resigned in June 2001. PATEL was subsequently unable to find employment at an Oregon hospital. PATEL even told an investigator for the Oregon BME that he was having difficulty finding employment in Oregon or neighboring states and sought help finding employment from the investigator (she declined to help).

After failing to find a job in the United States, PATEL sought employment in Australia. In December 2002, he applied for a job at the Bundaberg Base Hospital in Bundaberg, Queensland (“Bundaberg” or the “hospital”). PATEL was offered a job with the hospital in December 2002, and over the next few months, completed various forms required for employment at the hospital and licensing as a physician in Queensland (where licensing is referred to as “registration”).

PATEL actively hid his history of professional misconduct and lied repeatedly on forms required for registration in Australia as he sought employment at Bundaberg. Simply put, PATEL held himself as something he was not – a qualified physician licensed for full practice in the United States. PATEL affirmatively denied that this license had ever been subject to suspension or conditions – when in fact his license was at that very time limited, he had been disciplined in the past, and he had lost his New York state medical license altogether. PATEL never told officials at the Bundaberg Base Hospital or medical licensing authorities in Queensland about his history of professional misconduct. PATEL never disclosed that his medical license in Oregon had been limited – and that he was not authorized to conduct certain surgeries and that he was required to obtain second opinions for all “complicated surgical cases.” PATEL never disclosed that he had twice been disciplined by New York state regulators, resulting in the surrender of his license in 2000. To the contrary, he hid these facts – successfully defrauding hospital and Australian licensing officials – and was paid over \$400,000 while employed by the hospital.

Once employed by Bundaberg Base Hospital, PATEL’s tenure had tragic results:

- PATEL operated on one patient and concluded the surgery even though he knew that the

patient was still bleeding internally. PATEL went off to perform another (non-urgent) surgery, then returned to re-open the patient to again seek to stop the bleeding. Failing to locate and stop the bleeding, PATEL again gave up and ended the surgery with the patient still bleeding internally. The patient died hours later.

- For another patient, PATEL was supposed to remove a cancerous gland but instead removed a *healthy* gland – leaving the cancerous gland in the patient to continue its destructive course.

- PATEL inadvertently tore one patient's oesophagus.

- PATEL repeatedly performed surgeries he was barred from performing under his Oregon license without a second opinion. PATEL did not obtain second opinions, and in one case, did not even consult the patient's treating physician.

- PATEL performed unnecessary surgeries on patients in poor health when there were less risky alternatives.

On November 22, 2006, PATEL was charged with three counts of manslaughter for killing patients James Edward Phillips, Mervyn John Morris and Gerardus Wilhelmus Gosewinus Kemps. PATEL was also charged with causing grievous bodily harm and negligent harm to Darcy Russel Blight, and causing grievous bodily harm to Ian Rodney Vowles.

In addition to the violent crimes, PATEL was also charged with seven counts of fraud and one count of attempted fraud for his scheme to defraud Bundaberg Base Hospital officials and Australian regulators into employing and licensing PATEL.

The manslaughter charges carry a punishment of up to life imprisonment. The grievous bodily harm charges each carry up to 14 years imprisonment, whereas the negligent harm charges carry up to two years imprisonment. The more serious fraud charges carry punishment of up to 10 years imprisonment; the lesser charges carry a maximum sentence of five years imprisonment. All told, PATEL faces up to three life terms plus over 100 years in prison.

#### **4 - GOVERNMENT'S MEMORANDUM IN OPPOSITION TO RELEASE ON BAIL**

A warrant of arrest for Jayant Mukundray PATEL was issued by U.S. Magistrate Judge Dennis J. Hubel on March 7, 2008. PATEL is wanted by the Australian authorities.

Patel's extradition is sought by Australia pursuant to its extradition treaty with the United States, 27 U.S.T. 957, TIAS 8234, and to federal legislation implementing such treaties, 18 U.S.C. § 3184 *et se.* Article II (1) of the treaty provides for the extradition of persons accused of crimes punishable by the laws of both countries.

The Government of the United States, acting at the request of the Australian Government, urges that the defendant be held without bond pending a hearing on extraditability pursuant to U.S.C. § 3184.

## **II. PATEL SHOULD BE DETAINED PENDING EXTRADITION**

### **A. There is a Presumption Against Bail**

Bail in international extradition should be granted only under the most unusual circumstances. *Wright v. Henkel*, 190 U.S. 40 (1903). Indeed, there is a presumption that bail should not be issued in an extradition case. *Beaulieu v. Hartigan*, 554 F.2d 1 (1st Cir. 1977) (“Unlike the situation for domestic crimes, there is no presumption favoring bail. The reverse is rather the case.”).<sup>1</sup>

The international legal system depends wholly on treaty signatories to respect their obligations. The axiom *pacta sunt servanda* -- treaties must be obeyed -- is at the heart of international law. A nation that fails to perform a duty mandated by a treaty can justly be accused of subverting the system and may find itself receiving reciprocal treatment from its treaty partner.

---

<sup>1</sup> In *United States v. Williams*, 611 F.2d 914 (1st Cir. 1979), the court specifically held that the "special circumstances" rule applied to pre-hearing confinements. *Accord, Wright v. Henkel, supra* (bail issue arose in connection with prehearing confinement).

Extradition treaties *require* delivery of the fugitive sought – extradition is not optional: if the requesting state meets the conditions specified in the treaty, the United States is obliged to deliver the fugitive. This obligation cannot be fulfilled if the fugitive skips after being released on bond. The potential impact on our foreign relations must be brought to the attention of any court considering a fugitive's application for release on bail.

The Supreme Court expressly recognized the importance of these international considerations – and their impact on bail decisions – in *Wright*. As the Court explained,

The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment.

190 U.S. at 62. The Court declined to categorically deny the power of an extradition court to issue bail in all circumstances; instead it held that bail is not ordinarily appropriate in an extradition case. *Id.* at 190 U.S. 63.

