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Abstract

The Gonzalez case is the latest in a growing series of cases that chip away at the Rule of Non-Contradiction. The case, for all practical purposes, entailed a trial on the merits before the extradition magistrate. This Article takes issue with Gonzalez and other cases that erode the Rule of Non-Contradiction. Recognizing the fairness concerns that motivate deviation from the Rule, this Article proposes a modification to it. Specifically, this Article proposes that courts adopt an approach similar to that used in civil cases for deciding a motion for summary judgment. If the accused's evidence is such that no reasonable fact finder could disagree with it, then the court should admit it, even if it provides a defense to the charges or contradicts evidence presented by the requesting government.

THE RULE OF NON-CONTRADICTION IN INTERNATIONAL EXTRADITION PROCEEDINGS: A PROPOSED APPROACH TO THE ADMISSION OF EXCULPATORY EVIDENCE

*Jacques Semmelman**

INTRODUCTION

On the morning of June 30, 1998, three armed men robbed a bank in Puebla, Mexico, taking cash and travelers checks. Six months later, two brothers-in-law, Gonzalez and Huerta, were arrested in Louisiana while attempting to cash one of the stolen travelers checks. Gonzalez and Huerta professed their innocence. Gonzalez claimed he had received the travelers checks from a man in Mexico in exchange for Mexican pesos. The Government of Mexico demanded Gonzalez' and Huerta's extradition. The U.S. Attorney for the Western District of Louisiana commenced an extradition proceeding against them in U.S. District Court.[1]

Gonzalez and Huerta made an application to be released on bail, which in extradition cases is only available in "special circumstances."[2] The two suspects argued that special circumstances existed because the government would most likely fail to establish probable cause that they had committed the crimes charged, a *sine qua non* for certifying them for extradition.[3] The extradition magistrate[4] conducted an evidentiary hearing on the bail application.

The government's evidence at the bail hearing consisted of

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1. *See In re* Gonzalez, 52 F. Supp. 2d 725 (W.D. La. 1999).

2. *See id.* at 735 (citing Wright v. Henkel, 190 U.S. 40, 23 S. Ct. 781, 47 L. Ed. 948 (1903)).

3. *Id.* at 736.

4. The judicial officer who presides over an extradition hearing is called an "extradition magistrate," even if he or she is a U.S. District Court judge.

an affidavit stating that three Mexican eyewitnesses (two police officers and a bank employee) had identified the suspects from single photographs faxed to Mexico by Louisiana police. As the photographs were being shown to the witnesses, the witnesses were informed that these men had been arrested while trying to cash the travelers checks that had been stolen during the bank robbery.[5] The extradition magistrate found the government's evidence to be "highly suspect," improperly "suggestive," and "unreliable."[6] The extradition magistrate then permitted the suspects to present an alibi defense at the bail hearing. Gonzalez and Huerta each testified, and called alibi witnesses as well. The court found the accused and their alibi witnesses credible.[7] The court granted bail.[8]

Were this a domestic criminal case, these events would not have been the least bit noteworthy. But *In re Gonzalez*[9] was not a domestic criminal case. It was part of an international extradition proceeding.

The *Gonzalez* case, in which the accused was permitted to present a defense of alibi, albeit in the context of a bail hearing, represents a radical departure from traditional extradition jurisprudence. International extradition proceedings in the U.S. courts are governed by the evidentiary rule that the accused has no right to present a defense to the charges against him,[10] such as an alibi defense,[11] and has "no right to introduce evidence which merely contradicts the demanding country's proof, or which only poses conflicts of credibility."[12] Moreover, under

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5. *Gonzalez*, 52 F. Supp. 2d at 733-35, 737.

6. *Id.* at 737.

7. *See id.* at 741 (finding that accused "presented credible and persuasive evidence that they were elsewhere on the date of the robbery and could not have perpetrated this crime").

8. *Id.*

9. *In re* Gonzalez, 52 F. Supp. 2d 725 (W.D. La. 1999).

10. Such as the defense of innocence, *see* Melia v. United States, 667 F.2d 300, 302 (2d Cir. 1981); duress, *see In re* Powell, 4 F. Supp. 2d 945, 958-59 (S.D. Cal. 1998); insanity, *see, e.g.*, Charlton v. Kelly, 229 U.S. 447, 457 (1913); or justification, *see, e.g., In re* Ezeta, 62 F. 972, 986 (C.C.N.D. Cal. 1894). The accused may, however, present a defense expressly permitted by the applicable extradition treaty, such as, for example, a defense that the crime charged is a non-extraditable political offense. *See, e.g.*, Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981).

11. *See, e.g.*, Hooker v. Klein, 573 F.2d 1360, 1369 (9th Cir. 1978); *Eain*, 641 F.2d at 512; Desmond v. Eggers, 18 F.2d 503, 505 (9th Cir. 1927); *In re* Okeke, No. 96-7019P-01, 1996 U.S. Dist. LEXIS 22379, at *13 (D.N.J. Sept. 5, 1996).

12. *In re* Sindona, 450 F. Supp. 672, 685 (S.D.N.Y. 1978). *See also Eain*, 641 F.2d at

traditional application of the rule, evidence that the requesting government's witnesses later recanted their incriminating statements is not admissible in the extradition proceeding.[13] This Article refers to this rule as the "Rule of Non-Contradiction" (or "Rule"). While U.S. courts have generally adhered to the Rule of Non-Contradiction, *Gonzalez* can be viewed as the latest in a growing line of cases that erode the Rule.

The Rule of Non-Contradiction permits the accused to introduce evidence of very limited scope. The accused may only introduce evidence that "explains" the government's evidence, *i.e.*, that provides an innocent explanation for events that the government contends point toward guilt. In particular, to the extent that the government relies upon circumstantial evidence, the accused is generally permitted to introduce evidence that helps to explain it away.[14]

The Rule of Non-Contradiction has been described as

512; United States *ex rel.* Petrushansky v. Marasco, 325 F.2d 562, 567 (2d Cir. 1963), cert. denied, 376 U.S. 952 (1964); Jimenez v. Aristeguieta, 311 F.2d 547, 556 (5th Cir. 1962); Na-Yuet v. Hueston, 690 F. Supp. 1008, 1011 (S.D. Fla. 1988); Messina v. United States, 728 F.2d 77, 80 (2d Cir. 1984).

13. *See Eain*, 641 F.2d at 512 (refusing to admit evidence that accusing witnesses later recanted their accusations); Bovio v. United States, 989 F.2d 255, 259 (7th Cir. 1993) (holding that recantation by accusing witness excluded since accused "has no right to attack the credibility of [accusing witness] at this stage of the proceedings; issues of credibility are to be determined at trial.").

14. *See* United States v. Lui Kin-Hong, 110 F.3d 103, 118 (1st Cir. 1997) (stating that accused permitted to "present an explanation for the loans and payments" alleged by the government to have been bribes); Jhirad v. Ferrandina, 362 F. Supp. 1057, 1064-65 (S.D.N.Y. 1973) (allowing accused charged with embezzlement to offer evidence "to explain the deposit of moneys in [his] account"); *In re* D'Amico, 185 F. Supp. 925, 929-30 (S.D.N.Y. 1960) (kidnapping case, where victim was held in shack on property owned by accused, accused allowed to explain that shack was in remote area of large property, and was rarely visited by accused); *Na-Yuet*, 690 F. Supp. at 1011 (kidnapping case, accused entitled to offer evidence that would "explain [her] relationship with alleged accomplices and thereby account for her involvement with the ransom money," and evidence that would "explain [her] alleged 'flight' from" requesting country). *See also* Order of United States Commissioner Richard S. Goldsmith dated Nov. 30, 1966, M.S. Department of State, file PS 10-4 CAN-US, *reprinted in* 6 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1008-10 (1968) (listing unreported case in which extradition magistrate concluded that accused "has satisfactorily explained" government's proof and thereby defeated showing of probable cause). *But cf. Sindona*, 450 F. Supp. at 690 (stating bank fraud case, issue of what caused bank's failure was "a matter of circumstantial evidence," but given "substantial bodies of evidence" that would have to be explored to reach conclusion on issue, extradition magistrate excluded evidence proffered by accused as "not truly 'explanatory' within the meaning of the authorities.").

"somewhat murky."[15] Courts applying the Rule have not drawn a clear distinction between evidence that "explains" the government's proof and evidence that "contradicts" it.[16] Indeed, courts admit that the distinction is "difficult to articulate."[17]

The Rule of Non-Contradiction stems from the premise that an extradition hearing is not a trial on the merits.[18] Rather, it is a probable cause hearing, wherein disputed issues of fact are not resolved by the extradition magistrate. Instead, issues of fact are left for trial in the requesting country.[19]

Courts that give the Rule a strict interpretation hold that if the requesting government's case includes the testimony of an accomplice or other percipient witness, then that person's testimony must be deemed true for purposes of the extradition pro-

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15. Gill v. Imundi, 747 F. Supp. 1028, 1040 (S.D.N.Y. 1990); Peryea v. United States, 782 F. Supp. 937, 940 (D. Vt. 1991); *In re* Gonzalez, 52 F. Supp. 2d 725, 740 (W.D. La. 1999).

16. *See, e.g.*, Koskotas v. Roche, 931 F.2d 169, 175 (1st Cir. 1991) (noting that "the line between 'contradictory' and 'explanatory' evidence is not sharply drawn"); *In re* Schweidenback, 3 F. Supp. 2d 113, 117 (D. Mass. 1998) (same); *Jhirad*, 362 F. Supp. at 1064 ("[t]he law is somewhat unclear as to what evidence a fugitive can advance at the hearing . . . . The line between an explanation and a contradiction is a narrow and sometimes invisible one."); Republic of France v. Moghadam, 617 F. Supp. 777, 782 (N.D. Cal. 1985) ("[c]ourts have struggled to clarify the distinction"); In re Singh, 124 F.R.D. 571, 573 (D.N.J. 1987).

17. *See, e.g., Sindona*, 450 F. Supp. at 685 ("The distinction between 'contradictory evidence' and 'explanatory evidence' is difficult to articulate."); *Gill*, 747 F. Supp. at 1044; *In re* Demjanjuk, 603 F. Supp. 1463, 1464 (N.D. Ohio 1984).

18. *See, e.g.*, Collins v. Loisel, 259 U.S. 309, 316, 42 S. Ct. 469, 66 L. Ed. 464 (1922); Charlton v. Kelly, 229 U.S. 447, 461, 33 S. Ct. 945, 57 L. Ed. 1274 (1913); *In re* Orteiza y Cortes, 136 U.S. 330, 337, 10 S. Ct. 1031, 34 L. Ed. 464 (1890); *In re* Wadge, 15 F. 864, 886 (1883); *In re* Sindona, 450 F. Supp. 672, 685, 688 (S.D.N.Y. 1978); *Jhirad*, 362 F. Supp. at 1060; *Gill*, 747 F. Supp. at 1044.

19. *See, e.g.*, Shapiro v. Ferrandina, 478 F.2d 894, 905 (2d Cir. 1973) (stating that evidence that would merely create "a conflict of credibility" was properly excluded; "such a contest" of credibility "should properly await trial in Israel"); *In re* Sandhu, No. 90 Cr. Misc. No. 1 (JCF), 1997 U.S. Dist. LEXIS 7314, at *19-20 (S.D.N.Y. May 23, 1997) ("[p]roof that [accused] have been victims of fabricated evidence in other cases certainly casts doubt on the truthfulness of witnesses proffered by the Indian government. But that ultimate credibility determination must be made by the finder of fact at trial in the requesting country."); Ahmad v. Wigen, 726 F. Supp. 389, 400 (E.D.N.Y. 1989) ("[p]etitioner will have a full opportunity to challenge the credibility of his alleged accomplices' confessions at a trial in Israel under the rules of evidence in that country . . ."); Eain v. Wilkes, 641 F.2d 504, 511 (7th Cir. 1981) ("[s]uch a contest should be resolved at trial in Israel."); Sindona v. Grant, 461 F. Supp. 199, 204 (S.D.N.Y. 1978) ("[t]he accused has no right . . . to present evidence which . . . poses a question of credibility.").

ceeding.[20] Other courts are less deferential; while prohibiting the accused from introducing evidence to contradict the government's proof, these courts subject the government's evidence to careful scrutiny and even skepticism.[21] Prior to the 1999 *Gonzalez* decision, no published U.S. court opinion had allowed alibi evidence in an international extradition proceeding.[22]

Applied strictly, as it often is, the Rule of Non-Contradiction leads to harsh results. Under the Rule, the credibility of even the most disreputable government witness may not be impeached, and the testimony of even the most reputable defense

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20. *See In re* Atta, 706 F. Supp. 1032, 1050-51 (E.D.N.Y. 1989) ("[t]he primary source of evidence for the probable cause determination is the extradition request, and any evidence submitted in it is deemed truthful for purposes of this determination." *later proceeding* Ahmad, 726 F. Supp. at 399-400.); *In re* Pineda Lara, No. 97 Cr. Misc. 1 (THK), 1998 U.S. Dist. LEXIS 1777, at *25 (S.D.N.Y. Feb. 18, 1998) ("[i]n determining whether probable cause exists, the Court assumes that the evidence contained in the Request for Extradition is true."); *Singh*, 124 F.R.D. at 572 ("[d]efendants may not attack an affiant's credibility in this extradition proceeding"); *In re* Marzook, 924 F. Supp. 565, 592 (S.D.N.Y. 1996) ("I must accept as true all of the statements and offers of proof by the demanding state."); *In re* Cheung, 968 F. Supp. 791, 795 n.6 (D. Conn. 1997) (same).

