UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA, :

- against - : **S4 09 Cr. 466 (BMC)**

JOAQUIN ARCHIVALDO GUZMAN LOERA, :

Defendant. :

----------X

MEMORANDUM IN SUPPORT OF DEFENDANT JOAQUIN ARCHIVALDO GUZMAN LOERA'S MOTION TO DISMISS THE INDICTMENT BASED ON VIOLATION OF THE RULE OF SPECIALTY IN THE EXTRADITION TREATY BETWEEN MEXICO AND THE UNITED STATES

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PRELIMINARY STATEMENT

Defendant Joaquin Archivaldo Guzman Loera ("Guzman") respectfully submits this memorandum in support of his motion to dismiss the Fourth Superseding Indictment (the "Indictment") on the ground that this prosecution violates the Rule of Specialty contained in the Extradition Treaty between the United States and Mexico. Extradition Treaty, U.S.-Mexico, art. 17(c), May 4, 1978, [1979] 31 U.S.T. 5059.

The defense recognizes that the Second Circuit's recent decision in *United States v. Barinas*, __ F.3d __, 2017 WL 3197535 (2d Cir. July 28, 2017),

appears to preclude this Court from granting this motion on the ground that Mr. Guzman lacks standing. Nevertheless, because the circuits are divided over the standing question, and because we respectfully submit that *Barinas* was wrongly decided, the defense brings this motion to preserve Mr. Guzman's rights in the event the *Barinas* rule is overturned.

FACTS[1]

On or about May 20, 2016, the Mexican government granted requests made by the government of the United States that Mr. Guzman be extradited to this country. These extradition requests referenced indictments pending in the Southern District of California ("SDCA") (95 CR 973) and the Western District of Texas ("WDTX") (12 CR 849). Mr. Guzman challenged these grants of extradition, filing actions for *amparo* proceedings, which were denied on October 20, 2016. *See* Draft English Translation of Redacted Consent Agreement ("Redacted Consent Agreement"), Bates No. 466, attached hereto as Exhibit A. Mr. Guzman appealed these decisions. However, on January 19, 2017, the Fifth Collegiate Panel Court for Criminal Matters in Mexico City confirmed the judgments of the lower courts in Mexico and denied Mr.

[1] The facts underlying this motion are based on a redacted Spanish language document titled, in English, "Consent to the Exception to the Rule of Specialty" and the Draft English Translation of that document ("Redacted Consent Agreement") provided by the government in discovery. We provide other facts on information and belief, based on the defense team's investigation, including discussions with those who were involved with Mr. Guzman's extradition from Mexico.

Guzman's appeals. *Id.* As is clear from the face of the Redacted Consent Agreement itself, no extradition request based on the instant Indictment was made to the Mexican government. *Id.* at Bates No. 467-468. Certainly Mr. Guzman and his attorneys in Mexico were never served with such a request.

The indictment in the SDCA charges Mr. Guzman with one count of conspiracy to import and possess with the intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). The charged conspiracy supposedly began on "a date unknown to the grand jury" and is alleged to have continued up to June 23, 1995.

The WDTX indictment charges Mr. Guzman, in seven separate counts, with racketeering, in violation of 18 U.S.C. § 1962(d); conspiracy to possess with the intent to distribute cocaine and marijuana, in violation of 21 U.S.C. §§ 846 and 841(a)(1); conspiracy to import cocaine and marijuana, in violation of 21 U.S.C. §§ 963, 952(a), and 960(a); conspiracy to launder money, in violation of 18 U.S.C. § 1956(a)(2)(A); conspiracy to possess firearms, in violation of 18 U.S.C. §§ 924(c) and (o); murder, in violation of 21 § 848(e)(1)(A); and engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848(b)(1). Except for the murder count, the WDTX indictment alleges that all the charged conduct occurred between January 1, 2000, and April 11, 2012. The murder count alleges acts between September 3, 2009 and September 8, 2009.

