No. 14-5860

In the United States Court of Appeals for the Sixth Circuit

AVELINO CRUZ MARTINEZ,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal from the United States District Court
for the Middle District of Tennessee
No. 3:14-cv-174

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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STATEMENT OF THE CASE

This case arises from Mexico's effort to obtain the extradition of Avelino Cruz Martinez to face murder charges pending in that country. Cruz alleges that the Speedy Trial Clause of the Sixth Amendment forbids his extradition.

I. The United States and Mexico maintain an extradition treaty.

The United States and Mexico first negotiated an extradition treaty in 1861. Each party agreed to extradite individuals found within its territory who have been accused by the other of specified offenses, including murder. *See* Ext. Treaty, art. iii, Dec. 11, 1861, 12 Stat. 1199. In 1899, the United States and Mexico negotiated a new treaty, which stated: "Extradition shall not take place . . . [w]hen the legal proceedings or the enforcement of the penalty for the act committed . . . has become *barred by limitation* according to the laws of the country to which the requisition is addressed." Ext. Treaty, art. iii, Feb. 22, 1899, 31 Stat. 1818 (emphasis added). In 1978, the United States and Mexico signed yet another extradition treaty. This time, the parties stated that "[e]xtradition shall not be granted when the prosecution or the enforcement of the penalty for the offense for which extradition has been sought has become *barred by lapse of time* according to the laws of the requesting or requested Party." Ext. Treaty, art. 7, May 4, 1978, 31 U.S.T. 5059 (hereinafter, "Treaty") (emphasis added).

In shifting from "limitation" to "lapse of time," the U.S.-Mexico Treaty's language followed a predictable course. In the nineteenth century, the United States entered a number of treaties that forbade extradition if the proceeding or punishment was "barred by limitation."[1] But the United States also negotiated two treaties that employed the "lapse of time" phrase when identifying exceptions to extradition. *See* U.S.-Spain, art. v, Jan. 5, 1877, 19 Stat. 650; U.S.-Neth., art. v, May 22, 1880, 21 Stat. 769. From 1908 onward, the United States overwhelmingly employed the lapse-of-time phrase in its treaties.[2]

II. Mexico requests Cruz's extradition under the treaty to face murder charges.

On December 31, 2005, eyewitnesses watched Cruz fatally shoot two men in a small Oaxaca, Mexico village. Cruz was a resident of the United States at

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[1] *See* U.S.-Belg., art. ix, June 13, 1882, 22 Stat. 972; U.S.-Swed., art. vii, Jan. 14, 1893, 27 Stat. 972; U.S.-Nor., art. vii, June 7, 1893, 28 Stat. 1187; U.S.-Peru, art. vii, Nov. 28, 1899, 31 Stat. 1921; Cruz Supp. Br. 7 n.4 (examples).

[2] *See, e.g.*, U.S.-Port., art. v, May 7, 1908, 35 Stat. 2071; U.S.-Hond., art. v., Jan. 15, 1909, 37 Stat. 1616; U.S.-Dom. Rep., art. v, June 19, 1909, 36 Stat. 2468; U.S.-El Sal., art. v, Apr. 18, 1911, 37 Stat. 1516; U.S.-Para., art. v, Mar. 26, 1913, 38 Stat. 1754; U.S.-Costa Rica, art. v, Nov. 10, 1922, 43 Stat. 1621; U.S.-Venez., art. v, Jan. 19 & 21, 1922, 43 Stat. 1698; U.S.-Siam, art. v, Dec. 30, 1922, 43 Stat. 1749; U.S.-Est., art. v, Nov. 8, 1923, 43 Stat. 1849; U.S.-Lith., art. v, Apr. 9, 1924, 43 Stat. 1835; U.S.-Rom., art. v, July 23, 1924, 44 Stat. 2020; U.S.-Fin., art. v, Aug. 1, 1924, 44 Stat. 2002, U.S.-Ger., art. vi, July 12, 1930, 47 Stat. 1862; U.S.-Gr. Brit., art. 5, Dec. 22, 1931, 47 Stat. 2122; U.S.-Liber., art. v, Nov. 1, 1937, 54 Stat. 1733.

the time of the killings (and is now a citizen), but had traveled to Oaxaca to visit his relatives. Two weeks after the shooting, Cruz's family and the family of one victim signed an agreement that identified Cruz as the "perpetrator" of the homicide and required Cruz's family to pay 50,000 pesos to the victim's family. Mem., R.14 (#535-536).