21. *See, e.g.*, Gill v. Imundi, 747 F. Supp. 1028, 1041 (S.D.N.Y. 1990) (holding that extradition magistrate has some latitude in assessing credibility and is not strictly bound by face of government's affidavits); Quinn v. Robinson, 783 F.2d 776, 815 (9th Cir. 1986) ("[t]he credibility of witnesses and the weight to be accorded their testimony is solely within the province of the extradition magistrate."); Argento v. Jacobs, 176 F. Supp. 877, 883 (N.D. Ohio 1959) ("the Court must scrutinize the evidence carefully to determine at least a reasonable probability that the petitioner was guilty of the crime."); Austin v. Healy, 5 F.3d 598 (2d Cir. 1993); *In re* D'Amico, 185 F. Supp. 925, 930 (S.D.N.Y. 1960); Na-Yuet v. Hueston, 690 F. Supp. 1008, 1011 (S.D. Fla. 1988); Escobedo v. United States, 623 F.2d 1098, 1102 n.10 (5th Cir. 1980); *Moghadam*, 617 F. Supp. at 782-84; Freedman v. United States, 437 F. Supp. 1252, 1265 (N.D. Ga. 1977); *Shapiro*, 355 F. Supp. at 572.

22. The *Gonzalez* court cited two extradition cases in which it said "alibi evidence was presented and considered." *In re* Gonzalez, 52 F. Supp. 2d 725, 739 (W.D. La. 1999). In one such case, United States v. Wiebe, 733 F.2d 549, 553 (8th Cir. 1984), the Eighth Circuit, upholding extradition, stated that the extradition magistrate was "quite generous in permitting Wiebe to address the charges against him," but did not set forth the manner in which the accused had done so, except to say that the accused "presented no evidence, other than his own testimony . . ." *Wiebe*, 733 F.2d at 553. No alibi evidence is mentioned in the Court of Appeals' opinion. The other case cited by the *Gonzalez* court, Correll v. Stewart, No. 91-1009, 1991 WL 157246 (6th Cir. Aug. 16, 1991), is an unpublished opinion. Upholding extradition to Denmark, the Sixth Circuit summarized the evidence that established probable cause, which included the accused's "false exculpatory statements, [and] statements made by [the accused's] alibi witness which were later retracted . . ." *Correll*, No. 91-1009, 1991 WL 157246. While the opinion provides no more information than this about the "alibi witness," a fair reading is that it was the *government* that introduced the fact that an alibi witness had initially come forward to exculpate the accused, but had then retracted the alibi.

witness may not be introduced to contradict the government's evidence. Thus, the Rule severely limits the ability of the accused to challenge the government's evidence in support of probable cause.

It is not difficult to see why a U.S. court might be troubled by the Rule of Non-Contradiction, particularly when the accused has compelling evidence that contradicts the government's proof. The extradition magistrate is charged with protecting the accused's due process rights, and the extradition hearing is the primary vehicle through which the accused is accorded due process.[23] When an extradition magistrate is forced to exclude compelling exculpatory evidence proffered by the accused, the Rule of Non-Contradiction creates the risk of a hearing that is fundamentally unfair.

Moreover, certain evidence is, on its face, so dispositive that, in civil litigation, a court would be bound by it as a matter of law.[24] Surely if there were documentary, photographic, or other unimpeachable evidence that completely refuted the requesting government's proof, it might be difficult for a U.S. extradition magistrate to disregard it entirely. At the same time, courts are emphatic that an extradition hearing is not a trial.[25] Allowing

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23. United States v. Lui Kin-Hong, 110 F.3d 103, 106 (1st Cir. 1997) ("[e]xtradition proceedings before United States courts [must] comport with the Due Process Clause of the Constitution"); Sayne v. Shipley, 418 F.2d 679, 686 (5th Cir. 1969) ("[t]he Due Process clause guarantees [the accused] the right to a hearing prior to extradition."); Peroff v. Hylton, 563 F.2d 1099, 1103 (4th Cir. 1977) (finding that accused received due process at extradition hearing and *habeas corpus* proceedings); United States v. Manzi, 888 F.2d 204, 206 (1st Cir. 1989) ("[t]his court recognizes that serious due process concerns may merit review beyond the narrow scope of inquiry in extradition proceedings.").

24. *See, e.g.*, Colip v. Clare, 26 F.3d 712 (7th Cir. 1994); Archie v. State Farm Fire & Casualty Co., 813 F. Supp. 1208 (S.D. Miss. 1992); Jackson v. Riley Stoker Corp., 57 F.R.D. 120, 121 (E.D. Pa. 1972).

25. *See supra* note 18; *see also* Glucksman v. Henkel, 221 U.S. 508, 512 (1911). The court stated that

> [i]t is common in extradition cases to attempt to bring to bear all of the factitious niceties of a criminal trial at common law. But it is a waste of time . . . . [I]f there is presented . . . such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender.

Glucksman, 221 U.S. at 512; Bingham v. Bradley, 241 U.S. 511, 517, 36 S. Ct. 634, 60 L. Ed. 1136 (1916); *Wiebe*, 733 F.2d at 553; Zanazanian v. United States, 729 F.2d 624, 627 (9th Cir. 1984); Mainero v. Gregg, 164 F.3d 1199, 1207 (9th Cir. 1999); Eain v. Wilkes, 641 F.2d 504, 511 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981); Jimenez v. Aristeguieta, 311 F.2d 547, 556 (5th Cir. 1962).

the accused to introduce contradictory evidence risks transforming the extradition hearing into a trial on the merits, a notion fundamentally at odds with extradition jurisprudence in the United States and elsewhere,[26] and in derogation of the terms of U.S. extradition treaties.[27] Thus, there is a tension between the need to avoid a trial on the merits, and the risk that an accused will be deprived of a fair hearing by the exclusion of exculpatory evidence.

The *Gonzalez* case is the latest in a growing series of cases that chip away at the Rule of Non-Contradiction. The case, for all practical purposes, entailed a trial on the merits before the extradition magistrate.[28] This Article takes issue with *Gonzalez* and other cases[29] that erode the Rule of Non-Contradiction. Recognizing the fairness concerns that motivate deviation from the Rule, this Article proposes a modification to it. Specifically, this Article proposes that courts adopt an approach similar to

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26. *See* WHITEMAN, *supra* note 14, at 998-1004 (citing statutes and case law following Rule of Non-Contradiction).

27. *See, e.g., Bingham*, 241 U.S. at 517. The Court held that

> [i]t is one of the objects of [the extradition statute] to obviate the necessity of confronting the accused with the witnesses against him; and a construction of this section, or of the treaty, that would require the demanding government to send its citizens to another country to institute legal proceedings *would defeat the whole object of the treaty.*

Id. (emphasis added); *Shapiro*, 478 F.2d at 902 (quoting *Bingham*); *In re* Farez, 8 F. Cas. 1007, 1012 (C.C.S.D.N.Y. 1870) ("[s]uch a result would entirely destroy the object of such treaties."); *In re* Wadge, 15 F. 864, 866 (S.D.N.Y.), *aff'd*, 16 Fed. Rep. 332 (C.C.S.D.N.Y. 1883)

> [t]he result would be that the foreign government, though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country . . . . *This would be in plain contravention of the intent and meaning of the extradition treaties.* . . .

Wadge, 15 F. at 866 (emphasis added); *In re* Orteiza y Cortes, 136 U.S. 330, 337, 36 S. Ct. 634, 60 L. Ed. 1136 (1890) (citing *Wadge*).

28. At the bail hearing in *Gonzalez*, the accused called, *inter alia*, the following witnesses: Gonzalez (an accused), whom the court expressly found to be "a credible witness"; Huerta (an accused), who testified he had not left the United States since 1989; Huerta's sister, who testified that she was 75% certain that Huerta was babysitting her children on the evening of the date in question; Huerta's employer, who testified he was certain that Huerta was at work on the date in question, and who the court expressly found to be "a credible witness"; and two character witnesses, including Huerta's priest, who testified he is "certain that Huerta is incapable of robbing a bank." *In re* Gonzalez, 52 F. Supp. 2d 725, 730-32 (W.D. La. 1999). The government objected to the testimony as violative of the Rule of Non-Contradiction, but, for the most part, elected not to cross-examine these witnesses. *Gonzalez*, 52 F. Supp. 2d at 729 n.4.

29. *See infra* text accompanying notes 70-195.

that used in civil cases for deciding a motion for summary judgment. If the accused's evidence is such that no reasonable fact finder could disagree with it, then the court should admit it, *even if* it provides a defense to the charges or contradicts evidence presented by the requesting government. Such evidence would refute probable cause without requiring what is in essence a trial before the extradition magistrate.[30] On the other hand, if the accused's evidence is such that reasonable fact finders could disagree with it, then the Rule of Non-Contradiction should govern, and the extradition magistrate should leave the disputed issue for trial in the requesting country.

I. *THE EXTRADITION HEARING*

Extradition proceedings in the United States are governed by the applicable extradition treaty, statutes,[31] and case law. To secure an accused's extradition, the government must show, *inter alia,* that the accused has been charged by the requesting government with one or more crimes that fall within the scope of the applicable extradition treaty, and that there is probable cause to believe that the accused committed the crimes charged.[32] The extradition magistrate conducts a hearing to determine whether the government has established each of the elements needed for extradition, which includes a showing of probable cause. The probable cause hearing is comparable to a preliminary hearing in a domestic criminal case.[33]

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30. *Cf.* Gill v. Imundi, 747 F. Supp. 1028, 1045 (S.D.N.Y. 1990) (allowing defense to introduce evidence that court in requesting country found co-conspirator's confession untrue and coerced; admission of evidence "comports with the purpose of the limiting distinction between explanatory and contradictory evidence because it requires the taking of no testimony requiring the extradition magistrate to weigh and choose between contradictory stories.").

31. 18 U.S.C. § 3181 (1999).

32. *See, e.g.,* Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 703, 711-13 (1996). For a summary of extradition procedure in the United States, see generally, Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings,* 76 CORNELL L. REV. 1198, 1201-03 (1991).

33. *See, e.g.,* Benson v. McMahon, 127 U.S. 457, 463, 8 S. Ct. 1240, 32 L. Ed. 234 (1888). The Court explained that

> of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused . . . to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him.

The applicable statute[34] requires the extradition magistrate to determine whether the evidence is "sufficient to sustain the charge under the provisions of the proper treaty or convention."[35] Thus, by its terms, the statute adopts, as the probable cause standard in a given case, whatever standard is set forth in the pertinent extradition treaty. Frequently, although not universally,[36] U.S. extradition treaties provide that extradition may only occur upon such evidence of criminality as would be sufficient to hold the accused for trial according to the laws of the place where the accused is found.[37] Courts apply the federal standard for probable cause:[38] "evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt."[39]

II. *THE RULE OF NON-CONTRADICTION*

A. *Definition and Application of the Rule*

The following is a frequently-cited formulation of the Rule of Non-Contradiction:

Id.; *accord* Austin v. Healey, 5 F.3d 598, 603 (2d Cir. 1993); Sindona v. Grant, 619 F.2d 167, 175 (2d. Cir. 1980); *Peroff*, 563 F.2d at 1102; United States v. Taitz, 134 F.R.D. 288, 289 (S.D. Cal. 1991).

34. 18 U.S.C. § 3184 (1999).

35. *Id.*

36. *Cf.* Extradition Treaty Between the Government of the Swiss Confederation and the Government of the United States of America, Nov. 14, 1990, *entered into force* Sept. 10, 1997, S. Treaty Doc. No. 104-9, Art. 9, § 3(b) (explaining that evidence in support of extradition request must include "a summary of the facts of the case, of the relevant evidence, and of the conclusions reached, providing a reasonable basis to believe that the person sought committed the offense for which extradition is requested").