The requests for Mr. Guzman's extradition to the WDTX and the SDCA were filed in June 2015. He was arrested in Mexico in January 2016. As is required under the Extradition Treaty between the United States and Mexico, both extradition requests contained witness declarations in support of the extradition petitions.[2] In support of its extradition petition to the WDTX, the United States submitted the declaration of Jesus Manuel Fierro Mendez, dated "11-1-2012."[3] Fierro Mendez is an admitted and convicted corrupt former Mexican law enforcement official and narco-trafficker. At the time the government submitted the sworn declaration of Fierro Mendez, the government knew or should have known that his declaration contained material falsehoods and misrepresentations. Specifically, Fierro Mendez swore in his declaration that he had personally met Mr. Guzman and had been personally present and observed Mr. Guzman negotiate a firearms deal. In 2010, however, Fierro Mendez, testifying as a cooperating witness for the government, swore under oath that he "never met" Mr. Guzman. *See United*

[2] Though the government refused to provide Mr. Guzman with any discovery related to his extradition, except for the Consent Agreement and the Draft Translation, defense counsel were able to obtain the extradition petitions relating to the WDTX, which included the declarations of five civilian witnesses, and the SDCA, which included the declarations of two civilian witnesses.

[3] *See* Declaration of Jesus Manuel Fierro Mendez and a Draft English Translation of the same, attached hereto as Exhibit B. The Declaration is dated 11-1-2012. It is unclear if this refers to November 1 or January 11, 2012.

States v. Chavez-Bettancourt, et al., 08-CR-2985-DB, (WDTX) Dkt. No. 847 at 25; *see also* Dkt. No. 846 at 168-69 (March 4-6, 2010). Further, Fierro Mendez's declaration appears to directly contradict his sworn trial testimony in other respects. At trial, he claimed he did not begin working for the drug traffickers until he left the police force in Ciudad Juarez, Mexico in April of 2007. *Id*. Dkt. No. 846 at 135; Dkt. No. 847 at 5, 27-28. His declaration, in contrast, claimed he began working for the traffickers in 2005. He also stated in the declaration, contrary to his trial testimony, that he continued to work as a police officer until 2008. In his trial testimony, Fierro Mendez admitted to lying to U.S. federal agents about whether he had been the victim of an accidental shooting that rendered him disabled and forced him to resign from the police force in Juarez. *Id.* Dkt. No. 847at 6-7.

Fierro Mendez's trial testimony in *United States v. Chavez-Bettancourt* was not provided to the government of Mexico. Nor was the government of Mexico alerted to the fact that claims made in Fierro Mendez's declaration were contradicted by his earlier, sworn testimony in the United States District Court for the WDTX. Given that the Assistant United States Attorney who submitted the affidavit in support of the request for Mr. Guzman's extradition to the WDTX, Kristal M. Wade, is noticed as a lead attorney in *United States v. Chavez-Bettancourt*, the government can hardly

claim that it was unaware of the above inconsistencies when it requested Mr. Guzman's extradition.[4]

The government also appears to have knowingly submitted a false and misleading witness statement to secure Mr. Guzman's extradition to the SDCA. In June 2015, Assistant United States Attorney Todd Robinson submitted an affidavit in support of the United States government's request for Mr. Guzman's extradition to the SDCA. The affidavit contains a summary of the facts and evidence that were presented to the government of Mexico in the United States government's request for extradition. The evidence included the sworn declarations of two civilian witnesses: Miguel Angel Martinez-Martinez ("Martinez-Martinez") and another cooperating witness.[5]

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[4] Defense counsel was able to locate Fierro Mendez's trial testimony by combing the public docket after obtaining the WDTX extradition request—a document the government refused to disclose in discovery. As the Court is aware, the government has provided no discovery relating to Mr. Guzman's extradition (except for the Consent Agreement and Draft Translation), nor has it provided any *Brady* material. We were unable to find trial testimony as to any of the four other civilian witnesses who provided declarations in support of the extradition request made by the WDTX. Therefore, defense counsel is not in a position to establish whether other declarants, in addition to Fierro Mendez, lied in their declarations submitted to the Mexican government.

[5] While both Martinez-Martinez and the other cooperating witness have testified in United States District Courts as cooperating witnesses, only Martinez-Martinez's testimony is publicly available. The testimony of the other cooperating witness has been sealed and has not been provided to the defense by the government. Therefore, the defense is not in a position to demonstrate falsehoods in this witness's declaration.