Another relative who had witnessed the murders reported them to the local prosecutor in Oaxaca around the same time. A second witness provided corroboration. Mem., R.14 (#535). Both witnesses then identified Cruz from a photo array. Cert. Op., R.2-22 (#414). Based on this information, the local prosecutor secured an arrest warrant for Cruz in February 2006. Mem., R.14 (#535). In the meantime, Cruz had returned to the United States, lived in Tennessee, and traveled back to Mexico on occasion to secure immigration documents for his wife and family. *Id.* (#535-537).[3]

In May 2012, Mexico sent a diplomatic note invoking the U.S.-Mexico Treaty and requesting Cruz's provisional arrest. In June 2013, the United States filed an extradition complaint in the Middle District of Tennessee. Mem., R.14 (#536-537). Cruz was arrested, and Mexico delivered a formal extradition request two months later. *Id.* (#537, 541).

[3] In 2009, for unexplained reasons, a U.S. consular official contacted the local Mexican court and was informed of the pending arrest warrant. The record does not reflect that any further action occurred. Mem., R.14 (#536)

III. The magistrate judge certifies Cruz as extraditable to Mexico.

When the government files a complaint charging a person in the United States with having committed a crime in a foreign state covered by an extradition treaty, the matter is typically assigned to a magistrate judge, who determines whether the government's "evidence of criminality" is "sufficient to sustain the charge under the provisions of the proper treaty." 18 U.S.C. § 3184. If the judge so concludes, the judge "shall certify . . . to the Secretary of State" that the Secretary may issue a warrant for the individual's surrender and extradition. *Id.*

The magistrate judge certified Cruz for extradition, finding "ample evidence" to conclude that Cruz had committed the murders. Cert. Op., R.2-22 (#412); *see also id.* (noting Cruz's concession that the Mexican government's "documents establish probable cause"). The judge also confirmed that the U.S.-Mexico Treaty authorized Cruz's extradition for these charges. *Id.* (#411).

IV. The district court denies Cruz's request for habeas relief.

The magistrate judge's certification is not subject to direct appeal. *In re Metzger*, 46 U.S. 176, 191 (1847); *see also Oteiza v. Jacobus*, 136 U.S. 330, 333-334 (1890). But courts have entertained limited habeas review to determine whether the magistrate judge "had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence

warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925).

Cruz filed a petition for habeas corpus relief.[4] As relevant here, Cruz argued that the certification order was unlawful under the U.S.-Mexico Treaty's lapse-of-time provision. Cruz contended that the statute of limitations for his crimes under U.S. law had run, and that the Treaty incorporates the speedy trial protections of the Sixth Amendment, which (in his view) would bar prosecution given the delay in this case. The district court denied relief, finding that the issuance of the Mexican arrest warrant tolled the limitations period, *see* Mem., R.14 (#549), and that the Treaty "does not provide an extraditee with Sixth Amendment rights in the extradition process." *Id*. (#548).

V. This Court orders en banc review Cruz's speedy trial claim.

A divided panel of this Court affirmed the district court's ruling that neither the U.S. nor Mexico limitations period had run on the murder charges pending against Cruz, but held that the Treaty's lapse-of-time provision

[4] If this habeas proceeding confirms the validity of the magistrate judge's certification, the Secretary of State still maintains discretion whether to surrender Cruz for extradition. *See* 18 U.S.C. § 3186 (the Secretary "may" deliver the fugitive to the foreign government); *United States v. Kin-Hong*, 110 F.3d 103, 109 (1st Cir. 1997) ("It is . . . within the Secretary of State's sole discretion to determine whether or not the relator should actually be extradited.").

permitted Cruz to allege a violation of the Sixth Amendment's speedy trial clause. *See Martinez v. United States*, 793 F.3d 533, 542-548 (6th Cir. 2015); *id.* at 557-570 (Sutton, J., dissenting). At the government's request, the Court vacated the panel's decision and ordered en banc rehearing of the speedy trial issue.