37. *See* BASSIOUNI, *supra* note 32, at 706 ("This is the traditional standard of probable cause which is embodied in most treaties.").

38. *Id.* at 712; *Sindona*, 619 F.2d at 175; Republic of France v. Moghadam, 617 F. Supp. 777, 782 (N.D. Cal. 1985).

39. Coleman v. Burnett, 477 F.2d 1187, 1202 (D.C. Cir. 1973). *See, e.g.*, United States v. Wiebe, 733 F.2d 549, 553 (8th Cir. 1984) (quoting *Coleman*); *Moghadam*, 617 F. Supp. at 782; *In re* Atta, 706 F. Supp. 1032, 1050 (E.D.N.Y. 1989); *In re* Gonzalez, 52 F. Supp. 2d 725, 736 (W.D. La. 1999); BASSIOUNI, *supra* note 32, at 724. However, with respect to the *sufficiency* of the evidence to establish probable cause, some courts have looked to the law of the state in the which hearing is taking place. *See, e.g.*, *In re* Shapiro, 352 F. Supp. 641, 647 (S.D.N.Y. 1973) ("state law provides primary initial guidance in an extradition proceeding"). Other courts have applied federal standards. *See, e.g.*, Eain v. Wilkes, 641 F.2d 504, 507 (7th Cir. 1981). *See generally* BASSIOUNI, *supra* note 32, at 719, 731-35; *see also* Greci v. Birknes, 527 F.2d 956, 958-60 (1st Cir. 1976) (examining negotiating history of U.S.-Italy extradition treaty and concluding that treaty parties wanted federal, not state standard to apply).

> An accused person's right to produce evidence at an extradition hearing is limited. The rule is that the accused has no right to introduce evidence which merely contradicts the demanding country's proof, or which only poses conflicts of credibility. On the other hand, the accused has the right to introduce evidence which is "explanatory" of the demanding country's proof. The extent of such explanatory evidence to be received is largely in the discretion of the judge ruling on the extradition request
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> The distinction between "contradictory evidence" and "explanatory evidence" is difficult to articulate. However, the purpose behind the rule is reasonably clear. In admitting "explanatory evidence," the intention is to afford an accused person the opportunity to present reasonably clear-cut proof which would be of limited scope and have some reasonable chance of negating a showing of probable cause. The scope of this evidence is restricted to what is appropriate to an extradition hearing. The decisions are emphatic that the extraditee cannot be allowed to turn the extradition hearing into a full trial on the merits.[40]

The precise scope of the Rule is within the extradition magistrate's "discretion."[41]

Courts applying the Rule of Non-Contradiction have generally drawn a distinction between facts and conclusions. Unlike inferences and conclusions, facts may not be contradicted.[42] In

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40. *In re* Sindona, 450 F. Supp. 672, 685 (S.D.N.Y. 1978 (citations omitted).

41. *Id.*; *see also* Petrushansky v. Marasco, 325 F.2d 562, 567 (2d Cir. 1963); Hooker v. Klein, 573 F.2d 1360, 1369 (9th Cir. 1978). There is some authority to the effect that the scope of the extradition magistrate's discretion extends even to allowing the accused to introduce contradictory evidence. *See Wiebe*, 733 F.2d at 552-53 ("the magistrate was quite generous in permitting" the accused to testify and to deny "any culpability or involvement in the crimes with which he was charged"); BASSIOUNI, *supra* note 32, at 731 ("[T]he right of courts to bar evidence which merely contradicts probable cause or which presents a different version of events remains discretionary, though it is usually excluded."). *Cf.* Gill v. Imundi, 747 F. Supp. 1028, 1041 (S.D.N.Y. 1990) (citing cases). *See also* John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1469-71 (1988) (characterizing Rule of Non-Contradiction as "myth," but acknowledging that "a United States court sitting for extradition will not allow a full-scale defense to the merits of the case, because that is the function of the judicial authorities abroad.").

42. *See, e.g.*, United States v. Lui Kin-Hong, 110 F.3d 103, 118 (1st Cir. 1997); Jhirad v. Ferrandina, 362 F. Supp. 1057, 1064-65 (S.D.N.Y. 1973); *In re* D'Amico, 185 F. Supp. 925, 929-30 (S.D.N.Y. 1960); Na-Yuet v. Hueston, 690 F. Supp. 1008, 1011 (S.D. Fla. 1988). *But cf. In re Sindona*, 450 F. Supp. at 690 (refusing to allow accused to chal-

some cases, foreign governments have sought to take advantage of the Rule by cloaking the conclusions of their own investigating magistrates[43] or other officials as "facts" that are not subject to contradiction under the Rule.[44] For the most part, U.S. courts have refused to rubber stamp conclusions of foreign investigators even when characterized as fact.[45]

The Rule is applied most easily at its extremes. For example, where the government relies upon accomplice testimony to establish probable cause,[46] the accused may not call witnesses to

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lenge conclusions of Italian investigators that accused's conduct caused banks' collapse).

43. *See generally*, 1 JOHN M. FEDDERS, *et al.*, TRANSNATIONAL LITIGATION: PRACTICAL APPROACHES TO CONFLICTS AND ACCOMMODATIONS 196-97 (1984). In European countries that utilize the inquisitorial system, investigations are conducted by investigating or examining magistrates, who have broad powers, *inter alia*, to compel production of documents and testimony. *Id.* At the conclusion of the investigation, the investigating magistrate issues a report that contains findings of fact and conclusions of law, and which may include credibility determinations. *Id.*; *see also In re* Kasper-Ansermet, 123 F.R.D. 622, 633-34 (D.N.J. 1990) (discussing role of investigating magistrate under Swiss law).

44. *See* cases cited *infra* note 45.

45. *See* Parretti v. United States, 112 F.3d 1363, 1378 (9th Cir. 1997), *reh'g granted*, 124 F.3d 1186 (9th Cir. 1997), *op. withdrawn on other grounds*, 143 F.3d 508 (9th Cir. 1998), *cert. denied*, 525 U.S. 877, 119 S. Ct. 179, 142 L. Ed.2d 146 (1998) (rejecting government's argument that French investigating magistrate "should be presumed to be reliable and that his reliability cloaks his allegations of fact with sufficient credibility to establish probable cause, even in the absence of any showing of a basis for crediting whatever evidence he relied upon."); *In re* Extradition of Sauvage, 819 F. Supp. 896, 903 (S.D. Cal. 1993) (refusing to accept the conclusions of French investigating magistrate; extradition treaty "requires this court to make an independent determination from evidence as to probable cause"); *In re* Extradition of Ernst, No. 97 Crim. Misc. 1, 1998 U.S. Dist. LEXIS 10523, at *23-24, 29 (S.D.N.Y. July 14, 1998) (stating that even where defendant had already been *convicted* in absentia in Switzerland, that conviction "must be regarded as only a charge and the government is required to make an independent showing of probable cause to believe that [the accused] committed the offenses with which he is charged"; extradition magistrate's determination of probable cause "cannot be a mere ratification of the bare conclusions of others"); Caltagirone v. Grant, 629 F.2d 739, 743-44 (2d Cir. 1980) (holding that extradition magistrate may not defer to foreign magistrate's determination that arrest warrant should issue for accused); United States v. Wiebe, 733 F.2d 549, 553 (8th Cir. 1984) ("the record does not support [the accused's] contentions that the magistrate failed to conduct an independent review of the evidence and merely 'rubber stamped' the Spanish indictment."); Bobadilla v. Reno, 826 F. Supp. 1428, 1433 (S.D. Fla. 1993) (admitting expert testimony "as to the unreliability of the Honduran reports on the blood and fibers . . . . The Court is persuaded by Petitioner's argument that the government's evidence concerning the blood and fibers is incompetent due to lack of generally accepted scientific procedures."). *But cf. Sindona*, 450 F. Supp. at 688, 690 (giving "considerable weight" to "opinions" of Italian bank examiners and liquidator).

46. The self-incriminating statements of accomplices can be sufficient to establish

offer a contrary account[47] or to establish an alibi.[48] The accused may, however, offer evidence to *explain* the government's proof without contradicting it.[49] An example of explanatory evidence is found in *United States v. Lui Kin-Hong*.[50] The accused was permitted to offer evidence to explain various payments that the government alleged were bribes. The source, amount, and timing of the payments were not controverted in any respect, and, under the Rule of Non-Contradiction, could not have been. However, to the extent that the government was arguing that it was reasonable to infer that the payments were in fact bribes, the accused was allowed to introduce evidence that the payments had an innocent explanation.[51]

B. *Origin and Premises of the Rule of Non-Contradiction*

The Rule of Non-Contradiction derives from the basic premise that a probable cause hearing is not a trial on the merits.[52] *In re Wadge*[53] is an early reported case that invoked a ver-

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probable cause at an extradition hearing. *See, e.g.*, Zanazanian v. United States, 729 F.2d 624, 627 (9th Cir. 1984); Mainero v. Gregg, 164 F.3d 1199, 1206 (9th Cir. 1999); Eain v. Wilkes, 641 F.2d 504, 510 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981); *In re* Atta, 706 F. Supp. 1032, 1051 (E.D.N.Y. 1989). Moreover, some courts have recognized that accomplice testimony can be "of particular importance . . . where all the alleged criminal activity occurred in a distant country." *Eain*, 641 F.2d at 510; *accord, Atta*, 706 F. Supp. at 1051.

47. *See, e.g.*, Freedman v. United States, 437 F. Supp. 1252, 1266 (N.D. Ga. 1977) ("[T]he mere presentation of witnesses who testify as to an opposite version of facts will not" affect probable cause determination; "[t]he resolution of such conflicts in evidence must await a trial on the merits."); *accord*, Republic of France v. Moghadam, 617 F. Supp. 777, 783 (N.D. Cal. 1985); *see also* Shapiro v. Ferrandina, 355 F. Supp. 563, 572 (S.D.N.Y. 1973).

48. *See, e.g.*, Hooker v. Klein, 573 F.2d 1360, 1369 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978); *Eain*, 641 F.2d at 510; *In re* Okeke, No. 96-7019P-01, 1996 U.S. Dist. LEXIS 22379, at *13 (D.N.J. Sept. 5, 1996).

49. *See, e.g.*, Moghadam, 617 F. Supp. at 781-82 ("the accused may produce evidence to *explain* matters, [but] the court may exclude evidence which merely contradicts government testimony, poses conflicts of credibility or establishes a defense") (citing cases) (emphasis in original); Jhirad v. Ferrandina, 362 F. Supp. 1057, 1064-65 (S.D.N.Y. 1973); Na-Yuet v. Hueston, 690 F. Supp. 1008, 1011 (S.D. Fla. 1988); *In re* D'Amico, 185 F. Supp. 925, 929-30 (S.D.N.Y. 1960).

50. United States v. Lui Kin-Hong, 110 F.3d 103 (1st Cir. 1997).

51. The accused's explanation was that the payments were merely gifts made by a grateful business associate for having introduced a lucrative business relationship several years earlier. The court, however, elected not to believe the accused's explanation, finding it "inherently implausible." *Id.* at 119.

52. *See supra* and *infra* notes 18-19, 25, 40, 55, 60, 69, and accompanying text.

53. *In re* Wadge, 15 F. 864 (S.D.N.Y. 1883).

sion of the Rule of Non-Contradiction. The accused was sought for extradition by the United Kingdom on a charge of forgery. The accused sought a stay of the extradition hearing so that he could secure alibi evidence in the United Kingdom. The extradition magistrate refused to issue the stay, and certified the accused for extradition. The district court denied the accused's petition for a writ of *habeas corpus*.[54] Rejecting the accused's argument that he should have been accorded a stay to obtain and present evidence in his defense, the court wrote:

> If this were recognized as the legal right of the accused in extradition proceedings, *it would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter.* The result would be that the foreign government, though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, *would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation,* and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. *This would be in plain contravention of the intent and meaning of the extradition treaties, which are designed to secure a trial in the country where the crime was committed,* through the extradition of the accused, upon sufficient proof, according to our law, to justify a commitment here.[55]

The *Wadge* holding was endorsed by the Supreme Court in 1890.[56]

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54. An extradition magistrate's certification of extraditability is not appealable; the accused may obtain limited review by filing a petition for a writ of habeas corpus with the district court, and may appeal denial of the petition to the Court of Appeals. *See, e.g.*, Collins v. Miller, 252 U.S. 364, 369, 40 S. Ct. 347, 64 L. Ed. 616 (1920); Bovio v. United States, 989 F.2d 255, 257 n.2 (7th Cir. 1993).

55. *Wadge*, 15 F. at 866 (emphasis added).