In his sworn declaration dated November 12, 2014, Martinez-Martinez claimed to have personally worked for Mr. Guzman from 1987 until 1993, when Mr. Guzman was arrested. *See* Declaration of Miguel Angel Martinez-Martinez, attached hereto as Exhibit C at 1. He further stated that his first job with the cartel was to arrange shipments of cocaine from Colombia to Mexico¸ and that he was placed in charge of flights from Colombia to Mexico. *Id* at 1-2. Martinez-Martinez swore that he personally traveled to Colombia on February 28, 1988, to arrange the first of these flights, where he negotiated the transportation of 1,420 kilograms of cocaine with a "Carlos Uribe."[6] Martinez-Martinez further claimed that the February 28, 1988 flight was the first of "approximately 160 such flights." *Id*. at 2. He then continued to relay details about the "160" flights, implying first-hand knowledge of the details of such flights and that the flights were conducted in the same manner as the initial flight. *Id.* In his declaration, Martinez-Martinez claimed to have negotiated this initial shipment specifically with "Carlos Uribe." *Id*. at 2.

[6] There appears to be no public record of a case against any Carlos Uribe matching Martinez-Martinez's description of a major Colombian drug trafficker, nor does there appear to be any news account of a Colombian drug trafficker by the name Carlos Uribe.

Martinez-Martinez's declaration is clearly drafted in a manner to imply to the government of Mexico that he had first-hand knowledge of each of these 160 alleged flights and that he was physically present in Colombia when the alleged shipments were transported. When the United States government provided Martinez-Martinez's affidavit to the Mexican government, however, it knew that Martinez-Martinez had made contrary statements in sworn testimony given years prior to the execution of the affidavit.

In March 2006, Martinez-Martinez testified in the United States District Court for the District of Arizona pursuant to a government cooperation agreement in *United States v. Felipe De Jesus Corona-Verbena*, 91-CR-446(TUC)(FRZ).[7] In that trial, Martinez-Martinez was questioned regarding his first flight to Colombia, and the details regarding his purported role in arranging cocaine shipments from Colombia to Mexico. Though, in his declaration, Martinez-Martinez identified "Carlos Uribe" as the sole Colombian point of contact for his negotiations for the alleged transportation of cocaine from Colombia to Mexico, he did not even mention Uribe's name in his sworn testimony on direct examination. *See* Exhibit D at 1-103. In fact, from Martinez-Martinez's direct testimony, it appears that the alleged deal

[7] A copy of Mr. Martinez-Martinez's testimony in *United States v. Felipe De Jesus Corona-Verbena*, 91-CR-446(TUC)(FRZ) is attached hereto as Exhibit D.

was arranged with Alberto Araujo, a Mexican working for the cartel in Colombia, and a Colombian known to him as Lucas Bettencourt. *Id.* at 17-23. On cross-examination, in response to a question by defense counsel, Martinez-Martinez claimed to have met "Carlos Uribe" and picked up the cocaine from him, but denied that he had made the arrangements to purchase cocaine from Uribe. *Id.* at 120. Martinez-Martinez further testified that it was Araujo who had made the specific arrangements for the alleged purchase of cocaine, and that Martinez-Martinez was only present when some of the arrangements were made. *Id.* Martinez-Martinez testified that he himself was only physically present for two such cocaine flights. *Id.* at 17-29, 124, 135. He further testified that he did not coordinate all of the approximately 160 flights. *Id.* at 136.

The U.S. government was well aware of Mr. Martinez-Martinez's 2006 testimony in 2015 when it asked the government of Mexico to rely on his declaration in determining whether to grant Mr. Guzman's extradition to the SDCA. AUSA Robinson was present in court for Martinez-Martinez's testimony in 2006, where Martinez-Martinez identified him as "the attorney with whom [he] began cooperating." *Id.* at 103. Nonetheless, the United States not only failed to provide Martinez-Martinez's trial testimony to the Mexican government, but also failed to alert the Mexican government to the contradictions between Martinez-Martinez's earlier testimony and his

declaration which, if known, would cast doubt on the veracity of his affidavit. The United States government further hid from Mexico that Martinez-Martinez was an admitted cocaine abuser, who had acknowledged a daily habit of four grams of cocaine a day for the fifteen years preceding his arrest. *Id*. at 126-127. This was another important fact that the Mexican government should have been made aware of when deciding whether to rely on Martinez-Martinez's declaration in connection with Mr. Guzman's extradition.