ARGUMENT

The Sixth Amendment's speedy trial clause, by its terms, applies only to "criminal prosecutions." Cruz contends, however, that dozens of extradition treaties (including the U.S.-Mexico Treaty here) incorporate the speedy trial right into extradition proceedings. He is wrong. All the traditional interpretive devices employed by this Court—including text, drafting history, post-ratification practice, official State Department views, and canons of construction—negate the suggestion that U.S. negotiators and their foreign counterparts imported Sixth Amendment protections into these treaties. The lapse-of-time phrase that Cruz clings to addresses limitations defenses, no more.

I. The lapse-of-time phrase relates only to statute-of-limitations defenses.

Article 7 of the U.S.-Mexico Treaty proscribes extradition where the fugitive's prosecution or punishment "has become barred by lapse of time according to the laws of" either country. The language implies that "time" alone guides the inquiry. Or more simply, "*time* must do the barring." *Martinez*, 793 F.3d at 558 (Sutton, J., dissenting). Contrast that description with the Sixth

Amendment, which identifies "no fixed point in the criminal process" at which a trial must commence. *Barker v. Wingo*, 407 U.S. 514, 521 (1972). The "amorphous quality of the right" instead turns on "a functional analysis" of, not just time, but the promptness of the defendant's objections, the reason for the delay, and the prejudice to the defendant's trial strategy, *id*. at 522, 530; *see also United States v. Loud Hawk*, 474 U.S. 302, 315 (1986) (treating "the reason for delay" as the critical factor in the Sixth Amendment inquiry). This mismatch between the Treaty's hard-and-fast focus on "time" and the Sixth Amendment's "ad hoc" "balancing" of other non-time factors dispels the notion that the former incorporates the latter. *Barker*, 407 U.S. at 530.

The "history of the treaty" provides the other crucial clue as to meaning. *Air France v. Saks*, 470 U.S. 392, 396 (1985) (citation omitted). The previous U.S.-Mexico treaty prohibited extradition where the prosecution or penalty "had become barred by limitation," whereas the current treaty proscribes extradition where the prosecution or penalty "has become barred by lapse of time." Cruz believes the old language captured only statute of limitations defenses, whereas the new language authorizes Speedy Trial Clause (and other) claims. Supp. Br. 7.

Cruz's linguistic distinction is illusory. These two phrases—"barred by limitation" and "barred by lapse of time"—carried the same historical meaning.

For example, the 1882 U.S.-Belgium extradition treaty foreclosed extradition where the prosecution had become "barred by limitation." The United States captioned this provision, "Exemption by reason of lapse of time," when formally publishing the treaty in statute.

ARTICLE IX.	ARTICLE IX.	
Extradition shall not be granted, in pursuance of the provisions of this convention, if legal proceedings or the enforcement of the penalty for the act committed by the person claimed, has become barred by limitation, according to the laws of the country to which the requisition is addressed.	L'extradition n'aura pas lieu, conformément aux dispositions de la présente convention, si la prescription de l'action ou de la peine est acquise en faveur de l'individu réclamé, d'après les lois du pays auquel la demande est adressée.	Exemption by reason of lapse of time.

U.S.-Belg., art. IX, June 13, 1882, 22 Stat. 972

And when the United States switched course and adopted the lapse-of-time phrase as its preferred language around 1908, it referred to the phrase as a "limitation of time" provision in statutory publication.

	ARTICLE V.	ARTÍCULO V.
Limitation of time.	A fugitive criminal shall not be surrendered under the provisions hereof, when, from lapse of time or other lawful cause, according to the laws of the place within the jurisdiction of which the crime was committed, the criminal is exempt from prosecution or punishment for the offense for which the surrender is asked.	El criminal evadido no será entregado con arreglo á las disposiciones del presente Convenio cuando por el trascurso del tiempo ó por otra causa legal, con arreglo á las leyes del punto dentro de cuya jurisdicción se cometió el crimen, el delincuente se halle exento de ser procesado ó castigado por el delito que motiva la demanda de extradición.