56. *See In re* Orteiza y Cortes, 136 U.S. 330, 337, 10 S. Ct. 1031, 34 L. Ed. 464 (1890). In *Orteiza*, the U.S. Supreme Court upheld an extradition magistrate's refusal to allow the accused, sought for embezzlement by the Government of Cuba, to introduce documentary evidence in his defense. The accused had managed to have the documents certified by the U.S. consul general in Cuba, and sought to invoke a statute, Sec. 5 of Act of Aug. 3, 1882, c. 378, 22 Stat. 216 (codified as amended at 18 U.S.C. § 3190 (1999)), that said that any properly certified document would be received in evidence at the extradition hearing. The Supreme Court held that the statute was intended solely for the benefit of the requesting government, and could not be invoked by the accused. The opinion revolved around the application of the statute, and did

The current formulation of the Rule of Non-Contradiction began to take shape in *Charlton v. Kelly*.[57] In *Charlton*, the Supreme Court upheld the exclusion of "impressive evidence of the insanity of the accused,"[58] stating: "[t]o have witnesses produced to *contradict* the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of *explaining* matters referred to by the witnesses for the Government."[59] The Court grounded its rationale for the ruling on the tenet that an extradition proceeding "is not a trial. The issue is confined to the single question of whether the evidence for the State makes a prima facie case of guilt sufficient to make it proper to hold the party for trial."[60]

The Supreme Court further developed the Rule of Non-Contradiction in *Collins v. Loisel*.[61] There, the Court, citing *Wadge* and *Charlton*, rejected the accused's argument that the extradition magistrate had improperly excluded defense evidence, stating that "Collins was allowed to testify . . . to things which might have *explained* ambiguities or doubtful elements in the prima facie case made against him. In other words, he was permitted to introduce evidence bearing upon the issue of probable cause. The evidence excluded related *strictly to the defense.*"[62]

The Rule of Non-Contradiction has impacted U.S. international relations. In the *Insull* case,[63] the United States demanded that an individual accused of various financial crimes, including fraud, be extradited from Greece. In the extradition proceeding in Greece, the court received evidence introduced

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not expressly state that the accused could not under any circumstance introduce evidence that would contradict the requesting country's proof. The Court explicitly endorsed, however, the district court's decision in *Wadge*. *Orteiza*, 136 U.S. at 337.

57. Charlton v. Kelly, 229 U.S. 447, 33 S. Ct. 945, 57 L. Ed. 1274 (1913).

58. *Id.* at 457.

59. *Id.* at 461 (emphasis added). The Court found support for this distinction in an early circuit court case, United States v. White, 28 F. Cas. 588 (C.C.D. Pa. 1807) [No. 16, 6857]. In *White*, the court delineated the scope of a preliminary examination in a domestic criminal case as follows: "the defendant's witnesses are not examined . . . [but] the judge may examine witnesses who were present at the time when the offense is said to have been committed, to *explain* what is said by the witnesses for the prosecution . . ." *White*, 28 F. Cas. at 588 (emphasis added).

60. *Charlton*, 229 U.S. at 461.

61. Collins v. Loisel, 259 U.S. 309, 42 S. Ct. 469, 66 L. Ed. 956 (1922).

62. *Id.* at 315-16 (emphasis added).

63. Decision on the Application of the United States of America for the Extradition of Samuel Insull, Sr., Decision No. 119/1933 (Greek Court of Appeals, Oct. 31, 1933), *translated and reprinted in* at 28 AM. J. INT'L L. 362 (1934).

on behalf of the accused, and concluded that the accused lacked the intent to defraud.[64] Extradition was denied.

The U.S. Department of State protested to the Greek Minister of Foreign Affairs, complaining that "it is evident that the authorities attempted actually to try the case instead of confining themselves to ascertaining whether the evidence submitted by the U.S. Government was sufficient to justify the fugitive's apprehension and commitment for trial."[65] The U.S. Department of State went on to say that it "considers the decision utterly untenable and a clear violation of the" extradition treaty between the two countries.[66] As a result of the *Insull* case, the United States formally denounced its extradition treaty with Greece.[67]

The importance of abiding by the Rule of Non-Contradiction was further underscored in connection with a 1961 U.S. extradition proceeding against former dictator Marcos Perez Jimenez of Venezuela, sought by Venezuela for various financial and other crimes committed during his regime.[68] U.S. Secretary of State Dean Rusk responded to a request from Attorney General Robert F. Kennedy concerning the scope of evidence to be allowed at the extradition hearing. The Secretary of State informed the Attorney General of the Rule of Non-Contradiction, and explained:

> There are sound practical reasons for this rule. As a general matter, the determination of whether an individual has violated the laws of a country should and can best be made by the courts of that country and in that country where, in the usual case, the acts alleged to be criminal were committed and where the evidence, for both the prosecution and the defense, is most readily available. To accomplish this, this country has entered into extradition treaties and conventions with certain countries in which it obligates itself to surrender,

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64. *See* Charles Cheney Hyde, *The Extradition Case of Samuel Insull, Sr., In Relation to Greece*, 28 AM. J. INT'L L. 307, 311 (1934).

65. *See id.* at 311 (quoting U.S. Department of State Press Release dated Nov. 5, 1933).

66. *Id.*

67. *See* WHITEMAN, *supra* note 14, at 1002. The dispute was resolved in 1937 when the two governments signed a Protocol under which it was agreed that, under the treaty, "the court or magistrate considering the request for extradition shall examine only into the sufficiency of the evidence submitted by the demanding government to justify the apprehension and commitment for trial of the person charged . . . ." *Id.* at 1002-03.

68. *See* Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962).

> when a proper case is made out under the treaty or convention, individuals in this country who stand charged with or convicted of crimes in the other country. Reciprocally, the other country undertakes a corresponding obligation with respect to fugitives from justice of the United States found in that country.
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> . . .
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> Of course, the effectiveness of the extradition treaty system depends on how these treaties are interpreted and implemented. Should an accused in an extradition case, either in this country or the other country concerned, be allowed to present evidence in defense, the requesting country would likely be forced to produce further and rebutting evidence unless it wished to abandon the extradition entirely. It seems clear that this procedure inevitably would lead to what we believe is quite clearly not contemplated by Congress, the courts, or the Executive under our treaties and laws nor, in fact, by the parties to the extradition treaty; that is, a full scale trial of the accused in the requested country. . . .
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> . . .
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> The proper interpretation and implementation of the extradition agreements and the statutes affects not only the ability of this Government to fulfill obligations under the applicable treaty or convention with a foreign Government, but also its ability to obtain the benefits of such agreements. The manner in which this Government interprets and executes an extradition agreement with a foreign country will doubtless affect the treatment given extradition requests the United States makes to that country.[69]

III. *INROADS INTO THE RULE OF NON-CONTRADICTION*

While U.S. courts have consistently endorsed the Rule of Non-Contradiction in principle, they have varied with respect to its practical implementation. As shown below, some courts have sought ways to alleviate the harshness of the Rule. Certain courts have simply ignored the Rule. For example, in *United States ex rel. Karadzole v. Artukovic*,[70] the accused was charged by the Government of Yugoslavia with war crimes, including mass murder, committed during World War II. The extradition mag-

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69. Letter from Dean Rusk, U.S. Secretary of State, to Robert Kennedy, Attorney General (Apr. 20, 1961), *reprinted in* WHITEMAN, *supra* note 14, at 999-1000.

70. United States *ex rel.* Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959).

istrate permitted the accused to present "live witnesses" who "testified that the [government's] affiants were not telling the truth."[71] The court did not discuss or acknowledge the Rule of Non-Contradiction.[72] The extradition magistrate denied extradition, finding both a lack of probable cause and that the alleged crimes were protected, non-extraditable political offenses.[73]

Many years later, the government renewed its extradition request, and this time extradition was granted.[74] The earlier decision has been described by the Seventh Circuit as "one of the most roundly criticized cases in the history of American extradition jurisprudence,"[75] primarily for its ruling that World War II atrocities were non-extraditable political offenses.

Another case with political overtones was a 1959 case, *Argento v. Jacobs*.[76] In 1931, the accused had been convicted *in absentia* in Italy on a charge of murder. The accusing witnesses later recanted their testimony, claiming they had been coerced by officers of the fascist regime that ruled Italy at the time. Years later, the Government of Italy demanded extradition. The extradition magistrate certified the accused for extradition. The district court issued a writ of *habeas corpus*, relying heavily on the recantations and the allegations of coercion. Again, the court did not discuss or acknowledge the Rule of Non-Contradiction.

The first reported case that purported to apply the Rule,

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71. *Id.* at 390.

72. *Id.* The court cited Collins v. Loisel, 259 U.S. 309, 42 S. Ct. 469, 66 L. Ed. 956 (1922), and Charlton v. Kelly, 229 U.S. 447, 33 S. Ct. 945, 57 L. Ed. 1274 (1913), *see supra* text accompanying notes 57-62, only for the principle that at an extradition hearing probable cause is determined in accordance with the law of the state in which the proceeding takes place. *Artukovic*, 170 F. Supp. at 389. *Cf. supra* note 39.

73. *Id.* at 393. Most extradition treaties prohibit extradition for "political offenses." *See* Steven Lubet & Morris Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. & CRIMINOLOGY 193 (1980). There is substantial case law and a large body of literature concerning the "political offense exception." *See, e.g.*, CHRISTINE VAN DEN WIJNGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION (1980); *In re* Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984) (finding that Irish Republican Army attack on British army patrol, committed in furtherance of uprising in Northern Ireland, was protected political offense); *In re* Atta, 706 F. Supp. 1032 (E.D.N.Y. 1989) (refusing to find that armed attack by Abu Nidal terrorist on civilian passenger bus was protected political offense).

74. *In re* Artukovic, 628 F. Supp. 1370 (C.D. Cal. 1985), *stay denied*, 784 F.2d 1354 (9th Cir. 1986).

75. Eain v. Wilkes, 641 F.2d 504, 522 (7th Cir. 1981).

76. Argento v. Jacobs, 176 F. Supp. 877 (N.D. Ohio 1959).

but in fact deviated from it, was the 1931 decision in *In re Mertz*.[77] The accused was a U.S. federal agent who was investigating narcotics trafficking near the U.S.-Canadian border. Working undercover with the knowledge and approval of Canadian law enforcement authorities, he arrested a drug dealer on the U.S. side of the border, and later shot and killed him as he tried to escape. The Government of Canada charged the agent with murder and demanded his extradition. A disputed issue was whether the shooting had occurred on U.S. or Canadian soil. The government offered eyewitness testimony that the shooting had occurred on the Canadian side of the border.[78] Over the government's objection, the accused introduced evidence that the shooting had occurred on the U.S. side.[79] The extradition magistrate admitted the accused's evidence, found it "convincing,"[80] and made a factual determination that the shooting had occurred on U.S. soil.[81] Finding that no crime had been committed in Canada, the court refused to certify the accused for extradition.[82] The court acknowledged the Rule of Non-Contradiction,[83] but justified admission of evidence that the shooting had occurred within the United States on the rationale that the evidence "explain[ed]" the government's proof.[84]

The facts of a related case highlight the political nature of the *Mertz* decision. In *Vaccaro v. Collier*,[85] a different court certified for extradition the agent's informant, sought by the Government of Canada in connection with the same incident. Nevertheless, Secretary of State Cordell Hull refused to extradite the informant.[86] Explaining his decision to the Canadian Minister,

77. *In re* Mertz, 52 F.2d 241 (S.D. Tex. 1931).

78. *Id.* at 245.

79. *Id.* at 242.

80. *Id.* at 245.

81. *Id.* at 246.

82. *Id.*

83. *Id.* at 242-43.

84. *Id.* at 243.

85. Vaccaro v. Collier, 38 F.2d 862 (D. Md. 1930) (issuing writ of habeas corpus following extradition magistrate's certification of extraditability), *aff'd in part and rev'd in part*, 51 F.2d 17 (4th Cir. 1931) (overturning writ and allowing extradition to go forward on certain charges). The informant was sought as an accessory to the murder, and also for kidnapping another member of the drug ring. The court allowed extradition to go forward only on the kidnapping charge. *Id.*

86. The Secretary of State has full discretion whether or not to extradite. 18 U.S.C. § 3186 (1999). *See, e.g.*, Emami v. District Court, 834 F.2d 1444, 1453-54 (9th Cir. 1987); Escobedo v. United States, 623 F.2d 1098, 1105 (5th Cir. 1980); Peroff v. Hylton,

the Secretary of State cited the fact that Canadian law enforcement officials had approved of the undercover investigation and had even congratulated their U.S. counterparts immediately after the incident.[87] The Secretary of State also noted the conflicting evidence as to where the shooting had occurred, and the passage of four years between the shooting and the time the extradition request was made.[88]

While *Mertz* has almost never been cited, a 1960 case, *In re D'Amico*[89] has been cited as authority by courts seeking to sidestep the Rule. The accused was charged by the Government of Italy with kidnapping. The government's evidence consisted of the inculpatory confessions of two alleged accomplices, both of whom later recanted, and the fact that the victim had been held in a shack on property owned by the accused.[90] The extradition magistrate certified the accused for extradition. Counsel for the accused did not challenge probable cause at the extradition hearing.[91]

The accused then obtained new counsel, who challenged the determination of probable cause via *habeas corpus* review.[92] The district court reopened the extradition hearing and remanded to the extradition magistrate for further proceedings on the probable cause issue. The district court ruled that at the hearing the accused would be permitted to offer explanatory evidence concerning the shack, namely, that it was located in a remote area of the accused's property where the accused seldom ventured.[93] The court ruled, consistently with the Rule of Non-Contradiction, that such evidence was being "offered to explain"

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563 F.2d 1099, 1102 (4th Cir. 1977); Shapiro v. Secretary of State, 499 F.2d 527, 531 (D.C. Cir. 1974), *aff'd sub nom.* Commissioner v. Shapiro, 424 U.S. 614 (1976).