After his arrest, Mr. Guzman, through his attorneys in Mexico, challenged the legality of the United States' extradition requests. Mr. Guzman filed actions for *amparo* proceedings (akin to American habeas corpus proceedings), which were denied on October 20, 2016. At some point after his arrest, Mr. Guzman was transferred to a prison near Juarez. He appealed the denial of his *amparos*. On January 19, 2017, while Mr. Guzman was imprisoned in Juarez and his attorney was in the same city preparing to visit him, the Fifth Collegiate Panel Court for Criminal Matters in Mexico City "heard" and denied Mr. Guzman's appeal of the extradition orders. That same day, suddenly and without warning to Mr. Guzman's attorneys, Mr. Guzman was airlifted across the border to the United States.

On the same date, January 19, 2017, the United States government, through Diplomatic Note Number 17-0245, requested that the Mexican government consent to an "exception" to the rule of specialty ("Request for

Exception").[8] According to the United States government, at the time Mr. Guzman was spirited out of Mexico, he was in custody for the charges for which extradition had been granted—the charges pending in the SDCA and WDTX. Despite the U.S. government's confirmation to the Mexican government that Mr. Guzman was being held only for the charges pending in California and Texas, the plane carrying Mr. Guzman headed straight for Long Island and the EDNY.

The Request for Exception apparently included several sworn statements from various American law enforcement officials describing, in detail, the charges pending against Mr. Guzman in the EDNY as well as a history of the investigation of Mr. Guzman in this District.[9] Though the defense has not seen the Request for Exception or the affidavits attached to it, experience tells us that these documents likely consist of hundreds of

[8] The government has refused to provide the Request for Exception. The only documents relevant to extradition that the government has provided to the defense are the Consent Agreement and the Draft Translation. The Consent Agreement purports to quote the Request for Exception, which describes Mr. Guzman's custody status on January 19, 2017.

[9] The government describes the Request for Exception as including: "(1) an affidavit from an Assistant United States Attorney ("AUSA"); (2) an affidavit from a law enforcement officer; (3) affidavits from cooperating witnesses; (4) the text of pertinent United States statutes; (5) certified copies of the indictment and arrest warrant for the defendant; and (6) documentary evidence, such as seizure photographs and lab reports, submitted as exhibits to the law enforcement agent affidavit." *See* Dkt. No. 84 at n.1.

pages. As an example, the SDCA and WDTX extradition requests contain hundreds of pages and each petition is more than five inches thick when printed on standard paper.

In response to the Request for Exception, the Mexican Office of the Secretary of Foreign Affairs asked the Mexican Attorney General's Office to issue an opinion concerning the Request for Exception. *See* Exhibit A at Bates No. 471. Miraculously, this request for a legal opinion was also allegedly made on January 19, 2017, perhaps as Mr. Guzman was 30,000 feet in the air, flying farther and farther away from San Diego and El Paso. Even more miraculously, the Mexican Attorney General's Office purportedly issued its opinion concerning the Request for Exception *on the same day*. *Id.*

The Redacted Consent Agreement itself, numbering eighty-seven pages in its original Spanish iteration, is also dated January 19, 2017.[10] In the Redacted Consent Agreement, the Mexican government conceded that the

[10] The tale of all that occurred on January 19, 2017, strains credulity. The governments of the United States and Mexico would have the Court and Mr. Guzman believe that the Request for Exception (an inches-thick document of hundreds of pages) was presented to the Mexican government on January 19 and that, on the same day, the Mexican Foreign Ministry, through an official letter, asked for and received the Mexican Attorney General's Office's opinion on the Request and that the Mexican Foreign Ministry then completed and signed the eighty-seven page Consent Agreement. Such a sequence of events is unlikely. Furthermore, Mr. Guzman requested the extradition documents during his first court appearance before Magistrate Judge Orenstein on January 20, 2017. The government resisted providing the Consent Agreement to the defense until the Court's order of February 11, 2017. The government finally disclosed the Consent Agreement on February 14, 2017.

charges contained in the Request for Exception were "different from those for which the International Extradition was granted." Nevertheless, according to the face of the Redacted Consent Agreement, the Mexican Office of Foreign Affairs agreed to the United States government's request for an exception to the rule of specialty.

ARGUMENT

I. The Court should dismiss the Indictment because this prosecution prosecution violates the Extradition Treaty between the United States and Mexico.