U.S.-Hond., art. v, Jan. 15, 1909, 37 Stat. 1616 [5]

[5] During this period, the United States negotiated extradition treaties with Portugal, the Dominican Republic, Paraguay, Costa Rica, Estonia, Lithuania, Romania, and Finland (cited *supra*, p.2 n.2) that contain similar captions.

This practice of freely interchanging the "limitation" and "lapse of time" phrases was hardly novel. A leading nineteenth century extradition treatise viewed the two variants as synonyms. *See* 1 J. Moore, A Treatise of Extradition § 373, at 569-570 (1891) (treaty provisions that prohibit extradition where prosecution is "barred by lapse of time" or "barred by limitation" incorporate the statutes of limitations of the requesting (or requested) country). The Government of Mexico interchanged these terms as well. In 1934, Mexico refused to extradite a fugitive, Alfonso Davila, to the United States to face embezzlement charges. The treaty then in force between the countries forbade extradition requests "barred by limitation," but the Mexican government's communication to the United States refusing extradition explained that Davila's "punishment or the penal action is fulfilled by the simple lapse of time." Ltr. from Mexican Minister of Foreign Affairs, Nov. 13, 1934, *reprinted in* G.H. Hackworth, 4 Digest of Int'l L. § 339, at 194 (1942).

These historical practices confirm the government's textual reading. If the "barred by limitation" phrase refers only to limitations defenses (as Cruz readily admits, *see* Supp. Br. 6-7), then the "barred by lapse of time" phrase is similarly constrained to limitations defenses. Relying on these same guideposts, the Eleventh Circuit rejected the claim that Cruz now raises. "[F]or over a century," the court observed, "the term 'lapse of time' has been commonly associated with

a statute of limitations violation." *Yapp v. Reno*, 26 F.3d 1562, 1567; *id.* at 1569 (Carnes, J., dissenting) (agreeing on this point).

Cruz does not address this historical record. He instead retorts (Supp. Br. 5, 6 n.3, 18) that the lapse-of-time phrase linguistically embraces any delay-based claim, be it the Speedy Trial Clause, the Speedy Trial Act, or common-law laches. But his effort takes "[t]he definition of words in isolation," *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006), which is itself a perilous venture, but even more so in the field of treaty construction, where "the context in which the written words are used" carries particular force, *Air France*, 470 U.S. at 397. The fact that litigants and courts might employ similar phrasing when discussing other legal doctrines does not establish that the drafters of this country's extradition treaties engraved those doctrines into the treaties.

II. The lapse-of-time phrase does not incorporate speedy trial rights.

Cruz's effort to incorporate speedy trial protections into the U.S-Mexico Treaty's lapse-of-time phrase also ignores constitutional history. As recounted above, the lapse-of-time phrase first appeared when the United States negotiated extradition treaties with Spain and the Netherlands in 1877 and 1880. The ratifying histories of these treaties contain no mention of the Speedy Trial Clause. Moreover, the drafters of these agreements—State Department officials and their foreign counterparts—would not have understood any connection

between the lapse-of-time language and the Sixth Amendment.[6] The Supreme Court did not announce the constitutional speedy trial right until 1905, *see Beavers v. Haubert*, 198 U.S. 77 (1905), and a full exposition emerged only in 1972, *see Barker*, 407 U.S. at 515, long after the United States had adopted the lapse-of-time phrase as standard treaty language.

To view the lapse-of-time language as incorporating the Speedy Trial Clause, as Cruz urges, would mean that State Department officials in the 1870s deliberately seeded a dormant, yet-to-be-recognized federal right into this country's extradition treaties, which sprouted only when the Supreme Court engaged the issue decades later. That fantastic proposition, where the State Department covertly bound our foreign treaty partners to an inchoate U.S. constitutional principle, lacks support.