The Supreme Court's holding in *Wright* has been uniformly interpreted by subsequent courts to permit bail to be granted only where “special circumstances” are present, completely apart from whether the fugitive represents a good bail risk. As Judge Learned Hand explained, “The power should be exercised only in the most pressing circumstances, and when the requirements of justice are absolutely peremptory”). *In re Mitchell*. 171 F. 289, 290 (S.D.N.Y. 1909). *See also In re Klein*, 46 F.2d 85 (S.D.N.Y. 1930) (noting the “grave risk of frustrating the efforts of the executive branch of the [G]overnment to fulfil treaty obligations”); *United States ex rel. McNamara v. Henkel*, 46 F.2d 84 (S.D.N.Y. 1912) (“[T]hat the power to admit to

bail exists is admitted; that it is ever advisable to admit to bail prior to the date of a reasonably earlier examination is denied.”); *Salerno v. United States*, 878 F.2d 317 (9th Cir. 1989) (applying “special circumstances” test); *Matter of Russell*, 805 F.2d 1215, 1216-1217 (5th Cir. 1986) (“Being a tolerable bail risk is not in and of itself a 'special circumstance'.” *Kamrin v. United States*, 725 F.2d 1227, 1228 (9th Cir. 1984) (same); *United States v. Leitner*, 784 F.2d 159 (2nd Cir. 1986) *per curiam*; *Hu Yau-Leung v. Soscia*, 649 F.2d 914 (2d Cir.), *cert. denied*, 454 U.S. 971 (1981); *United States v. Williams*, 611 F.2d 914 (1st Cir. 1979); *United States v. Tang Lee Chan*, *supra*).

The reasons for this presumption against bail in international extradition cases are compelling. A person sought for an extraditable offense is already an international fugitive. It is reasonable to expect a fugitive will flee once alerted to the charges. Moreover, the fact that he faces an international extradition to a foreign state for a serious charge where his fate is uncertain is itself a strong incentive to flee. In addition, when, the person sought is not a citizen of the requested country there is a greater risk of flight. Finally, while forfeiture of bail in domestic criminal cases is designed to compensate, at least in part, the court that is seeking the accused's presence for trial, forfeiture of bail in an international extradition case caused by the failure of an extraditee to appear for a hearing would leave the demanding country, Australia, with neither remedy nor compensation.

B. No “Special Circumstances” Warranting Bail Are Present

No “special circumstances” warranting bail are present in this case. The “special circumstances” test has been satisfied in only limited cases. For example, in *Hu Yau Leung v. Soscia*, a court granted bail for a juvenile being extradited to Hong Kong because there was is no

appropriate facility in which to house a juvenile fugitive – so rather than expose the juvenile to the danger and risk of an adult prison, the court granted bail. 649 F.2d at 920. *In re Mitchell*, the fugitive faced the prospect of losing his entire fortune if not permitted to finish his participation as plaintiff in a civil proceeding which was underway at the time of his arrest – but the fugitive was remanded to custody at the conclusion of the trial. 171 F. at 290.

The fact that a prospective extraditee does not appear to be a flight risk will not overcome the presumption against bail as it does not constitute a “special circumstance.” *Salerno v. United States*, 878 F.2d at 317-318. The need to consult with one's attorney about pending civil litigation or the extradition proceeding itself is also not considered a special circumstance which would justify bond. *In re Russell, supra*, 805 F.2d at 1217.<sup>2</sup> Financial and emotional hardships are present in every extradition case, thus they do not constitute special circumstances. *Id.*

The Ninth Circuit has consistently applied the special circumstances test to deny bail in extradition proceedings. As the Ninth Circuit bluntly explained in *Salerno*, “[t]here is a presumption against bail in an extradition case and only “special circumstances” will justify bail.” *Salerno*, 878 F.2d. 317 (9<sup>th</sup> Cir. 1989). *See also In Re Extradition of Kirby*, 106 F.3d 855, 858 (9<sup>th</sup> Cir. 1997) (“Over ninety years ago, the Supreme Court recognized that there is a

---

<sup>2</sup> It bears noting, when considering a need to consult with counsel, that evidence conflicting with the government's proof is not appropriate, since a determination as to guilty or innocence is not the role of the extraditing court. *Collins v. Loisel*, 259 U.S. 309, 316 (permitting the introduction of defense evidence "would be in plain contravention of the intent and meaning of the extradition treaties"); *Hu Yau-Leung v. Soscia, supra*, at 649 F.2d 917 (alibi); *Eain v. Wilkes*. 641 F.2d 504, 511 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981) (attempt to impeach credibility of requesting country's witnesses not permitted); *see, also, Bingham v. Bradley*, 241 U.S. 511, 517 (1916) (procedural defenses). Instead, a fugitive's right to controvert the evidence introduced against him is "limited to testimony which explains rather than contradicts the demanding country's proof." *Collins v. Loisel, supra*, at 259 U.S. 315-317.

## **8 - GOVERNMENT'S MEMORANDUM IN OPPOSITION TO RELEASE ON BAIL**

presumption against bail in an extradition case and only “special circumstances” will justify bail.”). In *Salerno*, defendant sought release claiming that he was not a flight risk. The Ninth Circuit flatly rejected that as a basis for release in extradition proceedings:

Salerno has not demonstrated that he is entitled to release under [the special circumstances] standard. Instead, he contends that because he is not a flight risk, he is entitled to bail pending the appeal of the denial of his petition for a writ of habeas corpus. That is not the criteria for release in an extradition case. *Kamrin v. United States*, 725 F.2d 1225, 1228 (9th Cir.1984). We therefore deny his motion for bail pending appeal.

878 F.2d at 317-318. In *Matter of Extradition of Smyth*, the district court granted the extraditee bail after concluding that defendant’s need to “consult with counsel, gather evidence and confer with witnesses” constituted a “special circumstance.” 976 F.2d 1535, 1536 (9<sup>th</sup> Cir. 1992). The Ninth Circuit reversed, concluding that there nothing that justified the extraditee’s release. *Id.*

There are no “special circumstances” in PATEL’s case. Further, allowance of bail in any amount would not guarantee his presence in court. PATEL's release on bail could have negative implications for American foreign policy in cases where the United States seeks extradition of fugitives from Australia.<sup>3</sup>

---

<sup>3</sup> The Bail Reform Act does not apply to international extradition. *See, e.g., Kamrin v. United States*, 725 F.2d 1225, 1227-28 (9th Cir. 1984) (“ ‘special circumstances’ requirement creates a different standard for extradition cases than for federal criminal cases ... [t]he additional showing required in extradition belies Kamrin's claim that bail is one of the remedies and recourses of United States law to which an extraditee is entitled”). The Ninth Circuit made clear in *Extradition of Kirby* that “the district court's authority to grant bail in extradition cases is rooted” not in statute, but “in the Supreme Court decision in *Wright v. Henkel*.” 106 F.3d 855, 858 (9th Cir. 1997); *see also In re Extradition of Smyth*, 976 F.2d 1535, 1535-36 (9th Cir. 1992) (same). Therefore, the criteria governing the allowance and the amount of bail in domestic criminal cases are not applicable. The Bail Reform Act applies only to offenses against the United States that are triable in U.S. courts. *See* 18 U.S.C. 3141(a), 3142, 3156 (a)(2). Patel is not charged with an “offense” within the meaning of 18 U.S.C. § 3156. Patel is charged with violating numerous provisions of the Queensland Criminal Code, offenses against the Requesting  
(continued...)