A. Legal background

"The 'doctrine of specialty' prohibits prosecution of a defendant for a crime other than the crime for which he has been extradited." *United States v. Yousef*, 327 F.3d 56, 115 (2d Cir. 2003) (quoting *United States v. Alvarez–Machain*, 504 U.S. 655, 659 (1992)). This doctrine also requires the receiving country, here the United States, to adhere to any limitations placed on prosecution by the surrendering country, here Mexico. *See United States v. Cuevas*, 496 F.3d 256, 262 (2d Cir. 2007).

Courts "look to the language of the applicable treaty to determine the protection an extradited person is afforded under the doctrine of specialty." *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994). Under Second Circuit law, whether an extradition treaty permits prosecution for a certain crime or imposes a certain condition specified in the extradition request "is a

matter for the extraditing country to determine." *United States v. Campbell*, 300 F.3d 202, 209 (2d Cir. 2002) (citation omitted).

Further, in reviewing an extradition agreement for potential violations, courts may consider whether the surrendering country has objected or would object to what actually took place after extradition. *See*, *e.g.*, *Fiocconi v. Attorney General*, 462 F.2d 475, 481 (2d Cir. 1972). Where no record of the extraditing nation's view exists or if the record is unclear, courts should look to the extradition decrees and any diplomatic correspondence to assess whether the extraditing country could have anticipated the event the defendant protests. *See United States v. Paroutian*, 299 F.2d 486, 491 (2d Cir. 1962) (noting that appropriate consideration under doctrine of specialty is whether extraditing country would consider acts for which the defendant was prosecuted as independent from those for which he was extradited).

B. This prosecution violates the Extradition Treaty.

The Extradition Treaty between the United States and Mexico contains a specific Rule-of-Specialty provision. *See* Extradition Treaty, U.S.-Mexico, art. 17(c), May 4, 1978, [1979] 31 U.S.T. 5059. It provides in relevant part:

> A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which the extradition has been granted nor be extradited by that Party to a third States unless … [t]he requested Party has given its consent to his

> detention, trial, punishment or extradition to a third State for an offense other than that for which extradition was granted.

Id.

Here, Mr. Guzman is indisputably being detained and prosecuted for offenses "other than that for which the extradition has been granted." He was extradited only for the charges currently pending in the SDCA and the WDTX. Extradition has never been granted for the charges he faces here in New York. Accordingly, this Court lacks personal jurisdiction over Mr. Guzman, *see, e.g.*, *United States v. Yousef*, 327 F.3d 56, 115 (2d Cir. 2003) (doctrine of specialty "limits a Court's personal jurisdiction over the defendant") (citation omitted), and the Indictment should be dismissed.

C. Mr. Guzman has standing to raise a violation of the Extradition Treaty.

1. Supreme Court precedent grants standing to extradited defendants to bring specialty and extradition treaty challenges.

"The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limits on its exercise." *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004) (internal quotation marks omitted).

The Supreme Court held that criminal defendants have standing to invoke the rule of specialty in the same case where the Court first recognized

the doctrine of specialty itself, *United States v. Rauscher*, 119 U.S. 407 (1886). That case is still the Supreme Court's only word on the subject, and no subsequent pronouncements from the Court have cast any doubt on the holding.

In *Rauscher*, Great Britain extradited the defendant, a second mate on an American vessel, so that he could be prosecuted for murder. Instead, the United States tried and convicted him on a charge of inflicting cruel and unusual punishment on the victim, a lesser included offense under United States law. *Id.* at 409–11. The applicable extradition treaty, however, listed murder as an extraditable offense but did not list the crime of which he was convicted. *Id.* Though Great Britain did not officially object, the Court held that "a person who has been brought within the jurisdiction of the court, by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition . . . ." *Id.* at 430. The Court distinguished between the United States (where treaties are the law of the land equivalent to acts of a legislature) and other nations (where treaties are merely contracts between sovereigns). *Id.* at 418.

In Great Britain, matters of treaty enforcement at that time would have been handled by the Crown, but in the United States *Rauscher* contemplates a judicial remedy. Because of the status of extradition treaties under our

system of government, the rights described in the treaty are conferred on both the extradited individual and the extraditing government:

> [*A*] *treaty may also contain provisions which confer certain rights upon the citizens* or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and *which are capable of enforcement as between private parties in the courts of the country* . . . . The Constitution of the United States places such provisions as these in the same category as other laws of Congress, by its declaration that "This Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land." A treaty, then, is a law of the land, as an Act of Congress is, whenever its provisions prescribe a rule by which *the rights of the private citizen or subject may be determined.* And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Id. at 418–19 (emphasis added). Though the rights conferred under the treaty ultimately belong to the contracting nations, *Rauscher* makes clear that specialty rights are also conferred under the contract to the individuals who are the objects of the contract. "[I]t is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition." *Id.* at 422.