The renegotiation of U.S. extradition agreements in the 1970s and 1980s (including the 1978 U.S.-Mexico Treaty here) further undermines Cruz's position. While the Senate Report accompanying the U.S.-Mexico Treaty does not address the issue, the Senate Reports accompanying other contemporaneous treaties—which also contain the lapse-of-time phrase—announced that the

[6] Cruz previously noted that many States had enacted speedy trial statutes during this era. *See* Cruz Resp. to Rehrg. Pet. 6. The government fails to grasp the relevance, as Cruz has never urged a connection between the lapse-of-time phrase and the state statutes.

language innocuously referred to "statute of limitation" bars. *See* S. Exec. Rep. No. 93-19, at 3 (1973) (Paraguay); S. Exec. Rep. No. 96-20, at 24 (1979) (Germany); S. Exec. Rep. No. 98-29, at 5 (1984) (Thailand); S. Exec. Rep. No. 98-30, at 6 (1984) (Costa Rica); S. Exec. Rep. No. 98-31, at 6 (1984) (Jamaica). And at no point did the Reports mention constitutional speedy trial considerations when listing the substantive changes envisioned by the renegotiation process. *See* S. Exec. Rep. No. 96-21, at 19 (1979) (Mexico) (highlighting the various "changes in the new treaty," but omitting any mention of speedy trial rights).

Cruz dismisses the significance of Senate Reports in treaty disputes. Supp. Br. 21. The Supreme Court has, however, consulted them when construing the intent of a treaty's signatories. *See United States v. Stuart*, 489 U.S. 353, 366-368 (1989). The renegotiated U.S.-Germany extradition treaty, which the Senate considered at the same time as the U.S.-Mexico Treaty under review here, bears special mention. Congressional documents associated with the U.S.-Germany treaty (*see* T.I.A.S. 9785) show that the relevant Senate Report reflected official State Department testimony. The State Department had testified before the Senate that the lapse-of-time phrase in the U.S.-Germany treaty "discusses statute of limitations" and "is a standard provision in U.S. extradition treaties." *Hearing on Nine U.S. Treaties on Law Enforcement and Related Matters Before the S.*

Comm. on Foreign Relations, 96th Cong. 24 (1979) (statement of Deputy Legal Adviser James Michel). The State Department's interpretation of the lapse-of-time treaty language—which the Senate Report embraced—"is entitled to great weight." *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (citation omitted).

Cruz's other objections lack merit. He observes that the cited Senate Reports address "treat[ies] other than the one at issue." Supp. Br. 21. But these other treaties, which were negotiated and ratified during the same time period, contain the same phrase as the U.S.-Mexico Treaty. It defies logic to suggest that three simple words—"lapse of time"—refer only to limitations defenses in some agreements, but to the Speedy Trial Clause in the U.S.-Mexico Treaty. Cruz alternatively casts the Senate Reports' commentary as illustrative, "naming the prototypical example of a lapse-of-time law, *i.e.*, a statute of limitations," but still contemplating an expansion of the treaties to authorize Speedy Trial Clause claims. Supp. Br. 21. To accept Cruz's view would mean that the State Department and the Senate weaved Sixth Amendment protections into this country's extradition proceedings quietly and under everybody's nose, including those of our foreign partners. Because this novel theory is unsupported in fact, law, or practice, the Court should reject it.

III. The *Mylonas* decision is neither binding, nor relevant to this dispute.

As a final matter, Cruz promotes (Supp. Br. 8-10) his capacious interpretation of the U.S.-Mexico Treaty by referencing the decision in *In re Extradition of Mylonas*, 187 F. Supp. 716 (N.D. Ala. 1960), where a district court concluded that the lapse-of-time provision in the U.S.-Greece extradition treaty incorporated Speedy Trial Clause protections and, on that basis, refused to certify the fugitive's extradition. The government could not appeal *Mylonas*,[7] but in later cases, the Eleventh Circuit "expressly disapprove[d]" the decision. *Martin v. Warden*, 993 F.2d 824, 829 n.8 (11th Cir. 1993); *see also Yapp*, 26 F.3d at 1567 ("[W]e do not find [*Mylonas*] persuasive.").[8]

Cruz nevertheless asserts that the *Mylonas* decision was the "final say" on lapse-of-time clauses between 1960 and 1993. Supp. Br. 8. Because the U.S.-Mexico Treaty employs a lapse-of-time phrase, and because the Senate advised and consented to its ratification during this period, the Treaty (in his view) necessarily imports the *Mylonas* interpretation.