## 9 - GOVERNMENT’S MEMORANDUM IN OPPOSITION TO RELEASE ON BAIL

## CONCLUSION

WHEREFORE, the Government respectfully requests that JAYANT MUKUNDRAY PATEL be held without bail pending extradition proceedings against him.<sup>4</sup>

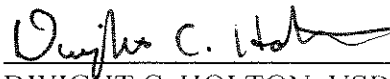
DATED this 11<sup>th</sup> day of March 2008.

Respectfully submitted,

KARIN J. IMMERGUT  
United States Attorney



by: ETHAN D. KNIGHT, OSB # 99298  
Assistant United States Attorney



DWIGHT C. HOLTON, VSB # 40761  
Assistant United States Attorney

---

<sup>3</sup> (...continued)

State, Australia, not the United States. Therefore, the Bail Reform Act set forth in 18 U.S.C. §§ 3141 et seq. is inapplicable.

<sup>4</sup> For the Court's convenience, a copy of *Wright v. Henkel*, *Salerno v. United States* and *Kamrin v. United States* are attached to the memorandum.

# ATTACHMENT 1

WHITAKER WRIGHT, Appt.,

v.

WILLIAM HENKEL, United States Marshal for the Southern District of New York, et al.

*Foreign extradition—what acts are made criminal by the laws of both countries—bail—when refusal not error—effect on appeal of pendency of second complaint.*

1. Absolute identity of statutes in Great Britain and the United States defining the offense of fraud by a corporate director is not necessary to make such offense "criminal by the laws of both countries," within the meaning of the provisions of the treaty with Great Britain of 1839, art. 1 (26 Stat. at L. 1508), defining extraditable crimes; it is sufficient if the essential character of the transaction is the same and is made criminal by both statutes.
2. A fugitive from the justice of Great Britain, charged with the commission of fraudulent acts as a corporate director, which are made criminal by the laws of that country and by the laws of the state of the United States in which the fugitive is found, is extraditable under the treaty with Great Britain of 1839, art. 1, including, among other extraditable crimes, fraud by a corporate director "made criminal by the laws of both countries."
3. The denial of an application for bail in foreign extradition proceedings, supported by the affidavit of petitioner's physician that he was suffering from bronchitis and a severe chill which might develop into pneumonia, and that the confinement tended greatly to injure his health and to result in serious impairment, is not reversible error, although the refusal was put upon the ground of the want of power.
4. The dismissal of an appeal from an order of a United States circuit court dismissing writs of habeas corpus to inquire into a detention under a warrant of arrest issued in extradition proceedings is not required because of the pendency, as appears on the argument of such appeal, of proceedings on a second complaint by the demanding government, which reiterates the original charge with some amplification, and charges an additional offense.

[No. 661.]

Argued April 28, 29, 1903. Decided June 1, 1903.

**A**PPEAL from the Circuit Court of the United States for the Southern District of New York to review an order dismissing writs of habeas corpus to inquire into a detention under a warrant of arrest issued in extradition proceedings. *Affirmed.*

Statement by Mr. Chief Justice Fuller: Whitaker Wright applied to the circuit court of the United States for the southern district of New York for writs of habeas corpus and certiorari on March 20, 1903, by a petition which alleged:

(1) That he was a citizen of the United States, restrained of his liberty by the marshal of the United States for the southern district of New York, by virtue of a warrant dated March 16, 1903, issued by Thomas Alexander, "United States" commissioner for the southern district of New York, and com-

missioner duly authorized by the district court of the United States for the southern district of New York, and also commissioner appointed under the laws of the United States concerning the extradition of fugitives from the justice of a foreign government under a treaty or convention between this and any foreign government," which warrant was couched in these terms:

"Whereas, complaint has been made on oath under the treaty between the United States and Her Majesty, the late Queen of Great Britain and Ireland, concluded and signed at Washington, on the 9th day of August, 1842, and of the supplementary treaty between the same high contracting parties, signed July 12, 1889, before me, Thomas Alexander, one of the commissioners appointed by the district court of the United States for the southern district of New York, and also commissioner especially appointed to execute the acts of Congress, entitled 'An Act for Giving Effect to Certain Treaty Stipulations Between This and Foreign Governments for the Apprehension and Delivering up of Certain Offenders,' approved August 12, 1848 [9 Stat. at L. 302, chap. 167, U. S. Comp. Stat. 1901, p. 3591], and of the several acts amendatory thereof, that one Whitaker Wright did heretofore, during the month of October, in the year 1899, and in the month of December, 1900, in the city of London, in that part of the United Kingdom of Great Britain and Ireland called England, and within the jurisdiction of his said Britannic Majesty, commit the crime of fraud as a director of a company, to wit, did heretofore, in the month of October, in the year 1899, and in the month of December, 1900, at the city of London aforesaid, then being a director of a certain body corporate, to wit, the London & Globe Finance Corporation, unlawfully make, circulate, and publish certain reports and statements of accounts of the said corporation, which were false; the said Whitaker Wright then well knowing the said reports and statements to be false, with intent thereby to deceive and defraud the shareholders or members of the said corporation; that the said Whitaker Wright is a fugitive from justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States; that the crime of which the said Whitaker Wright has so as aforesaid been guilty is an offense within the treaty between the United States and Great Britain."

(2) That the warrant was issued on a complaint by His Britannic Majesty's consul general at the port of New York, as follows:

"First. That one Whitaker Wright did heretofore and in the month of December, 1900, in the city of London, in that part of the United Kingdom of Great Britain and Ireland called England, and within the jurisdiction of his said Britannic Majesty, commit the crime of fraud as a director of a company, to wit, did heretofore and in the month of October, in the year 1899, and in the month of December, 1900, at the city of

London, aforesaid, then being a director of a certain body corporate, to wit, the London & Globe Finance Corporation, unlawfully make, circulate, and publish certain reports and statements of accounts of the said corporation, which were false; the said Whitaker Wright, then well knowing the said reports and statements to be false, with intent thereby to deceive and defraud the shareholders or members of the said corporation.

"Second. That the said Whitaker Wright is a fugitive from the justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States.

"Third. That the crime of which the said Whitaker Wright has so as aforesaid been guilty is an offense within the treaty between the United States and Great Britain.

"Fourth. That deponent's information and belief are based upon messages received by cable from his Majesty's Secretary of State for Foreign Affairs, one of the said messages stating that a warrant had been issued in England for the apprehension of the said Whitaker Wright for the offense herein charged and directing deponent to apply for a provisional warrant, under the treaty for extradition, between the United States and Great Britain.