The *Rauscher* Court conceived of its holding as "a complete answer to the proposition that the rights of persons extradited under the treaty cannot be enforced by the judicial branch of the government, and that they can only appeal to the executive branches of the treaty governments for redress." *Id.* at 431.

2. After *Rauscher*, at least four Circuits have held that a defendant may raise a specialty claim.

Following *Rauscher*, the Tenth Circuit has held that a defendant may raise a specialty claim. *See United States v. Levy*, 905 F.2d 326, 328 n.1 (10th Cir. 1990) (relying on *Rauscher* for the proposition that defendant had standing to raise a specialty challenge). The Eighth, Ninth, and Eleventh Circuits have similarly held that a defendant can raise a specialty challenge, but only to the extent that the extraditing country could raise it. *See, e.g.*, *United States v. Thirion*, 813 F.2d 146, 151 n.5 (8th Cir. 1987) ("The government's argument that [defendant] lacked standing to complain of a violation of the treaty is without merit."); *Andonian*, *supra*, 29 F.3d at 1435 ("An extradited person may raise whatever objections the extraditing country is entitled to raise.") (citations omitted); *United States v. Puentes*, 50 F.3d 1567, 1572 (11th Cir. 1995) ("We hold that a criminal defendant has standing to allege a violation of the principle of specialty. We limit, however,

the defendant's challenges under the principle of specialty to only those objections that the rendering country might have brought.").

At least three circuits have decided this question in the other direction. The Third Circuit held that only the parties to the treaty may raise a specialty issue. *See United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 168 (3d Cir. 1997) ("Had [petitioner] brought suit invoking the [extradition] treaty or the Rule of Specialty, she would lack standing.") (footnote omitted). So, too, has the Seventh Circuit. *See Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990) ("It is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved.") (citation omitted). And the Second Circuit held last week in *Barinas* that an extradited individual "lacks standing to complain of noncompliance with an extradition treaty unless the treaty [contains] language indicating that the intent of the treaty drafters was that such benefits could be vindicated through private enforcement." *Barinas*, 2017 WL 3197535, at *5 (internal quotation marks and citations omitted).

Mr. Guzman recognizes that *Barinas* appears to deprive him of "prudential standing" to bring this motion. *Id.* Nevertheless, we respectfully submit that *Barinas* was wrongly decided, is inconsistent with *Rauscher*, and that Mr. Guzman does have standing to invoke the specialty clause of the

Extradition Treaty. *See also Restatement (Third) of Foreign Relations Law of the United States* § 477, comment *b* (June 2017 update) ("Both the person extradited and the extraditing state are beneficiaries of the [specialty] doctrine. While the case law in the United States and elsewhere is not consistent, it appears that the person extradited has standing to raise the issue of variance between the extradition request and the indictment by motion during or in advance of his trial.").

II. The Court should dismiss the Indictment despite the "Consent" procured from Mexico.

As noted, the U.S.-Mexico Extradition Treaty prohibits detention, prosecution, and punishment for offenses beyond those for which extradition was granted unless Mexico has "given its consent." Here, the government contends that Mexico has given such consent, relying on the Redacted Consent Agreement. That document does not preclude the granting of this motion.

First, though the Redacted Consent Agreement is lengthy and detailed, it does not indicate that Mexico ever consented to the criminal forfeiture allegations contained in the Indictment. Indeed, it does not appear that Mexico was even *asked* to consent to the inclusion of those allegations against Mr. Guzman. Accordingly and notwithstanding Mexico's purported consent,

the forfeiture allegations violate the Rule of Specialty and should be dismissed.