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[7] The government cannot file a direct appeal from a decision refusing to certify a fugitive for extradition under 18 U.S.C. § 3184. *See In re Mackin*, 668 F.3d 122, 126-130 (2d Cir. 1981) (Friendly, J.).

[8] No other court has accepted *Mylonas*. Cruz incorrectly states (Supp. Br. 8) that *United States v. Galanis*, 429 F. Supp. 1215 (D. Conn. 1977), treated the decision as "good law." The *Galanis* court cited *Mylonas* in footnote only to say that its holding was "not [o]n point" to the dispute there. *Id*. at. 1225 n.9.

Not so. *Mylonas* "[wa]s a district court opinion and as such ha[d] no binding precedential value." *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 649 (6th Cir. 2004). As a result, the decision's mere existence at the time of the U.S-Mexico Treaty's ratification does not control or inform the proper construction of the Treaty's lapse-of-time provision. Of course, this Court may examine *Mylonas*'s analysis of the issue and, if persuaded, adopt it. Unfortunately, *Mylonas* contains no legal reasoning, just a cursory statement asserting that the fugitive's speedy trial rights had been violated by the extradition process. *See* 187 F. Supp. at 721 ("I am of the opinion that the accused has not been afforded a speedy trial, and that extradition should be denied on that ground."). The dearth of analysis reveals the flaws in the *Mylonas* decision and, by extension, Cruz's position here.

One last point: The government disputes Cruz's assertion that the State Department renegotiated the U.S.-Mexico Treaty in 1978 "to echo the clause interpreted in *Mylonas*." Supp. Br. 9. The State Department has long advanced the view that lapse-of-time provisions in extradition instruments refer only to limitations defenses. In 1968, the State Department published an official digest of U.S. extradition procedures. Under the heading "Statute of Limitation," the digest remarked, "One of the most common exemptions from extradition relates to offenses for which prosecution or punishment is *barred by lapse of time*."

M. Whiteman, 6 Digest of Int'l L. § 17, at 859 (1968) (emphasis added). It then supplied examples of courts adjudicating limitations defenses in extradition proceedings, with no mention of the Speedy Trial Clause. *Id.* at 860-865. As to *Mylonas*, the digest repeated guidance from the Justice Department: "[T]he provisions of the Sixth Amendment . . . obviously apply to criminal prosecutions tried in the United States and not to fugitives whose extradition is sought for trial under treaties with foreign countries whose laws may be entirely different." *Id.* § 40, at 1059-1060 (quoting Ltr. from Assistant Attorney General Wilkey, July 15, 1960).

When the State Department renegotiated the U.S.-Mexico Treaty in 1978 to include the lapse-of-time language, it hewed to this position. The non-precedential, twice-discredited *Mylonas* decision did not guide the State Department's efforts then. It should not sway this Court now.

IV. Various interpretative canons support the government's position.

The government agrees (*see* Cruz Supp. Br. 10) that this Court need not resort to interpretive canons. The text, drafting history, post-ratification practice, and official State Department views all confirm that lapse-of-time provisions address limitations defenses, and not the Speedy Trial Clause. To the extent interpretive canons carry any relevance, they further buttress the government's reading of the U.S.-Mexico Treaty.