87. *See* Note dated July 18, 1934 from Secretary of State Cordell Hull to Canadian Minister Herridge, MS Department of State, file 211.42 Vaccaro, Sarro/62, *reprinted in part in* 4 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 162-63 (1942); *see also* Jeffrey J. Carlisle, *Extradition of Government Agents as a Municipal Law Remedy for State-Sponsored Kidnapping*, 81 CALIF. L. REV. 1541, 1568 (1993).

88. *See* HACKWORTH, *supra* note 87, at 163. There were also indications that the request for extradition had only been made after the deceased's widow had been unsuccessful in attempts to negotiate compensation for her husband's death with the U.S. Government. *Vaccaro*, 38 F.2d at 871.

89. *In re* D'Amico, 185 F. Supp. 925 (S.D.N.Y. 1960).

90. *Id.* at 928-29.

91. *Id.* at 926.

92. *Id.*

93. *Id.* at 929.

the government's proof, and was therefore admissible.[94] The court then turned to the two accomplice confessions. The court noted that "[w]here, as here, such testimony has been completely recanted, its probative value is thin indeed,"[95] causing "grave doubt"[96] that there was probable cause.

The recantation was part of the government's documentary evidence, and, in a technical sense, was not being *introduced* by the accused to contradict the government's proof. Nevertheless, in instructing the extradition magistrate concerning the probable cause issue, the district court was expressly taking into account, and giving substantial weight to, evidence that contradicted the very essence of the government's proof—the inculpatory confessions. The court did this even as it was citing, and purporting to apply, some of the leading cases on the Rule of Non-Contradiction.[97]

After *D'Amico*, two decisions of the U.S. District Court for the Southern District of New York abided by the Rule but inadvertently paved the way for the Rule's subsequent erosion. In *Shapiro v. Ferrandina*,[98] the accused was charged by the Government of Israel with fraud. The allegation was that he and an accomplice had set up an investment fund and had falsely represented to investors that their investments were guaranteed by a bank.[99] In support of probable cause, the government introduced the testimony of four witnesses who stated that the accused had made the false representations at issue.[100] The accused sought to call other witnesses to testify, *inter alia*, that he had not made the statements.[101]

The extradition magistrate refused to allow the contradictory evidence. On *habeas corpus* review, the district court agreed. Reciting the Rule of Non-Contradiction,[102] the district court went further, stating:

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94. *Id.* at 930.
95. *Id.*
96. *Id.*
97. *Id.* at 931.
98. Shapiro v. Ferrandina, 355 F. Supp. 563, 572 (S.D.N.Y. 1973).
99. *Id.* at 571.
100. *Id.*
101. *Id.* at 572.
102. *See id.* "the fugitive has a right to introduce evidence . . . limited to testimony which explains rather than contradicts the demanding country's proof . . . ." (quoting United States *ex rel.* Petrushansky v. Marasco, 325 F.2d 562, 567 (2d Cir. 1963)).

> While the process of definition is difficult in the area of "probable cause" perhaps it is enough to say that what tends to obliterate probable cause may be considered but not what merely contradicts it. The improbability or the vagueness of testimony may destroy the probability of guilt, but the tendering of witnesses who testify to an opposite version of the facts does not. The latter must await trial on the merits.[103]

On appeal, the Second Circuit affirmed, stating that the district court had properly refused to allow the accused to introduce the evidence that he had not made the representations: "[i]f allowed, such statements would in no way "explain"—or, as the district judge put it, "*obliterate*"—the government's evidence, but would only pose a conflict of credibility. Such a contest, the judge permissibly ruled, should properly await trial in Israel."[104]

The Second Circuit thus correctly understood the district court's use of the word "obliterate" to be, in effect, a synonym for "explain." Nothing in either the district court's opinion or in the opinion of the Court of Appeals suggests that either court intended the term "obliterate" to describe a special case of evidence that "contradicts." To the contrary, both courts expressly stated that a "conflict of credibility" would *not* "obliterate" the government's case.[105]

In re Sindona[106] was the other Southern District of New York case that inadvertently paved the way for subsequent erosion of the Rule. Sindona had been charged by the Government of Italy with engineering a massive fraud that led to the collapse of several banks. At the extradition hearing, Sindona did not dispute the fact that there had been substantial transfers of funds from the banks to his companies.[107] He sought to introduce evidence, *inter alia*, that the transfers were duly authorized loans, and that the collapse of the banks had not been caused by his actions but by other circumstances.[108]

Invoking the Rule of Non-Contradiction, the extradition magistrate refused to admit Sindona's evidence. Although the proffered evidence was arguably "explanatory," the court limited

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103. *Id.* (emphasis added).
104. Shapiro v. Ferrandina, 478 F.2d 894, 905 (2d Cir. 1973) (emphasis added).
105. *Id.*; Shapiro v. Ferrandina, 355 F. Supp. 563, 572 (S.D.N.Y. 1973).
106. *In re* Sindona, 450 F. Supp. 672 (S.D.N.Y. 1978).
107. *Id.* at 684.
108. *Id.* at 684-85.

"explanatory evidence" to "reasonably clear-cut proof which would be of limited scope and have some reasonable chance of *negating* a showing of probable cause. . . . [T]he extraditee cannot be allowed to turn the extradition hearing into a full trial on the merits."[109] After summarizing Sindona's "extensive"[110] and highly complex offer of proof,[111] the court concluded that "Sindona's offer of exculpatory proof does not fall within the area of 'explanatory' evidence contemplated by the cases. Sindona's contentions raise issues appropriate for presentation at a full trial in Italy; but they do not *negate* the probable cause showing of the Italian government . . . ."[112]

The court in *Sindona* thus intended to reduce, not increase, the scope of evidence that may be offered by an accused in an extradition proceeding. Although Sindona proffered evidence that was arguably "explanatory" of the government's proof, the fact that it was not also of "limited scope"[113] and "reasonably clear-cut"[114] precluded its admissibility. By introducing the word "negate" into the formulation of the Rule of Non-Contradiction, the *Sindona* court was restricting, not expanding, the rights of the accused, by limiting the admissibility of explanatory evidence. Nothing in the opinion remotely suggests that the court was expanding the accused's right so as to allow introduction of *contradictory* evidence that "negates" probable cause.

Prior to the *Shapiro* decision,[115] courts had not used the word "obliterate" in connection with the Rule of Non-Contradiction. Prior to the *Sindona* decision,[116] courts had not used the word "negate" in connection with the Rule. Since those decisions, however, many courts have adopted and incorporated the word "obliterate,"[117] or "negate,"[118] or both,[119] into their formu-

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109. *Id.* at 685 (emphasis added).

110. *Id.*

111. *Id.* at 685-87.

112. *Id.* at 687 (emphasis added).

113. *Id.* at 685.

114. *Id.*

115. *See supra* text accompanying notes 98-105.

116. *See supra* text accompanying notes 106-14.

117. *See, e.g.*, Freedman v. United States, 437 F. Supp. 1252, 1266 (N.D. Ga. 1977) (citing *Shapiro*); *In re* Mainero, 990 F. Supp. 1208, 1218 (S.D. Cal. 1997) (citing *Shapiro*), *aff'd sub nom.* Mainero v. Gregg, 164 F.3d 1199, 1207 n.7 (9th Cir. 1999) ("evidence that explains away or completely obliterates probable cause is the only evidence admissible at an extradition hearing."); Gill v. Imundi, 747 F. Supp. 1028, 1040-41 (S.D.N.Y. 1990) (holding that expert testimony proffered by accused "would not serve

lations of the Rule of Non-Contradiction.

Until 1985, no reported opinion concluded that *contradictory* evidence proffered by an accused was admissible because it "negated" or "obliterated" probable cause. The opinion in *Republic of France v. Moghadam*,[120] marks the first time an extradition magistrate refused to certify an accused for extradition on the ground that the accused's proffered contradictory evidence "negated" the government's showing of probable cause.[121]

The accused, Moghadam, was sought for narcotics offenses. A certain Custer had been arrested at the airport in Paris and found to have heroin and opium in her luggage. She was carrying a letter that implicated Moghadam, a convicted drug dealer,[122] in the smuggling attempt.[123] She told the French investigating magistrate[124] that Moghadam had arranged for her to transport the narcotics and deliver them to him in San Francisco.[125] She claimed that at some point during her journey, she

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to 'explain' or 'obliterate' the government's evidence, so much as to pose a conflict in the testimony of two handwriting experts"); *In re* Powell, 4 F. Supp. 2d 945, 959 (S.D. Cal. 1998) (stating that accused is "foreclosed from raising the defense of duress in the extradition hearing, as the defense is more appropriately offered before the court of jurisdiction."); *In re* Garcia, 890 F. Supp. 914, 923-24 (S.D. Cal. 1994) ("it has been held appropriate to permit evidence that tends to obliterate probable cause"); *In re* Greer, Misc. No. 91-90, 1991 U.S. Dist. LEXIS 19515, at *15-16 (D. Vt. Nov. 20, 1991) ("Explanatory evidence is evidence that 'obliterates' probable cause, not merely contradictory evidence.") (citing *Shapiro*); *In re* Okeke, No. 96-7019P-01, 1996 U.S. Dist. LEXIS 22379, at *11 (D.N.J. Sept. 5, 1996) (citing *Shapiro*); *In re* Sandhu, 90 Cr. Misc. No. 1, 1997 U.S. Dist. LEXIS 7314, at *19 (S.D.N.Y. May 23, 1997) (citing *Shapiro*).

118. *See, e.g.*, Koskotas v. Roche, 931 F.2d 169, 175 (1st Cir. 1991) (citing *Sindona*); *In re* Schweidenback, 3 F. Supp. 2d 113, 117 (D. Mass. 1998) (citing *Sindona*); *In re* Cheung, 968 F. Supp. 791, 795 (D. Conn. 1997) (citing *Sindona*); Lindstrom v. Gilkey, No. 98 C 5191, 1999 WL 342320, at *5 (N.D. Ill. May 14, 1999) (citing *Sindona*).

119. *See, e.g.*, Cheng Na-Yuet v. Hueston, 734 F. Supp. 988, 995 (S.D. Fla. 1990) ("[E]xtraditee cannot avoid extradition simply by contradicting the requesting country's case. Rather, the extraditee must 'negate' or 'obliterate' the requesting country's showing of probable cause.") (quoting *Cheng*); *In re* Ntakirutimana, 1998 U.S. Dist. LEXIS 22173, at *78 (S.D. Tex. Aug. 6, 1998) (quoting *Cheng*); Martin v. Warden, 804 F. Supp. 1530, 1533 (N.D. Ga. 1992) (quoting *Cheng*), *aff'd*, 993 F.2d 824 (11th Cir. 1993); Ludecke v. Marshal, 15 F.3d 496, 499 (5th Cir. 1994) (rejecting accused's argument that "their evidence in opposition to the request for extradition negated and obliterated all the allegations made by the German government").

120. Republic of France v. Moghadam, 617 F. Supp. 777 (N.D. Cal. 1985).

121. *Id.* at 783.

122. *Id.* at 784.

123. *Id.* at 778.

124. *See supra* note 43 for a brief discussion of the role of investigating magistrates in certain countries.