"That deponent has, since the apprehension of the said Whitaker Wright yesterday, cabled to His Majesty's said foreign secretary for fuller details as to said crime, and an answer is directly expected, but that the said Whitaker Wright may be detained, pending the arrival of such information, deponent asks for a provisional warrant herein."

(3.) "That the aforesaid complaint states no facts which create jurisdiction for the issuance of the aforesaid warrant, and for the detention of your petitioner; that it does not state any facts which show that your petitioner has been guilty of any offense within the provisions of any extradition treaty between the United States of America and the United Kingdom of Great Britain and Ireland."

(4.) That he had duly objected to the continuance of any proceedings under the complaint and warrant, on the ground that the commissioner had no jurisdiction; but his objections had been overruled, and the commissioner had adjourned the proceedings until March 30, 1903.

(5.) That on March 18, 1903, he presented to the commissioner an application to be admitted to bail pending the proceeding, and, in support of the application, filed with the commissioner the affidavit of his attending physician, which was to the effect that petitioner was suffering from bronchitis and a severe chill, which might develop into pneumonia, and that the confinement tended greatly to injure his health and to result in serious impairment; but that the commissioner denied the application on the ground that no power existed for admitting petitioner to bail; (6) that the cause of imprisonment was the charge and the refusal to admit to bail.

(7.) That the imprisonment and detention were illegal, and the warrant void, the complaint stating no jurisdictional facts to warrant imprisonment and detention. That the denial of the right to give bail constitutes a violation of the 8th Amendment of the Constitution, and § 1015 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 718), and of the common law of the United States, and constitutes a deprivation of liberty without due process of law.

The writs prayed for were granted, and, after hearing, dismissed and the application to be admitted to bail denied, March 30, the opinion being filed March 25, and copy of final order served March 28. The case was then brought to this court by appeal.

\* At the argument it was made to appear that, on March 31, His Majesty's consul general at New York made a new complaint, which reiterated the original charge, with some amplification, and added that Wright "did also, at the times and places aforesaid, then being a director and manager of said company or corporation aforesaid, with intent to defraud, alter and falsify books, papers, and writings belonging to the said company or corporation, and made and concurred in the making of false entries, and omitted and concurred in omitting material particulars in books of account and other documents belonging to the said company or corporation; and did also, at the times and places aforesaid, then being a director of the said company or corporation as aforesaid, alter and falsify books, papers, and writings, and made and was privy to the making of false and fraudulent entries in the books of account and other documents belonging to the said company or corporation, with intent to defraud and deceive shareholders and creditors of said company or corporation, and other persons."

It was further stated: "That deponent's information and belief are based upon a certified copy of a warrant, issued by one of his Majesty's justices of the peace for the city of London, for the apprehension of the said Whitaker Wright, for the offense herein first enumerated, and a certified copy of the information and complaint of the senior official receiver in companies liquidation (acting under the order of the high court of justice) and the depositions of Arthur Russell and John Flower, in support thereof, upon the application for a summons against the said Whitaker Wright, and the depositions of George Jarman and Harry Gerald Abrahams, on which information and complaint and depositions the said warrant was granted for the apprehension of the said Whitaker Wright," etc. Copies of these papers accompanied the complaint, and reference was made to cable messages from the Secretary of State for Foreign Affairs.

On this complaint a warrant was issued and the accused arraigned before the commissioner, and it was thereupon stated that the demanding government would abandon all further proceedings under the complaint

of March 16, and consented to the discharge of the prisoner from the arrest thereon. The commissioner held that, as the proceedings under the previous warrant had been carried into the circuit court, he was without power to discharge the prisoner under that warrant. Subsequently, the order of the circuit court dismissing the writs of habeas corpus and certiorari, and remanding the prisoner, was brought to the commissioner's attention, but counsel for the prisoner stated that papers were being prepared for the purpose of removing the case to the Supreme Court. The commissioner ruled that, pending such proceedings, he must decline to dismiss the complaint and discharge the prisoner.

Article 10 of the treaty of 1842 (8 Stat. at L. 572, 576), reads as follows:

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: *Provided* That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive."

\* Article 1 of the treaty of 1839 (26 Stat. at L. 1508), is:

"The provisions of the said 10th article are hereby made applicable to the following additional crimes:

"1. Manslaughter, when voluntary.

"2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.

"3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

"4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or

officer of any company, made criminal by the laws of both countries.

"5. Perjury, or subornation of perjury.

"6. Rape; abduction; child-stealing; kidnapping.

"7. Burglary; house-breaking or shop-breaking.

"8. Piracy by the law of nations.

"9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

"10. Crimes and offenses against the laws of both countries for the suppression of slavery and slave trading.

"Extradition is also to take place for participation in any of the crimes mentioned in this convention or in the aforesaid tenth article, provided such participation be punishable by the laws of both countries."

Sections 83 and 84 of chapter 96, 24 and 25 Victoria, are as follows:

83. "Whosoever, being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular in any book of account or other document, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

84. "Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned."

Section 75 provided for a liability, on conviction of the misdemeanor therein mentioned, "at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Section 166 of the companies' act of 1862 (25 and 26 Vict. chap. 89), provides:

"If any director, officer, or contributory

of any company wound up under this act destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or other document belonging to the company, with intent to defraud or deceive any person, every person so offending shall be deemed to be guilty of a misdemeanor, and, upon being convicted, shall be liable to imprisonment for any term not exceeding two years, with or without hard labor."

Section 514 and subdivision 3 of § 611 of the New York Penal Code read as follows:

"Sec. 514. *Other cases of forgery in the third degree.*—A person who either (1) being an officer or in the employment of a corporation, association, partnership, or individuals, falsifies, or unlawfully and corruptly alters, erases, obliterates, or destroys any accounts, books of accounts, records, or other writing, belonging to or appertaining to the business of the corporation, association, partnership, or individuals; . . . is guilty of forgery in the third degree."

"Sec. 611. *Misconduct of officers and employees of corporations.*—A director, officer, agent, or employee of any corporation or joint stock association who: . . . (3) knowingly concurs in making or publishing any written report, exhibit, or statement of its affairs or pecuniary condition, containing any material statement which is false; . . . is guilty of a misdemeanor."

Section 525 provides: "Forgery in the third degree is punishable by imprisonment for not more than five years."

By § 15 it is provided;

"A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this code, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both."

By the extradition act of Great Britain of 1870 (33 and 34 Vict. chap. 52), it is provided that: "A fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender." The accused is, on committal, to be informed of this, and "that he has a right to apply for a writ of habeas corpus." If he is not surrendered and conveyed out of the United Kingdom "within two months after such committal, or, if a writ of habeas corpus is issued, after the decision of the court upon the return to the writ, it shall be lawful for any judge of one of Her Majesty's superior courts at Westminster," on notice, to order him to be discharged, unless sufficient cause is shown to the contrary.