First up is *Factor v. Laubenheimer*, 290 U.S. 276, 293 (1933), where in the context of an extradition dispute, the Supreme Court stated that treaty "obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them." Thus, where a "treaty fairly admits of two constructions," courts should adopt the interpretation that "enlarg[es]" "the rights which may be claimed under it." *Id.* at 293-294. As four neighboring circuits have observed, *Factor* demands that ambiguities in an extradition treaty be construed in favor of the state signatories—that is, "in favor of surrendering a fugitive to the requesting country." *Nezirovic v. Holt*, 779 F.3d 233, 239 (4th Cir. 2015); *accord King-Hong*, 110 F.3d at 110; *Ludecke v. U.S. Marshal*, 15 F.3d 496, 498 (5th Cir. 1994); *United States v. Wiebe*, 733 F.2d 549, 554 (8th Cir. 1984). That means in this case, as in *Factor*, construing a treaty's enumerated defenses to extradition narrowly.

Second, courts shun treaty interpretations that require "[f]oreign powers . . . to be versed in the niceties of our criminal laws." *Grin v. Shine*, 184 U.S. 181, 184 (1902); *see also Skaftourous v. United States*, 667 F.3d 144, 156 (2d Cir. 2011) (noting "the reluctance of our courts to fastidiously examine foreign law in extradition proceedings"); *Matter of Assarsson*, 635 F.2d 1237, 1244 (7th Cir. 1980). The interpretation urged by Cruz runs headlong into that principle. Under the U.S.-Mexico Treaty, extradition is prohibited where the prosecution

or punishment is "barred by lapse of time according to the laws of *the requesting or requested Party*" (emphasis added). Under Cruz's preferred construction then, a fugitive in Mexico could fight extradition to the United States by invoking the Speedy Trial Clause, the Speedy Trial Act, common-law laches, or some other delay-based claim. Mexican judges would have to resolve these often complex U.S. legal claims. Likewise, Cruz and other fugitives in this country could invoke any analogous Mexican doctrines to U.S. judges in an effort to halt their extradition to Mexico. Courts rightly bristle at such invitations to adjudicate foreign law, fearing "the chance of error . . . when we try to construe the law of a country whose legal system is much different from our own." *Assarsson*, 635 F.2d at 1244.

Finally, courts have acknowledged that the comity principles undergirding the extradition system "would be ill-served by requiring foreign governments to submit their purposes and procedures to the scrutiny of United States courts." *Koskotas v. Roche*, 931 F.2d 169, 174 (1st Cir. 1991); *see also Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990); *Assarsson*, 635 F.2d at 1224. Importing the Speedy Trial Clause inquiry into extradition proceedings would throw that caution to the wind, requiring courts to issue "determinations of negligence" as to the foreign prosecutors, judges, and ministry officials who investigated the crime, issued the arrest warrant, and sought U.S. extradition

assistance.[9] *Doggett v. United States*, 505 U.S. 647, 652 (1992). For example, Cruz seeks an inquiry into whether his Mexican prosecutors spuriously pursued his extradition in response to a "statistics-orientated initiative" or "individual malice." Supp. Br. 11. Even worse, our foreign counterparts would apparently be held to Sixth Amendment benchmarks developed for American criminal investigations and proceedings. *See* Cruz Principal Br. 41-46. The obvious perils of this inquiry should lead the Court to question its application here. *See Yapp*, 26 F.3d at 1562 ("A speedy trial inquiry would require a district judge or magistrate judge, generally unfamiliar with foreign judicial systems and the problems and circumstances facing them, to assess the reasonableness of a foreign government's actions in an informational vacuum.").

[9] Cruz notes that, in three states, the limitations period runs until an indictment, warrant, summons, or other process is executed on the defendant, but will continue to run in cases if the warrant's execution is "unreasonably delayed." Supp. Br. 23. The question whether a defendant's limitations period continued to run under the cited statutes because the local jurisdiction unduly delayed its execution of a warrant would not arise in international extradition proceedings. Under those statutes, because the fugitive defendant is (by definition) absent from the prosecuting jurisdiction, his limitations period is automatically tolled by operation of law. *See, e.g.*, Conn. Gen. Stat. § 54-193(d); Fla. Stat. § 775.15(5); Kan. Stat. § 21-5107(e)(1). Furthermore, courts generally look to the *federal* statute of limitations when adjudicating a fugitive's claim that his extradition is barred due to expiration of the limitations period. *See Theron v. United States*, 832 F.2d 492, 498-499 (9th Cir. 1987) (collecting cases).