125. *Moghadam*, 617 F. Supp. at 778.

had called Moghadam from a hotel to report that all was well.[126] Telephone records confirmed that Custer had called a phone number belonging to Moghadam's brother-in-law.[127] From a French prison, Custer wrote a letter to the U.S. Drug Enforcement Administration ("D.E.A.") offering to provide evidence against Moghadam if she were transferred from the French jail to a U.S. jail.[128]

The Government of France requested that the United States extradite Moghadam to France for his role in the importation. The U.S. Attorney in San Francisco commenced an extradition proceeding. At the extradition hearing, Moghadam sought to introduce evidence that Custer had later written a letter recanting the accusation made in her letter to the D.E.A.[129] Custer had subsequently withdrawn the recantation and had reasserted the original accusation.[130]

Citing *D'Amico* for the proposition that an extradition magistrate could take into account "the fact that testimony against the defendant was recanted by the witness,"[131] the court stated that "[t]he most significant aspect of the probable cause determination is Custer's recantation letter which was later withdrawn."[132] Analyzing the facts surrounding Custer's accusation, recantation, and re-accusation, the court concluded that "Custer's recantation appears to have more indicia of reliability than the original accusations."[133] The court based this conclusion largely on the fact that the accusations were "self-serving" and had been motivated by Custer's stated desire to be transferred out of the French jail, whereas the recantation worked directly against that interest.[134]

The court acknowledged the Rule of Non-Contradiction, but stated that Custer's recantation went beyond "the mere pres-

126. *Id.*

127. *Id.* at 779 n.2. At the extradition hearing, the accused was properly permitted to offer evidence explaining that Custer's fiance worked for the accused's brother-in-law and often received calls at that number. *Id.*

128. *Id.* at 779.

129. *See id.* at 780 ("[T]he government never brought the recantation letter to the attention of the court or the defendant.").

130. *Id.*

131. *Id.* at 783.

132. *Id.*

133. *Id.*

134. *Id.*

entation of witnesses who testify as to an opposite version of the facts."[135] Here, according to the court, the recantation "*negate[d]* the only evidence of probable cause."[136] Concluding that the government had failed to establish probable cause, the court denied extradition.

Moghadam was the first reported case in which a court, though purporting to adhere to the Rule of Non-Contradiction, contrasted the credibility of an accusation, offered by the government, against that of its recantation, offered by the accused, and denied extradition on the ground that the recantation evidence was more credible than the accusation evidence. *Moghadam* thus represents a significant departure from the Rule of Non-Contradiction, despite the court's striving to characterize its holding as consistent with the Rule by emphasizing the complete *negation* of probable cause.[137] Ironically, the "negation" aspect of the Rule originated with *Sindona*, where the court used the phrase with the intent to reduce, not increase, the right of the accused to introduce evidence at an extradition hearing.[138]

Two subsequent cases, *In re Contreras*[139] and *Maguna-Celaya v. Haro*,[140] rely upon the breakthrough established in *Moghadam*. In both cases, witnesses made confessions that inculpated the accused, and later recanted them. In both cases, the courts found that the recantations contained greater indicia of reliability than the original accusations, and, as result, ruled that the recantation evidence *negated* probable cause.

In *Contreras*, eleven witnesses had been arrested in a house containing illegal firearms. They each signed a statement, prepared for them by Mexican police, inculpating the accused as the supplier of the weapons. Pursuant to Mexican procedure, two days later the witnesses were brought before a Mexican judge, where they were asked to affirm their statements. At that time, all eleven recanted their accusations. The witnesses claimed that they had been threatened and physically coerced

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135. *Id.*

136. *Id.* (emphasis added).

137. *Id.*

138. *See supra* text accompanying notes 109-15.

139. *In re* Contreras, 800 F. Supp. 1462 (S.D. Tex. 1992).

140. Maguna-Celaya v. Haro, 19 F. Supp. 2d 1337 (S.D. Fla. 1998), *rev'd mem.*, 172 F.3d 883 (11th Cir. 1999), *cert. denied*, __ U.S. __, 120 S.Ct. 410, 145 L. Ed.2d 320 (1999).

into signing the statements.[141]

At the extradition hearing, the government relied upon the eleven accusatory statements to establish probable cause. The defense sought to introduce evidence of the recantations, as well as evidence that physical coercion had been brought to bear against the eleven witnesses in order to induce them to sign the accusatory statements.[142] The extradition magistrate acknowledged the Rule of Non-Contradiction, noting that evidence "explaining away or completely rebutting" probable cause is admissible, while evidence "that merely controverts the government's probable cause evidence, or raises a defense . . . is excluded."[143] The court identified the issue before it as "whether recantation testimony is deemed rebutting or explanatory which would be admissible since it explains away or destroys the existence of probable cause."[144] Citing *Sindona* for the principle that evidence "negating" probable cause is admissible,[145] and *Moghadam* for the principle that "recantation evidence rebutting probable cause" is admissible,[146] the court concluded that

> where the indicia of reliability is on the prior inculpating statement, then a recantation, if admitted, would not *negate* the existence of probable cause; or if the recantation only controverted a prior inculpating statement, then it would not rebut the probable cause evidence. However, where a prior statement is shown to be coerced and the indicia of reliability is on the recantation, then the subsequent statement *negating* the existence of probable cause is germane.[147]

The court ruled that, in light of the immediate and uniform recantation by all eleven witnesses, as well as other facts,[148]

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141. *Contreras*, 800 F. Supp. at 1466-68.

142. *Id.*

143. *Id.* at 1464.

144. *Id.* at 1465.

145. *Id.* at 1464.

146. *Id.* at 1469.

147. *Id.*

148. *Id.* at 1468. These facts included that the retractions occurred in open court at a judicial hearing in Mexico, where the witness is required to "declare" that his statement or confession is accurate and then "adopt" it before the court. *Id.* at 1466. The court noted that the witnesses "took the first opportunity to retract the prior statements, knowing that they may have subjected themselves and their families to retribution." *Id.* at 1468. Also, the original confessions were not written in the form of first person narratives. Rather, they were "affidavits" from the Mexican officials who were present when the statements were made. *Id.* at 1465. Thus, "the incriminating state-

"[a]ny indicia of reliability would be on the subsequent retractions" rather than on the original accusations.[149] Extradition was denied.

The facts of *Maguna-Celaya v. Haro*[150] are arguably less compelling for the accused than those in *Contreras*, but the outcome in the district court was the same.[151] The accused was sought by the Government of Spain in connection with various acts of violence allegedly committed by Basque separatists.[152] The government's evidence in support of probable cause consisted of the confessions of four individuals, each inculpating the accused. One of the four had recanted the confession within a day. The other three had waited almost *nine years* before claiming, after being contacted by counsel for the accused, that they had been coerced into confessing.[153]

Citing the Rule of Non-Contradiction, the extradition magistrate noted that the recantation evidence presented a conflict that could only be resolved at trial in Spain.[154] The extradition magistrate found that the government had established probable cause and certified the accused for extradition.[155] The accused filed a petition for a writ of *habeas corpus*.

Citing *Shapiro* for the principle that the accused was entitled to "obliterate" probable cause,[156] and *Contreras* for the principle that the accused may "obliterate" probable cause by showing that

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ments were not of the [witness'] own making, but were pre-written statements that only required his signature." *Id.* at 1468. At the declaration hearing in Mexico, the 11 witnesses variously testified that parts of the written confessions were not contained in the statements as originally signed by them; that they recognized their signatures on the confessions, but not the written contents, or, alternatively, that the written contents were untrue; and that they were not permitted to read the documents that they were forced to sign. *Id.* at 1466-68. Finally, the court noted that the facts, if true, showed that the 11 had been physically coerced and tortured into giving their confessions. *Id.* at 1468.

149. *Id.* at 1469.

150. Maguna-Celaya v. Haro, 19 F. Supp. 2d 1337 (S.D. Fla. 1998).

151. The Eleventh Circuit reversed. *See infra* text accompanying notes 163-168.

152. *Maguna-Celaya*, 19 F. Supp. 2d at 1338-39.

153. *Id.* at 1344.

154. *See id.* at 1341 (citing magistrate's Order Certifying Extradition). Although not reflected in the published opinion of the habeas corpus judge, the extradition magistrate alternatively found that the recantations were not sufficiently reliable to undermine the earlier statements. *Id.* This finding formed the basis for the Eleventh Circuit's subsequent reversal of the district court. Maguna-Celaya v. Reno, Slip Op., No. 98-5604 (11th Cir. Feb. 4, 1999). *See infra* text accompanying note 163-68.

155. *Maguna-Celaya*, 19 F. Supp. 2d at 1341.

156. *Id.* at 1343.

the government's evidence was obtained via coercion,[157] the district court granted the writ of habeas corpus.[158] The court found that "the evidence favors reliability of the recantations over that of the original statements,"[159] and "completely *negates* the existence of probable cause."[160] The court then went even further, and formulated a new exception to the Rule of Non-Contradiction:

> When all the evidence presented by the Government in an extradition proceeding is credibly tainted, thereby *obliterating* probable cause, . . . the burden should shift to the Government to come forward with independent evidence that the relator committed the crimes charged. Such a rule would protect the Court's preeminent duty to guard against due process violations.[161]

The government appealed from the order issuing the writ of *habeas corpus*.[162] The Eleventh Circuit reversed.[163] In an unpublished opinion, the Court of Appeals ruled that, "[a]ssuming *arguendo*"[164] the evidence of coercion and recantation could be considered in an extradition proceeding, the habeas corpus judge had failed "to afford the appropriate deference" to the factual findings of the extradition magistrate.[165] The extradition magistrate, while concluding that the recantation evidence was "likely inadmissible,"[166] held that, in any event, "the recantations were not sufficiently reliable to undermine the witnesses' earlier statements."[167] The habeas corpus judge was not entitled to make a de novo factual determination.[168]

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157. *Id.*

158. *Id.* at 1345.

159. *Id.* at 1344.

160. *Id.* at 1345 (emphasis added).

161. *Id.* at 1344.

162. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 478 comment c (1987) [hereinafter "RESTATEMENT"] (explaining that government may not appeal from extradition magistrate's refusal to certify accused for extradition, but may appeal from grant of writ of habeas corpus).

163. Maguna-Celaya, Slip Op., No. 98-5604.

164. *Id.*

165. *Id.*

166. Maguna-Celaya v. Haro, 19 F. Supp. 2d 1337, 1343 (S.D. Fla. 1998).

167. *Maguna-Celaya*, Slip Op. No. 98-5604, at n. 1.

168. It is well-established that the habeas corpus judge may not engage in de novo fact-finding on the probable cause issue; rather, the scope of habeas corpus review of that issue is limited to whether there is "any evidence" to support the finding of probable cause. *See, e.g.*, Fernandez v. Phillips, 268 U.S. 311, 312 (1925); Demjanjuk v. Pe-

Maguna-Celaya filed a certiorari petition with the Supreme Court, and obtained a stay of extradition from Justice Anthony Kennedy pending determination of the petition.[169] The full Court, however, denied certiorari.[170] Thus, while the outcome in *Maguna-Celaya* was, in the end, favorable to the government, the process that led to it contravened the Rule of Non-Contradiction.

The most extreme deviation from the Rule of Non-Contradiction took place in *Gonzalez*,[171] the case that introduces this Article.[172] In *Gonzalez*, the court held that alibi evidence "negating" probable cause is admissible in circumstances where the Government's probable cause evidence lacks reliability and the

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trovsky, 776 F.2d 571, 576 (6th Cir. 1985); Quinn v. Robinson, 783 F.2d 776, 790 (9th Cir. 1986).

169. *See Justice Blocks Basque Extradition*, WASH. NEWS, Aug. 13, 1999.

170. Maguna-Celaya v. Haro, __ U.S. , 120 S.Ct. 410, 120 L. Ed. 2d. 320 (1999). In his certiorari petition, Maguna-Celaya argued that the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (or "Convention") 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/506 (1984), *entered into force* Nov. 20, 1994, reprinted in 23 I.L.M. 1027 (1984), *as mod.* 24 I.L.M. 535 (1985) [hereinafter "Convention"], prohibited consideration of evidence obtained by torture. *See Justice Blocks Basque Extradition*, WASH. NEWS, Aug. 13, 1999. The Convention obligates signatory countries (now including the United States) to ensure that "any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings . . ." Convention, *supra*, at art. 15. Some commentators have argued that, as a result of the Convention, U.S. courts should refuse to consider evidence secured through torture. *See, e.g.*, Lori Fisler Damrosch, *Symposium on Parliamentary Participation in the Making and Operation of Treaties: United States: The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI-KENT L. REV. 515, 520 (1991). However, when the U.S. Senate consented to ratification of the Convention, it specified in a special declaration that the Convention not be deemed "self-executing." 136 Cong. Rec. S17,492 (daily ed. Oct. 27, 1990). President Bill Clinton ratified the Convention subject to the Senate's qualification that the Convention be deemed non-self-executing. *See* John Quigley, *The Rule of Non-Inquiry and Human Rights Treaties*, 45 CATH. U. L. REV. 1213, 1229-30 (1996). Only when a treaty provision is self-executing does it vests individuals with legal rights enforceable in court. *See* Jacques Semmelman, *The Doctrine of Specialty in the Federal Courts: Making Sense of United States v. Rauscher*, 34 VA. J. INT'L L. 71, 72-73 (1993). A non-self-executing treaty "is unavailing to the litigant relying on it in court." Carlos M. Vasquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1121 (1992). Accordingly, the Convention may not be invoked by an accused in a U.S. extradition proceeding as a basis for excluding evidence allegedly elicited through torture. *See also* 18 U.S.C. §§ 2340A, 2340B (1999) (implementing Convention by creating federal crime of torture, and expressly disclaiming creation of "any substantive or procedural right enforceable by law by any party in any civil proceeding."); 22 C.F.R. § 95.4 (1999).