The first schedule contained a list of crimes, which includes: "Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company, made criminal by any act for the time being in force."

\* By § 5273 of the Revised Statutes, Title

66, *Extradition* (U. S. Comp. Stat. 1901, p. 3596), it is provided that whenever any person committed under the title or any treaty "to remain until delivered up in pursuance of a requisition," is not so delivered up and conveyed out of the United States within two calendar months after such commitment, he may be discharged by any judge of the United States or of any state, on notice, unless sufficient cause is shown to the contrary.

Section 5270 (U. S. Comp. Stat. 1901, p. 3591), is as follows:

"Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within the limits of any state, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

*Messrs. Samuel Untermyer and Louis Marshall* for appellants.

*Mr. Charles Fox* for appellees.

*Solicitor General Hoyt* and *Mr. Milton D. Purdy* for United States.

\* Mr. Chief Justice Fuller delivered the opinion of the court:

The writ of habeas corpus cannot perform the office of a writ of error, but the court issuing the writ may inquire into the jurisdiction of the committing magistrate in extradition proceedings (*Ornelas v. Ruiz*, 161 U. S. 502, 40 L. ed. 787, 16 Sup. Ct. Rep. 689; *Terlinden v. Ames*, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484); and it was on the ground of want of jurisdiction that the writ was applied for in this instance before the commissioner had entered upon the examination; as also on the ground that petitioner should have been admitted to bail.

The contention is that the complaint and warrant did not charge an extraditable offense within the meaning of the extradition

treaties between the United States and the United Kingdom of Great Britain and Ireland, because the offense was not criminal at common law, or by acts of Congress, or by the preponderance of the statutes of the states.

Treaties must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose. The ordinary technicalities of criminal proceedings are applicable to proceedings in extradition only to a limited extent. *Grin v. Shine*, 187 U. S. 181, ante, p. 98, 23 Sup. Ct. Rep. 98; *Tucker v. Alexandroff*, 183 U. S. 424, 46 L. ed. 264, 22 Sup. Ct. Rep. 195.

\* The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties, and, as to the offense charged in this case, the treaty of 1889 embodies that principle in terms. The offense must be "made criminal by the laws of both countries."

We think it cannot be reasonably open to question that the offense under the British statute is also a crime under the 3rd paragraph of § 611 of the Penal Code of New York, brought forward from § 603 of the Code of 1882. Fraud by a bailee, banker, agent, factor, trustee, or director, or member or officer of any company, is made the basis of surrender by the treaty. The British statute punishes the making, circulating, or publishing, with intent to deceive or defraud, of false statements or accounts of a body corporate or public company, known to be false, by a director, manager, or public officer thereof. The New York statute provides that if an officer or director of a corporation knowingly concurs in making or publishing any written report, exhibit, or statement of its affairs or pecuniary condition, containing any material statement which is false, he is guilty of a misdemeanor. The two statutes are substantially analogous. The making of such a false statement knowingly, under the New York act, carries with it the inference of fraudulent intent; but, even if this were not so, criminality under the British act would certainly be such under that of New York. Absolute identity is not required. The essential character of the transaction is the same, and made criminal by both statutes.

It may be remarked that the statutes of several other states agree with that of New York on this subject; and that §§ 73 and 74 of the act of Congress to define and punish crimes in the district of Alaska, 30 Stat. at L. 1253, chap. 429, and § 5209 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3497), in respect of the officers of national banks, are largely to the same effect as the English statute.

As the state of New York was the place where the accused was found and, in legal effect, the asylum to which he had fled, is the language of the treaty, "made criminal by the laws of both countries," to be interpreted as limiting its scope to acts of Con-

gress, and eliminating the operation of the laws of the states? That view would largely defeat the object of our extradition treaties by ignoring the fact that, for nearly all crimes and misdemeanors, the laws of the states, and not the enactments of Congress, must be looked to for the definition of the offense. There are no common-law crimes of the United States; and, indeed, in most of the states the criminal law has been recast in statutes, the common law being resorted to in aid of definition. *Benson v. McMahon*, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240.

In July, 1844, Attorney General Nelson advised the Secretary of State, then Mr. Calhoun, that "cases, as they occur, necessarily depend upon the laws of the several states in which the fugitive may be arrested or found;" and in December of that year, Mr. Calhoun wrote to the French minister: "What evidence is necessary to authorize an arrest and commitment depends upon the laws of the state or place where the criminal may be found." *Moore, Extradition*, § 344; *United States v. Warr*, 3 N. Y. Legal Obs. 346, Fed. Cas. No. 16,644.

So, Mr. Secretary Fish, in November, 1873, in replying to certain specified questions of the minister of the Netherlands, among other things, said: "That, in every treaty of extradition, the United States insists that it can be required to surrender a fugitive criminal only upon such evidence of criminality as, according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial if the crime had there been committed;" and "that the criminal code of the United States applies only to offenses defined by the general government, or committed within its exclusive jurisdiction, or upon the high seas, or some navigable water, and that each state establishes and regulates its own criminal procedure, as well with respect to the definition of crimes as to the mode of procedure against criminals, and the manner and extent of punishment." *Moore, Extradition*, § 337n.

In *Muller's Case*, 5 Phila. 289, 292, the definition of the offense in the state where the fugitive was found was applied by the district court for the eastern district of Pennsylvania, and Judge Cadwalader said:

"In the series of treaties which have been mentioned, certain offenses, including forgery, are named with reference to their definitions in the system of general jurisprudence. But the treaties require the specific application of the definitions to be conformable, in particular cases, to the jurisprudence and legislation of the respective places where the parties may be arrested; and likewise require the application of local rules of decision as to the sufficiency of the evidence. The act in question—though generically forgery wherever criminal—might be specifically criminal in one place, but not in another. I thought that the question depended upon the law of Pennsylvania under the statute of 1860, and that the case on

the part of the Saxon government had, therefore, been made out.

"There is no jurisprudence or common law of the government of the United States.

No legislation of their government, independently of the jurisprudence and legislation of the several states, can have been expected by those who made the treaties ever to give specific definitions of certain crimes mentioned in them. No such legislation as to forgery of private writings, which is the offense here charged, can have been expected. As to this crime, and others, local definitions and rules might be not less different in Ohio and in Pennsylvania than in Scotland and in England, or might be more different. In framing the treaty of 1842 with Great Britain, these local differences must have been mutually considered by the governments of the two contracting nations."