In response, Cruz asks this Court to read the Speedy Trial Clause into the U.S.-Mexico Treaty to "secure equality and reciprocity" between the countries. Supp. Br. 10. The government is unclear what Cruz means here. The Treaty already authorizes fugitives to raise limitations defenses grounded in either U.S. or Mexican law; it accordingly treats both countries equally. To be sure, the U.S. and Mexican limitations periods carry different triggering rules, end points, and tolling considerations, but that reflects the particularities of each country's legal system, and not any Treaty-generated inequity.

Cruz also cites (Supp. 13-15) three cases that have no bearing on the interpretive canons referenced above. *United States v. Rauscher*, 119 U.S. 407, 430 (1886), held that, under the 1842 U.S.-Great Britain extradition treaty, a fugitive "who has been brought within the jurisdiction of the court, by virtue of the proceedings under an extradition treaty, can only be tried for one of the offenses described in that treaty." *Id*. at 430. The Court reached this conclusion in light of "the entire face of the treaty." *Id*. at 420. But even if the treaty's language was ambiguous, the Court remarked, two federal statutes imposed this restriction (now known as the doctrine of specialty) upon extradition treaties to which the United States was a party. *Id*. at 423-424.

In *Pettit v. Walshe,* 194 U.S. 205, 214 (1904), an extradition commissioner in New York issued an arrest warrant for an individual wanted on murder

charges in Britain, and who was found in Indiana. The Supreme Court held that the commissioner could not order the individual to New York because, under the U.S.-Great Britain treaty, the extradition hearing must occur "in the state where the accused was found and arrested." *Id.* at 218. The Court held that the treaty language—which required an extradition hearing "according to the laws of the place where the fugitive or person so charged shall be found"—"might be construed as referring to this country as a unit," rather than Indiana. *Id.* at 217. But, the Court remarked, "there are no common-law crimes of the United States" and "the crime of murder . . . is not known to the federal government." *Id.* As a result, the treaty's reference to the "laws of the place" where the fugitive was found most naturally referred to "that state of the Union in which he is arrested." *Id.*

Finally, in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10 (1936), the Supreme Court held that the language of the U.S.-France extradition treaty "[wa]s explicit in the denial of any obligation to surrender citizens of the asylum state." *Id.* at 10; *see also id.* at 11 ("[T]he treaty contains no express grant of the power [to extradite U.S. citizens]."). In the face of this clear language, the Court dismissed the government's invitation to imply such authority from other extratextual materials. *Id.* at 13.

These three decisions relied on a straightforward textual inquiry. The Supreme Court held that the *Rauscher* and *Valentine* treaties dictated only one reading, which it adopted. The Court in *Pettit* gleaned two possible treaty interpretations, but deemed only one to be plausible. *Factor*, by contrast, addresses the situation where the treaty admits of two plausible constructions, in which case, courts should adopt the one that enlarges the rights of the state signatories. That canon, when applied here, favors the government's position.

Again, in the government's view, this debate is academic. All of this Court's primary interpretive tools dispel the notion that the U.S.-Mexico Treaty incorporates the Speedy Trial Clause.

CONCLUSION

The Court should affirm the district court's denial of habeas relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with this Court's en banc briefing order because it does not exceed 25 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared on a proportionally spaced typeface using Microsoft Word 2013 in 14-point Calisto MT font.

/s/David M. Lieberman

CERTIFICATE OF SERVICE

I certify that, on January 8, 2016, I served an electronic copy of the government's Supplemental Brief on counsel for appellant, Assistant Federal Public Defender Michael C. Holley, via the Court's ECF system:

/s/David M. Lieberman

DESIGNATION OF DISTRICT COURT RECORD

The government designates the following documents from the district court record:

Docket No.	Document	Page ID #
R.2-22	Certification Opinion and Order	403-415
R.14	Memorandum	534-553