171. *In re* Gonzalez, 52 F. Supp. 2d 725 (W.D. La. 1999).

172. *See supra* text accompanying notes 1-9.

alibi evidence is credible and persuasive.[173] While the alibi evidence was admitted in the context of a bail hearing, the issue was whether the government would likely meet its burden of establishing probable cause at the extradition hearing. By admitting alibi evidence in connection with this issue at the bail hearing, the court effectively was opening the door to alibi evidence at the extradition hearing.

The court found the Government's probable cause evidence, which consisted of highly suggestive photo identifications,[174] to be unreliable.[175] The court permitted the defendants to take the stand and also to call alibi witnesses, whom the court found to be credible.[176] The court concluded that the defendants had a substantial likelihood of succeeding on the merits at the extradition hearing, and found that to be a "special circumstance" warranting release on bail.[177]

In analyzing whether it was proper to allow the defendants to present alibi evidence, the court conducted an "exhaustive review" of case law involving alibi evidence at extradition hearings.[178] The court attempted to distinguish the cases in which alibi evidence was held inadmissible, on the ground that "each involve[d] *substantial* probable cause evidence, unlike the instant case."[179]

Citing *Contreras* and the district court's opinion in *Maguna-Celaya,* the court stated, "[a]lthough the instant case does not involve recantations of witnesses, it does involve a situation where the reliability of the government's identification is in question. In such a situation, the admission of evidence tending to *negate* probable cause is equally valid . . . ."[180] The court held that "[e]vidence of an alibi defense is . . . admissible if it *negates or obliterates* probable cause . . ."[181]

Gonzalez expands the holdings of *Contreras* and *Maguna-Celaya* to allow evidence of an alibi defense. The case stands for

173. *Gonzalez,* 52 F. Supp. 2d at 741.
174. *Id.* at 737. *See supra* text accompanying notes 5-6.
175. *Id.* at 737.
176. *Id.* at 733, 741.
177. *Id.* at 737.
178. *Id.* at 739 (citing cases).
179. *Id.* (emphasis added).
180. *Id.* at 740 (emphasis added).
181. *Id.* at 739 (emphasis added).

the proposition that alibi evidence is admissible whenever the government's probable cause evidence lacks reliability and where credible alibi evidence exists that "undermines, or 'negates' the existence of probable cause."[182]

These cases—*Moghadam*, *Contreras*, *Maguna-Celaya*, and *Gonzalez*—are extremely problematic. Evidence of recantation does not "explain" the government's case; it *contradicts* the government's case.[183] Evidence of recantation does not, to use the Supreme Court's phraseology, "explain[ ] ambiguities or doubtful elements" in the government's proof.[184] Rather, it repudiates the government's proof by calling it false. Alibi evidence likewise does not "explain" the government's case; it contradicts it.[185] Because each of these reported cases[186] entail credibility

182. *Id.* at 741.

183. *See* Eain v. Adams, 529 F. Supp. 685, 691 (N.D. Ill. 1980) (excluding evidence of recantation because "[t]he accused does not have the right to contradict the demanding country's proof"); *aff'd sub nom.* Eain v. Wilkes, 641 F.2d 504, 511 (7th Cir. 1981) ("[t]he later statements do not explain the government's evidence, rather they tend to contradict or challenge the credibility of the facts implicating petitioner").

184. Collins v. Loisel, 259 U.S. 309, 315 (1922).

185. Eain, 641 F.2d at 512 (holding that alibi evidence "directly contradicts the government's proof" that accused committed crime charged on certain day); *In re* Okeke, No. 96-7019P-01, 1996 U.S. Dist. LEXIS 22379, at *13 (D.N.J. Sept. 5, 1996) ("[T]he proffered evidence of alibi directly contradicts" the accusing witness' statement, and therefore "the Court must exclude this evidence from consideration."); Desmond v. Eggers, 18 F.2d 503, 506 (9th Cir. 1927) (holding that alibi evidence "would necessarily tend to contradict the testimony of [the government's] witnesses.").

186. Courts in other cases have considered evidence of recantation but have concluded, based upon the facts, either that recantation had not actually occurred, or that the recantations were not reliable. *See In re* Garcia, 890 F. Supp. 914, 923-24 (S.D. Cal. 1994) (finding, as factual matter, that witnesses had not recanted their accusations "when first given the opportunity to recant and thus 'obliterate' their prior statements and thus 'obliterate' probable cause, the co-conspirators did just the opposite, *i.e.*, they reaffirmed and adopted their prior statements almost in their entirety"); *In re* Mainero, 990 F. Supp. 1208, 1222, 1226 (S.D. Cal. 1997) ("The essential question is whether the indicia of reliability is on the recantation or the initial statement"; finding, based upon the facts, that "[t]he indicia of reliability is in favor of" the initial accusations "and not their in court 'recantations.'"), *aff'd*, 164 F.3d 1199, 1207 n.7 (9th Cir. 1999) (stating because extradition magistrate allowed recantation evidence, "we need not reach the question whether recantation evidence is admissible in an extradition hearing."); Bobadilla v. Reno, 826 F. Supp. 1428, 1434 (S.D. Fla. 1993) (admitting and considering recantation evidence, but concluding that probable cause exists). Although the outcomes in these cases were favorable to the government, the cases suffer from the same conceptual infirmities present in the cases in which the outcome favored the accused, *i.e.*, the extradition magistrates admitted contradictory evidence proffered by the accused and made a credibility determination. *See also Sandhu v. Burke*, 97 Civ. 4608 (JGK), 2000 WL 191707, at * 16 (Feb. 10, 2000) (remanding for further proceedings and noting that "the consideration of recantations is consistent with the principle that

determinations based upon evidence introduced by the accused, they undermine the premise of the Rule of Non-Contradiction—that an extradition hearing is neither a trial on the merits, nor should it become one.[187]

Moreover, these cases fail to provide practical standards for deciding when to enforce the Rule of Non-Contradiction and when to disregard it. Some recantations are more credible than original confessions, while other recantations are not. As with most credibility conflicts, deciding whether a recantation is more credible than the original confession is best made with the witnesses in court so that the fact finder can observe their demeanor.[188] Similarly, some alibi witnesses are credible while others are not. Credibility of an alibi witness is best assessed with the witness before the court.

Moghadam, *Contreras*, and *Maguna-Celaya* should not fall outside of the Rule of Non-Contradiction because they involved recantations made by the government's own witnesses. Recantation gives rise to an issue of fact as to which of the witness' statements is true—the original accusation or the subsequent recantation. In the domestic context, if a government witness has given inculpatory testimony before a federal grand jury, only to recant and to refuse to inculpate the defendant at trial, then the government is entitled to offer the grand jury testimony at trial

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an extradition magistrate may consider evidence that tends to obliterate probable cause.").

187. *See supra* notes 18-19, 25, 40, 55, 60, 69 and accompanying text.

188. *See, e.g.*, United States v. Atkins, 545 F.2d 1153 (8th Cir. 1976) ("The District Court, after hearing [the government's witness'] recanted testimony and observing his demeanor, found that [he] had told the truth at trial and that his recanted testimony was not credible."); *see also* International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1265 (5th Cir. 1991) ("Only through live cross-examination can the fact-finder observe the demeanor of a witness, and assess his credibility."); Gray v. Spillman, 925 F.2d 90, 94 n.3 (4th Cir. 1991) ("The case resolves itself into numerous credibility determinations arising from sharply conflicting testimony. Gray's version may not be believed. However, belief or nonbelief is a function of the finder of fact, not of the judge or magistrate judge."); Wood v. Allstate Insurance Co., 21 F.3d 741, 746 (7th Cir. 1994). In 1949, Judge Jerome Frank, writing for a Second Circuit panel that included Judge Learned Hand, said:

> Trial on oral testimony, with the opportunity to examine and cross-examine witnesses in open court, has often been acclaimed as one of the persistent, distinctive, and most valuable features of the common-law system. For only in such a trial can the trier of facts (trial judge or jury) observe the witnesses' demeanor; and that demeanor—absent, of course, when the trial is by affidavit or deposition—is recognized as an important clue to the witness' credibility.

Colby v. Klune, 178 F.2d 872, 873 (2d Cir. 1949).

as part of its evidence-in-chief.[189] The trial jury decides whether to believe the accusatory testimony or the recantation, taking into account all of the evidence in the case.[190] In the analogous extradition context, to allow an extradition magistrate to decide which version to believe, and to deny extradition if the accused's evidence is deemed more credible than the government's evidence, improperly pre-empts trial in the requesting country.[191]

The distinction drawn by the courts in *Moghadam, Contreras, Maguna-Celaya,* and *Gonzalez*—that *contradictory* evidence is admissible so long as it "negates" or "obliterates" probable cause—derives from *Shapiro* and *Sindona* and their progeny.[192] However, as discussed above,[193] in neither *Shapiro* nor *Sindona* did the court intend to allow the accused to introduce *contradictory* evidence on an "obliteration" or "negation" rationale. If anything, the *Sindona* court then limited even further the evidence that an accused could introduce under the Rule.[194]

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189. FED. R. EVID. 801(d)(1)(A); *see, e.g.*, United States v. Mosley, 555 F.2d 191, 193 (8th Cir. 1977); United States v. Henry, 448 F. Supp. 819, 821 (D.N.J. 1978). This is subject, of course, to other evidentiary principles such as relevance and competence.

190. *See, e.g.*, United States v. Hemmer, 729 F.2d 10, 17 (1st Cir. 1984) (recanting witness' "grand jury testimony was admissible as substantive evidence" at trial; "It was for the jury to decide whether or not to credit it."); United States v. Holladay, 566 F.2d 1018, 1019 (5th Cir. 1978) ("It was for the jury to decide whether" to believe the testimony of "a witness who recants or contradicts his prior testimony . . .").

191. Nor is there justification based upon the exclusionary rule, even where there is evidence of coercion, as in *Contreras* and *Maguna-Celaya*. As a general matter, the exclusionary rule does not apply in extradition proceedings, since its purpose is only to regulate the conduct of U.S. law enforcement officers, not foreign police. *See, e.g., In re* Powell, 4 F. Supp. 2d 945, 950-52 (S.D. Cal. 1998); Esposito v. Adams, 700 F. Supp. 1470, 1479 n.9 (N.D. Ill. 1988); Simmons v. Braun, 627 F.2d 635, 636-37 (2d Cir. 1980). Although in a domestic criminal case, an involuntary confession by the accused would be suppressed and excluded from the evidence at trial, see Lego v. Twomey, 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972), an indictment may be returned on the basis of an involuntary or coerced confession. *See In re* Atta, 706 F. Supp. 1032, 1052 (E.D.N.Y. 1989); United States v. Tapp, 812 F.2d 177, 179 (5th Cir. 1987); United States v. Rivieccio, 723 F. Supp. 867 (E.D.N.Y. 1989); Holt v. United States, 218 U.S. 245, 248-49, 31 S. Ct. 2, 54 L. Ed. 1021 (1910); *see also* Lawn v. United States, 355 U.S. 339, 350, 78 S. Ct. 311, 2 L. Ed. 2d. 321 (1958); United States v. Calandra, 414 U.S. 338, 344-45 (1974). *Cf.* United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976); United States v. Tate, 329 F.2d 848, 853 (2d Cir. 1964). While an argument could be made in the domestic context that a U.S. court may exercise its supervisory authority and dismiss such an indictment, U.S. courts have no supervisory authority over foreign proceedings. *See, e.g.*, Jhirad v. Ferrandina, 536 F.2d 478, 484-85 (2d Cir. 1976).

192. *See supra* text accompanying notes 115-19.

193. *See supra* text accompanying notes 105-19.

194. *See supra* text accompanying notes 109-14.