And this language is strikingly applicable to the supplemental treaty of 1889, framed, as it was, by Mr. Secretary Blaine, and that accomplished lawyer and publicist, then Sir Julian Pauncefote, who was thoroughly familiar with the dual system of this government. Where there was reason to doubt whether the generic term embraced a particular variety, specific language was used. As, for instance, as to the slave trade; though criminal, yet, apparently because there had been peculiar local aspects, the crime was required to be "against the laws of both countries;" and so as to fraud and breach of trust, which had been brought within the grasp of criminal law in comparatively recent times. But it is enough if the particular variety was criminal in both jurisdictions, and the laws of both countries included the laws of their component parts.

In *Grin v. Shine* we applied the definition of embezzlement given by the laws of California; but there the petitioner himself appealed to that definition, and the case, though in many respects of value here, did not rule the precise point before us.

But we rule it now, and concur with Judge Lacombe, that when, by the law of Great Britain, and by the law of the state in which the fugitive is found, the fraudulent acts charged to have been committed are made criminal, the case comes fairly within the treaty, which otherwise would manifestly be inadequate to accomplish its purposes. And we cannot doubt that, if the United States were seeking to have a person indicted for this same offense under the laws of New York extradited from Great Britain, the tribunals of Great Britain would not decline to find the offense charged to be within the treaty because the law violated was a statute of one of the states, and not an act of Congress.

It is true that in the case of *Windsor* (1865), 6 Best & S. 522, a contrary view was expressed; but it should be observed that the charge was forgery, and it was held that the facts did not constitute forgery in England, and that the statute of New York defining the offense of forgery in the third

degree could not properly be regarded as extending the force of the treaty to offenses not embraced within the definition of forgery at the time when the treaty was executed. So far as the conclusion is expressed by the eminent judges who united in that decision, that the treaty did not comprise offenses made such only by the legislation of particular states of the United States, it does not receive our assent.

The result is that we hold that the commissioner had jurisdiction, and that brings us to consider whether the commissioner or the circuit court erred in denying the application to be let to bail.

By § 1015 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 718), it is provided: "Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders." But this must be read with § 1014, the preceding section, and that is confined to crimes or offenses against the United States. *Rice v. Ames*, 180 U. S. 377, 45 L. ed. 582, 21 Sup. Ct. Rep. 406. These sections were originally contained in one section. Judiciary Act of 1789, 1 Stat. at L. 91, chap. 20, § 33.

Not only is there no statute providing for admission to bail in cases of foreign extradition, but § 5270 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3591), is inconsistent with its allowance after committal, for it is there provided that, if he finds the evidence sufficient, the commissioner or judge "shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

And § 5273 (U. S. Comp. Stat. 1901, p. 3596), provides that, when a person is committed "to remain until delivered up in pursuance of a requisition," and is not delivered up within two months, he may be discharged, if sufficient cause to the contrary is not shown.

The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfil if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment. And the same reasons which induced the language used in the statute would seem generally applicable to release pending examination.

The subject was considered by the district court of Colorado in the case of *Carrier*, 57 Fed. 578, and Hallett, J., held that the matter of admitting to bail was not a question of practice; that it was dependent on statute; that although the statute of the United States in respect of procedure in extradition did not forbid bail in such cases,

that was not enough, as the authority must be expressed; and that as there was no provision for bail in the act, bail could not be allowed.

And Judge Lacombe in the present case stated that applications to admit to bail in such cases had, on several occasions,\* been made to the circuit court, and that they had been uniformly denied.

In *Queen v. Spilsbury* [1898], 2 Q. B. 615, it was held that the Queen's Bench had, "independently of statute, by the common law, jurisdiction to admit to bail," but that was a case arising under the Fugitive Offenders Act [44 and 45 Vict. chap. 69], and the distinction existing ordinarily between rendition between different parts of Her Majesty's dominions, and cases arising under the Extradition Acts, was pointed out. The court, while ruling that the power to admit to bail existed, held that, as matter of judicial discretion, it ought not to be exercised in that case.

We are unwilling to hold that the circuit courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief. Nor are we called upon to do so, as we are clearly of opinion, on this record, that no error was committed in refusing to admit to bail, and that, although the refusal was put on the ground of want of power, the final order ought not to be disturbed.

The affirmance of the final order leaves it open to the demanding government to withdraw the proceeding first initiated, and proceed on the subsequent application, the pendency of which, as called to our attention, we do not think required us to dismiss this appeal.

*Order affirmed.*

(190 U. S. 197)

TERRITORY OF HAWAII, *Appt.*,

v.

OSAKI MANKICHI.<sup>1</sup>

*Hawaiian annexation — effect of Newlands resolution on criminal procedure.*

Criminal proceedings by grand and petit juries as prescribed by U. S. Const. Amends. 5, 6, were not substituted for the existing criminal procedure in the Hawaiian islands by their annexation, "as a part of the territory of the United States and subject to the sovereign dominion thereof," by the Newlands resolution of July 7, 1898 (30 Stat. at L. 750), accepting the cession theretofore made by the Republic of Hawaii, and continuing the municipal legislation of such islands not inconsistent with such resolution "nor contrary to the Constitution of the United States," until Congress should otherwise determine.

[No. 219.]

*Argued March 4, 5, 1903. Decided June 1, 1903.*

<sup>1</sup> See *U. S. v. Dorr*, 23 Sup. Ct. 829.

APPEAL from the District Court of the United States for the Territory of Hawaii to review a decree discharging on habeas corpus a person convicted of manslaughter upon an indictment not found by a grand jury and upon a verdict rendered upon the agreement of nine jurors. *Reversed* and remanded, with instructions to dismiss the petition.

Statement by Mr. Justice Brown:

\* This was a petition by Mankichi for a writ of habeas corpus to obtain his release from the Oahu convict prison, where he is confined upon conviction for manslaughter, in alleged violation of the Constitution, in that he was tried upon an indictment not found by a grand jury, and convicted by the verdict of nine out of twelve jurors, the other three dissenting from the verdict.

Following the usual course of procedure in the Republic of Hawaii, prior to its incorporation as a territory of the United States, the prisoner was tried upon an indictment much in the form of an information at common law, by the attorney general, and indorsed "a true bill, found this 4th day of May, A. D. 1899. A. Perry, first judge of the circuit court," etc.

From an order of the United States district court, discharging the prisoner, the attorney general of the territory appealed to this court.

*Messrs. Edmund P. Dole and Solicitor General Richards* for appellant.

*Messrs. Frederic R. Conder, Jr., Paul Fuller, George A. Davis, F. M. Brooks, and Charles Fred Adams* for appellee.

\* Mr. Justice Brown delivered the opinion of the court:

The question involved in this case is an extremely simple one. The difficulty is in fixing upon the principles applicable to its solution. By a joint resolution adopted by Congress, July 7, 1898 (30 Stat. at L. 750), known as the Newlands resolution, and with the consent of the Republic of Hawaii, signified in the manner provided in its Constitution, the Hawaiian islands and their dependencies were annexed "as a part of the territory of the United States, and subject to the sovereign dominion thereof," with the following condition: "The municipal legislation of the Hawaiian islands, not enacted for the fulfilment of the treaties so extinguished, and not inconsistent with this joint resolution *nor contrary to the Constitution of the United States*, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." The material parts of this resolution are printed in the margin.† Though the resolution was passed

† Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States (30 Stat. at L. 750).

Whereas the government of the Republic of Hawaii having, in due form signified its consent, in the manner provided by its Constitution,

# ATTACHMENT 2

exercise its discretion in reviewing appellant's motion to vacate under that rule.

VACATED and REMANDED.



Miguel SALERNO, Petitioner-Appellant,

v.

UNITED STATES of America, United States Attorney General, and United States Marshal for the Eastern District of California, Respondents-Appellees.

No. 89-15646.

United States Court of Appeals,  
Ninth Circuit.

Submitted June 29, 1989.

Decided June 29, 1989.

Petition for writ of habeas corpus was brought in which petitioner challenged magistrate's order certifying him extraditable to Australia. The United States District Court for the Eastern District of California, Edward Dean Price, J., denied bail pending appeal, and petitioner moved Court of Appeals for bail pending appeal. The Court of Appeals held that despite contention of petitioner, that he was not flight risk, petitioner, who failed to demonstrate exceptional circumstances such as high probability of success, serious deterioration of health while incarcerated, and unusual delay in appeal process, was not entitled to bail pending appeal of denial of petition for writ of habeas corpus.

Motion denied.

#### 1. Extradition and Detainers ¶13

Despite contention of petitioner, who was certified extraditable to Australia, that he was not flight risk, petitioner, who failed to demonstrate exceptional circumstances such as high probability of success, serious deterioration of health while incar-

cerated, and unusual delay in appeal process, was not entitled to bail pending appeal of denial of petition for writ of habeas corpus in which he challenged certification order.

#### 2. Extradition and Detainers ¶13

Fact that habeas petitioner was not flight risk was not criteria for release on bail in international extradition case.

Anthony P. Capozzi, Capozzi & Giovacchini, Fresno, Cal., for petitioner-appellant.

Tommy Hawk, Asst. U.S. Atty., Office of the United States Atty., Fresno, Cal., Linda Candler, Washington, D.C., for respondents-appellees.

Appeal from the United States District Court for the Eastern District of California.

Before BEEZER and TROTT, Circuit Judges.

Miguel Salerno appeals from the denial of his petition for a writ of habeas corpus in which he challenges the magistrate's order certifying him extraditable to Australia. On May 4, 1989, the district court denied Salerno's motion for bail pending appeal. He now moves this court for bail pending appeal.

[1] There is a presumption against bail in an extradition case and only "special circumstances" will justify bail. *Wright v. Henkel*, 190 U.S. 40, 63, 23 S.Ct. 781, 787, 47 L.Ed. 948 (1903); *Hu Yau-Leung v. Soscia*, 649 F.2d 914, 920 (2d Cir.), cert. denied, 454 U.S. 971, 102 S.Ct. 519, 70 L.Ed.2d 389 (1981). Examples of such circumstances include the raising of substantial claims upon which the appellant has a high probability of success, a serious deterioration of health while incarcerated, and unusual delay in the appeal process. See *Aronson v. May*, 85 S.Ct. 3, 5, 13 L.Ed.2d 6 (1964); *United States v. Williams*, 611 F.2d 914, 915 (1st Cir.1979); *Galante v. Warden*, 573 F.2d 707, 708 (2d Cir.1977).

[2] Salerno has not demonstrated that he is entitled to release under this stan-

dard. Instead, he contends that because he is not a flight risk, he is entitled to bail pending the appeal of the denial of his petition for a writ of habeas corpus. That is not the criteria for release in an extradition case. *Kamrin v. United States*, 725 F.2d 1225, 1228 (9th Cir.1984). We therefore deny his motion for bail pending appeal.



**Frederick G. LAND,**  
Petitioner-Appellant,

v.

**George DEEDS, Warden and Brian McKay, Attorney General of the State of Nevada, Respondents-Appellees.**

No. 89-15627.

United States Court of Appeals,  
Ninth Circuit.

Submitted June 1, 1989.

Decided June 29, 1989.

Habeas petitioner filed request for bail pending decision on his petition. The United States District Court for the District of Nevada, Philip M. Pro, J., entered order denying request, and petitioner appealed. The Court of Appeals held that bail pending decision in habeas case is reserved for extraordinary cases involving special circumstances for a high probability of success.

Appeal dismissed; request denied.

#### 1. Habeas Corpus ⇌814

No appeal lay, under "collateral order" doctrine or otherwise, from magistrate's order denying defendant's request for bail pending decision in defendant's habeas case. 28 U.S.C.A. §§ 1291, 2254.

#### 2. Habeas Corpus ⇌800

Bail pending decision in habeas case is reserved for extraordinary cases involving special circumstances or a high probability of success. 28 U.S.C.A. § 2254.

#### 3. Habeas Corpus ⇌846

Denial of defendant's request for bail pending decision on habeas petition will not be disturbed on appeal, unless clearly erroneous. 28 U.S.C.A. § 2254.

Frederick G. Land, Southern Desert Correctional Center, Indian Springs, Nev., for petitioner-appellant.

No appearance for respondents-appellees.

Appeal from the United States District Court for the District of Nevada (Las Vegas).

Before BROWNING, THOMPSON  
and LEAVY, Circuit Judges.

#### PER CURIAM:

[1] Frederick Land appeals from a magistrate's order denying bail pending a decision on his petition for a writ of habeas corpus under 28 U.S.C. § 2254. This is neither an appeal from a final judgment, 28 U.S.C. § 1291, nor a valid interlocutory appeal under the collateral order exception. *See Flanagan v. United States*, 465 U.S. 259, 265, 104 S.Ct. 1051, 1054-55, 79 L.Ed.2d 288 (1984); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Consequently, this appeal is dismissed for lack of jurisdiction, *see Woodcock v. Donnelly*, 470 F.2d 93 (1st Cir.1972), *Glynn v. Donnelly*, 470 F.2d 95 (1st Cir.1972), and we construe this appeal from a non-appealable order as a petition for a writ of mandamus. *See Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1343 (9th Cir.1981) (an invalid appeal may be construed as a mandamus petition).