Shapiro and *Sindona* introduced, respectively, the words "obliterate" and "negate" into the formulation of the Rule of Non-Contradiction. This language led other courts, in adopting the terminology, to the erroneous principle that *contradictory* evidence may be admitted if it negates or obliterates probable cause. Because negation or obliteration via contradictory evidence—such as evidence of recantation or alibi—requires a trial on the merits to determine credibility, admission of such evidence is fundamentally incompatible with U.S. extradition treaties.[195]

IV. *A PROPOSED STRUCTURE FOR ADMISSIBILITY OF CONTRADICTORY EVIDENCE*

Circumstances may arise in which an accused has evidence so compelling that no reasonable fact finder could reject it. Such evidence is frequently presented in civil cases. Courts presented with such evidence in civil cases grant summary judgment.[196]

This Article proposes an approach to the Rule of Non-Contradiction that draws upon standards of proof for a defendant to obtain summary judgment in a civil case. Where the accused in an extradition proceeding has evidence such that, in a civil case, a court would grant summary judgment in favor of the accused, the extradition magistrate should admit the evidence—even if it provides a defense or contradicts the government's proof—and should rule in favor of the accused. This approach helps ensure the fairness of the extradition hearing, enhancing its due process function, without transforming the hearing into a trial on the merits. On the other hand, if the accused's contradictory evidence merely gives rise to an issue of fact, the extradition magistrate should adhere to the Rule of Non-Contradiction, and should exclude the evidence. Only the requesting country's courts should resolve disputed issues of fact.

The Supreme Court has held that at the summary judgment stage in civil cases, the judge's function is not to weigh the evidence and determine the truth of the matter, but rather "to determine whether there is a genuine issue for trial."[197] "Credibil-

195. *See supra* notes 18-19, 25, 40, 55, 60, 69 and accompanying text.

196. *See* FED. R. CIV. P. 56.

197. Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986).

ity determinations" are to be made solely by the trier of fact at trial.[198] However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'" and summary judgment must be granted.[199]

These principles are based upon the need to separate cases that warrant a trial from those that do not. They are consistent with the function performed by the extradition magistrate, and should be imported into the law of extradition—with the proviso that the government in an extradition case need only establish probable cause, not a prima facie case.[200] Thus, as a general

198. *Id.* at 255.

199. Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

200. *See, e.g.*, Sindona v. Grant, 461 F. Supp. 199, 205, 207 (S.D.N.Y. 1978) (requesting government does not have to prove prima facie case, but need only establish probable cause); Lindstrom v. Gilkey, No. 98 C 5191, 1999 WL 342320, at *9 (N.D. Ill. May 14, 1999) ("competent evidence to establish reasonable grounds [to extradite] is not necessarily evidence competent to convict.") (quoting Fernandez v. Phillips, 268 U.S. 311, 312 (1925)); RESTATEMENT, supra note 162, § 476 comment b (stating that while U.S. law and treaties require showing of probable cause, "[i]n Great Britain and states following the British model, the standard is stricter, equivalent to a prima facie case"); WHITEMAN, *supra* note 14, at 975 (noting distinction between prima facie case and probable cause in extradition context); HACKWORTH, *supra* note 87. *But cf.* Charlton v. Kelly, 229 U.S. 447, 461, 33 S. Ct. 945, 57 L. Ed. 1274 (1913) ("[t]he issue is confined to the single question of whether the evidence for the state makes a prima facie case of guilt sufficient to make it proper to hold the party for trial."); Collins v. Loisel, 259 U.S. 309, 316, 42 S. Ct. 469, 66 L. Ed. 956 (1922) (referring to accused's right to explain "ambiguities or doubtful elements in the prima facie case"); *In re* Shapiro, 352 F. Supp. 641, 645 (S.D.N.Y. 1973) ("the testimony of the complaining witnesses leaves no doubt that prima facie the offenses asserted in the Statement of Charge have been made out and call for a trial of the merits."); *In re* Lincoln, 228 F. 70, 73 (E.D.N.Y. 1915) ("the evidence presented, as found by the judge upon the hearing, makes out a prima facie case"); BASSIOUNI, *supra* note 32, at 713 ("the probable cause standard is akin to a prima facie standard."). If the evidentiary showing needed to establish probable cause is less demanding than that needed to make out a prima facie case, then it is theoretically possible that the accused might have documentary evidence sufficient to defeat the requesting government's prima facie case but not the government's showing of probable cause. However, if the accused's documentary evidence is of such probative force that it would have entitled the accused to summary judgment in the analogous civil context, as a practical matter, it is difficult to imagine how there would still be probable cause in the face of such evidence. Nevertheless, to allow for the theoretical possibility, an extradition magistrate presented by the accused with evidence sufficient to grant summary judgment should admit the evidence, and should nevertheless decide whether, notwithstanding the strength of the accused's evidence, there is still probable cause to believe the accused committed the crimes charged, taking into account the conceptual distinction (assuming there is one) between a showing of probable cause and establishing a prima facie case.

matter, U.S. extradition magistrates should continue to exclude contrary factual accounts, recantations, alibi evidence, proof of prior inconsistent statements by the prosecution's witnesses, and similar evidence that, ordinarily, simply gives rise to an issue of fact to be determined at trial. Extradition magistrates should, however, admit unimpeachable evidence, such as a document or photograph, of a caliber sufficient to grant summary judgment.[201]

Under the proposed approach, the extradition magistrate should determine first whether the government's evidence standing alone suffices to establish probable cause. As in the summary judgment context, the government at the extradition hearing is entitled to the benefit of reasonable inferences that may be drawn from the evidence.[202] If the government's evidence standing alone does not establish probable cause, then the government has not met its burden, and the extradition magistrate must refuse to certify the accused for extradition.

If the government's evidence, standing alone, suffices to establish probable cause, then the extradition magistrate should next consider whether the government's evidence, taken together with the explanatory and contradictory evidence proffered by the accused, "could not lead a rational trier of fact to find for" the government.[203] Proceeding from the premise that a trial on the merits should only occur in the requesting country,[204] if the overall effect of the evidence is such that a rational trier of fact could find for the government, the extradition mag-

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201. For example, if the accused can prove conclusively that he was incarcerated at the time he is alleged to have robbed a bank, such proof should be admissible and dispositive even though it contradicts the requesting government's proof and constitutes an alibi defense. On the other hand, if the accused has witnesses willing to swear that he was with them on the date in question, that merely creates an issue of fact to be resolved at trial.

202. *See, e.g.*, Shapiro, 352 F. Supp. at 645 (finding probable cause by drawing "the permissible inference" from evidence "even if no single direct act had been brought home by any witness to" accused); Eain v. Adams, 529 F. Supp. 685, 692 (N.D. Ill. 1980) (finding probable cause based upon "all evidence received, and all reasonable inferences to be drawn therefrom"), *aff'd sub nom.* Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981); *In re* Sindona, 450 F. Supp. 672, 688 (S.D.N.Y. 1978) (making probable cause determination, relying upon "inferences which are logically drawn from the circumstances presented in the evidence."), *aff'd*, 619 F.2d 167 (2d Cir. 1980).

203. *Matsushita*, 475 U.S. at 587.

204. *See supra* notes 18-19, 25, 40, 55, 60, 69 and accompanying text.

istrate should disallow the proffered evidence and should certify the accused for extradition. On the other hand, if the overall effect of the evidence is such that no rational trier of fact could find for the government, the accused's evidence should be admitted, and the facts established by the accused's documentary or other unimpeachable evidence should be found in favor of the accused.

Courts should generally continue to admit non-contradictory defense evidence that *explains* the government's proof, irrespective of the strength of that evidence,[205] subject to the limitation established by *Sindona* that the evidence be of "limited scope"[206] and "reasonably clear-cut"[207] so as to avoid a trial on the merits. It is important to note that this proposal does not envision the emergence of a substantial new body of case law in which extradition is denied. Cases in which the accused has evidence sufficient to defeat extradition under the standard proposed in this Article are likely to be few and far between. Before an extradition request reaches the courts, it is screened by both the Department of State and the Department of Justice.[208] There is no reason to believe that the U.S. Government wishes to devote prosecutorial resources to pursuing extradition requests that can be overcome by incontrovertible proof. Nor is there any indication in the reported case law that such extradition requests have reached the courts.

While this Article proposes a refinement to the Rule of Non-Contradiction, the Rule itself should not be jettisoned. Although the Rule originated in an era that pre-dated routine intercontinental air travel,[209] it is still the case today that there would be serious hardship to the requesting government and its

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205. *See supra* text accompanying notes 49-51.

206. *Sindona*, 450 F. Supp. at 685.

207. *Id.*

208. *See* RESTATEMENT, *supra* note 162, § 478 comment a; Title 9, United States Attorney's Manual, § 9-15.700 (1999) (stating that Office of International Affairs of U.S. Department of Justice "reviews [extradition] requests for sufficiency and forwards appropriate ones to the district" for initiation of extradition proceedings).

209. *See* Charlton v. Kelly, 229 U.S. 447, 461, 33 S. Ct. 945, 57 L. Ed. 1274 (1913); Collins v. Loisel, 259 U.S. 309, 315-16 (1922); *In re* Wadge, 15 F. 864, 866 (S.D.N.Y. 1883); *In re* Orteiza y Cortes, 136 U.S. 330, 337 (1890). *See also* Bingham v. Bradley, 241 U.S. 511, 517 (1916) (requiring "the demanding government to send its citizens to another country to institute legal proceedings, would defeat the whole object of the treaty."); *In re* Farez, 8 F. Cas. 1007, 1012 (C.C.S.D.N.Y. 1870) ("Such a result would entirely destroy the object of such treaties.").

witnesses were it required to engage in a full-scale trial on the merits in the requested country.[210] As a practical matter, abandoning the Rule of Non-Contradiction would likely compel the requesting government to present live witnesses at the extradition hearing in order to enable the extradition magistrate to make a credibility determination.[211] In addition to the enormous imposition on civilian witnesses, in many cases, the requesting government's witnesses include convicted felons. The need to remove them temporarily from the requesting country's jails and transport them on a civilian passenger aircraft to the United States in order to testify at an extradition hearing would provide a serious disincentive to the requesting country to pursue its extradition requests, thereby undermining the entire system of bilateral extradition treaties. It also goes without saying that the United States would prefer neither to send its felon-witnesses to foreign countries, nor permit the entry of foreign convicts into this country, even under tight security, in order to testify at extradition hearings.

The Rule of Non-Contradiction, however, should not be viewed by foreign governments as a license to commit perjury. U.S. extradition magistrates should not allow the Rule of Non-Contradiction to be exploited by foreign investigators and witnesses to misrepresent facts without fear of contradiction. Nothing in the law of extradition—including the need to avoid a full-scale trial on the merits—mandates that a U.S. extradition magistrate close his or her eyes to outright misrepresentation.

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210. *See, e.g.*, Shapiro v. Ferrandina, 478 F.2d 894, 902 (2d Cir. 1973) (stating that even "in the era of the jet airplane . . . the transportation of witnesses thousands of miles has elements of trouble and expense"); Jhirad v. Ferrandina, 362 F. Supp. 1057, 1060 (S.D.N.Y. 1973) ("It would be most difficult for a court in one jurisdiction to seek to determine factual issues arising in another distant jurisdiction. Undoubtedly, this constitutes the rationale for requiring that the demanding country to support extradition merely prove reasonable grounds to believe the fugitive guilty.").

211. *See, e.g., In re* Singh, 124 F.R.D. 571, 577 (D.N.J. 1987) ("[T]he Government would be compelled to produce witnesses here. That is simply too close to the dress rehearsal trial the Court must avoid."); *In re* Shapiro, 352 F. Supp. 641, 647 (S.D.N.Y. 1973) ("[i]t would introduce chaos into extradition proceedings to construe the treaty so as to require the personal appearance of the complaining witnesses in the state of asylum."); *Wadge*, 15 F. at 866 (allowing accused to introduce alibi evidence "might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter."), *Orteiza*, 136 U.S. at 337 (quoting *Wadge*); Letter dated Apr. 20, 1961, from Secretary of State Dean Rusk to Attorney General Robert F. Kennedy, *reprinted in* WHITEMAN, *supra* note 14, at 999-1000.

Where documents, photographs, or similar unimpeachable evidence offered by the accused contradicts the requesting government's evidence, the extradition magistrate should look at that evidence and decide whether a reasonable fact finder could still find for the government. If not, then the court should admit the evidence and should refuse to certify the accused for extradition.

CONCLUSION

The Rule of Non-Contradiction arises out of the need to prevent extradition hearings from becoming trials on the merits. Yet, the Rule has the harsh effect of precluding probative, and perhaps dispositive, evidence offered by an accused. Some courts, while purporting to endorse the Rule, have found ways to sidestep it. These decisions are incompatible with U.S. treaty obligations. While the Rule itself should remain in effect, courts should permit the accused to offer documentary, photographic, or other evidence that leaves no genuine issue of fact for trial. Admitting such evidence would not require the U.S. courts to try extradition cases on the merits, and would enhance the due process function served by the extradition hearing.