[2, 3] Bail pending a decision in a habeas case is reserved for extraordinary cases involving special circumstances or a high probability of success. *See Aronson v.*

# ATTACHMENT 3

car wash franchises in that country between March 1972 and December 1974. Australia has no statute of limitation for these crimes. The United States statute of limitation for such charges is five years. 18 U.S.C. § 3282.

The United States Attorney petitioned for Kamrin's extradition in 1982. Supporting documents cited the 1974 Treaty of Extradition Between the United States and Australia, 27 U.S.T. 957, T.I.A.S. 8234 [the Treaty]. Kamrin was arrested and released on his own recognizance.

In March 1983 a federal magistrate certified to the Secretary of State that extradition was proper. See 18 U.S.C. § 3184. Because that certification was not a final order warranting direct appeal, Kamrin petitioned for a writ of habeas corpus. Adopting the magistrate's memorandum and order, the district court denied it.

#### DISCUSSION

##### I. Standard of Review

[1] No factual issues are raised. The question is one of interpretation and application of a treaty, which requires *de novo* review. *Cucuzzella v. Keliikoa*, 638 F.2d 105, 106-07 & nn. 1, 2 (9th Cir.1981).

##### II. The Treaty's Limitations Provision

Article VII of the Treaty provides that "[e]xtradition shall not be granted . . . when the prosecution for the offense has become barred by lapse of time according to the laws of the requesting state." The Treaty, art. VII(1)(b) (emphasis added). The prosecution is not time-barred in Australia, the requesting state here.

[2] To apply the United States statute of limitation would preclude prosecution and thus extradition. When the United States is the requested country, delay in seeking extradition may be relevant to the Secretary of State's final determination as to whether extradition may go forward. *Freedman v. United States*, 437 F.Supp. 1252, 1264 (N.D.Ga.1977). The delay may not, however, serve as a defense to judicial extradition proceedings.

[3] Generally, absent a specific treaty provision, the statute of limitation may be raised as a defense to criminal proceedings only after return to the requesting state. *Freedman*, 437 F.Supp. at 1263 (citing *Merino v. United States Marshal*, 326 F.2d 5 (9th Cir.1963), cert. denied, 377 U.S. 997, 84 S.Ct. 1922, 12 L.Ed.2d 1046 (1964)). It may not always be clear whether a prosecution is time-barred, and the general rule allows the prosecuting state to resolve the issue. The extraditee has an opportunity to raise the defense in the requesting country. The provision in Article VII is consistent with the general rule.

[4] Given the general rule, the absence of a contrary provision should be interpreted as an intention by the party states that the statute of limitation of the requested state does not apply. Cf. *Caplan v. Vokes*, 649 F.2d 1336, 1337, 1340 (9th Cir.1981) (concerning treaty that expressly included party states' intention to apply statute of limitation of requested state). The parties did not intend for the United States statute of limitation to apply here.

##### III. Due Process

[5] Article X of the Treaty provides that "the person whose extradition is sought shall have the right to use such remedies and recourses as are provided by [the law of the requested state]." Kamrin claims that this entitles him to the due process right that underlies United States statutes of limitations: the right to a trial in which his defense is unimpaired by the passage of time.

Kamrin claims that *United States v. Williams*, 480 F.Supp. 482 (D.Mass.1979), held that the right to be free on bail was a "remedy and recourse" provided by laws of the United States. The First Circuit reversed the district court decision in *Williams*, holding that a showing of "special circumstances" is required for bail in extradition proceedings. 611 F.2d 914, 914 (1st Cir.1979). Williams had not made a sufficient showing, and his release was reversed. *Id.* at 914-15.

This "special circumstances" requirement creates a different standard for extradition cases than for federal criminal cases, where bail is granted unless the judicial officer determines that release will not reasonably assure the appearance of the defendant as required. 18 U.S.C. § 3146(a). The additional showing required in extradition belies Kamrin's claim that bail is one of the remedies and recourses of United States law to which an extraditee is entitled. The analogy of a statute of limitation to bail does not help Kamrin.

[6] More important, it has long been settled that United States due process rights cannot be extended extraterritorially. *Neely v. Henkel*, 180 U.S. 109, 21 S.Ct. 302, 45 L.Ed. 448 (1901). See also *Holmes v. Laird*, 459 F.2d 1211 (D.C.Cir.), cert. denied, 409 U.S. 869, 93 S.Ct. 197, 34 L.Ed.2d 120 (1972).

[A] surrender of an American citizen required by treaty for purposes of a foreign criminal proceeding is unimpaired by an absence in the foreign judicial system of safeguards in all respects equivalent to those constitutionally enjoined upon American trials.

*Holmes*, 459 F.2d at 1219 (citing *Neely*, 180 U.S. 109, 21 S.Ct. 302, 45 L.Ed. 448).

[7] Time may have eroded Kamrin's ability to present a defense in Australia, but time has not eroded the holding of *Neely*. One who commits a crime in a foreign country "cannot complain if required to submit to such modes of trial . . . as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty." *Neely*, 180 U.S. at 122-23, 21 S.Ct. at 307; *Holmes*, 459 F.2d at 1218-19. The extradition treaty between Australia and the United States has not provided a different mode than application of the requesting state's statute of limitation.

#### CONCLUSION

Neither the language of the Treaty nor the United States Constitution require application of the United States five-year statute of limitation to prevent Kamrin's

extradition. The denial of the writ is affirmed and extradition may be completed. The mandate shall issue now.



UNITED STATES of America,  
Plaintiff-Appellee,

v.

Elmer Wayne CRISCO,  
Defendant-Appellant.

No. 83-5016.

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted Sept. 6, 1983.

Decided Feb. 14, 1984.

Certiorari Denied May 14, 1984.

See 104 S.Ct. 2360.

Defendant was convicted in the United States District Court for the Southern District of California, Judith Nelson Keep, J., after denial of motion to suppress, Earl B. Gilliam, J., of conspiracy to possess cocaine with intent to distribute and use of communication facility to facilitate possession with intent to distribute, and he appealed. The Court of Appeals, Panner, District Judge, sitting by designation, held that: (1) defendant's incriminating statement made at time of his arrest was not made during custodial interrogation; (2) District Court properly substituted alternate juror for regular juror after deliberations had begun; and (3) District Court did not abuse its discretion in denying defendant's motion for mistrial.

Affirmed.

Canby, Circuit Judge, dissented and filed opinion.

#### 1. Criminal Law ⇨412.2(2)

As relating to giving of *Miranda* warnings, determination whether a defendant