Second, with respect to the remaining counts in the Indictment, the Second Circuit has suggested an American court need not accept a foreign nation's agreement to extradite (or to waive the rule of specialty) as conclusive on its face. In *United States v. Bout*, 731 F.3d 233 (2d Cir. 2013), the Circuit addressed—on the merits—a defendant's contention that a Thai court's extradition decision was invalid because it was based on material mistakes of fact. *See id.* at 240. The Circuit's decision to resolve the issue on the merits indicates that, while American courts will not "second-guess" the wisdom of another country's decision to grant extradition or waive the Rule of Specialty, *see United States v. Garavito–Garcia*, 827 F.3d 242, 247 (2d Cir. 2016), they *will* review whether to give effect to the foreign nation's decision or waiver in light of traditional (and internationally recognized) principles, such as duress, fraud, and unconscionability. *See also Andonian*, *supra*, 29 F.3d at 1438 (considering whether doctrine of specialty was violated in light of defendant's "assert[ion] that the evidence presented to Uruguay" by the United States government, including a sworn declaration from a cooperating witness, was "false"); *United States v. Siriprechapong*, 181 F.R.D. 416, 420 (N.D. Cal. 1998) (granting discovery of document relating to extradition of defendant because it has the supervisory power to "examine claims of fraud,

bad faith and perjury . . ."). *Cf. Apple & Eve, LLC v. Yantain North Andre Juice Co.*, 610 F. Supp. 2d 226, 229 (E.D.N.Y 2009) (noting that while international arbitration agreements are generally enforced, a limited exception exists when "the arbitration clause itself is (1) subject to an internationally recognized defense such as duress, mistake, fraud, or waiver, or (2) contravenes fundamental policies of the forum state") (citations and quotation marks omitted).

Here, the Redacted Consent Agreement should not be given effect because (1) it appears to have been predicated on extradition grants procured based on materially false and misleading assertions and omissions, and (2) the United States is holding Mr. Guzman under cruel and inhumane conditions of solitary confinement, made even more harsh by the so-called "Special Administrative Measures," which Mexico has not agreed to, and which vitiate the validity of the Consent Agreement.

A. Mexico did not consent to the forfeiture allegations.

The Fourth Superseding Indictment includes four separate sets of allegations seeking criminal forfeiture. Indictment ¶¶ 46–53. There is no evidence, however, that Mr. Guzman was extradited to face forfeiture charges or that Mexico consented to the United States pursuing forfeiture against him. Accordingly, since criminal forfeiture amounts to prosecution and punishment for a separate "offense" within the meaning of the U.S.-Mexico

Extradition Treaty, Mr. Guzman is being detained, tried, and punished for offenses "other than that for which the extradition has been granted," in violation of the Treaty's Rule of Specialty. Thus, the forfeiture allegations should be dismissed.

Judge Weinstein's decision in *United States v. Jurado–Rodriguez*, 907 F. Supp. 568 (E.D.N.Y. 1995), is on point. There, the defendant was extradited to the United States from Luxembourg on drug and money laundering charges. But the extradition request did not contain any forfeiture allegations. The United States nevertheless included forfeiture allegations in the indictment. The defendant moved to dismiss, arguing that the pursuit of criminal forfeiture violated the Rule-of-Specialty provision contained in the United States-Luxembourg Extradition Treaty. That provision stated in relevant part that an extradited person "shall not be tried or punished in the country to which his extradition has been granted … for a crime or offence not provided for by the present convention. . . ." *Id.* at 573.

The court conducted an evidentiary hearing at which experts in international criminal law testified. One of the experts, Professor Cherif Bassiouni, a "world renowned scholar of international law" and extradition, testified that the forfeiture allegations against the defendant were "unlawful" under the applicable treaty because they were not included in the extradition request. *Id.* at 574, 575. "The proper procedure under such circumstances is,

he suggested, to request a supplemental extradition decree from Luxembourg. Such supplemental requests are, he pointed out, routinely made after physical extradition." *Id.* at 575. Judge Weinstein summarized Professor Bassiouni's testimony this way:

> Given that criminal forfeiture is, in his view, a separate crime for purposes of the extradition decree, requiring a separate hearing in the United States, it should be enumerated in any extradition request. Professor Bassiouni noted that the United States Department of State, Office of International Affairs, routinely requests a separate charge for forfeiture matters in the extradition requests from foreign countries. He concluded that it was necessary for the United States to make a supplemental request to Luxembourg based on the specific forfeiture charges in the indictment before the forfeiture charges … could be proven.

Id. at 575–76. Though the court did not rule definitively on the issue, it indicated that it was "dubious" about the propriety of the United States proceeding on the forfeiture allegations without Luxembourg's consent. *Id.* at 581.

The same analysis applies here. Mexico and the United States likely understood the term "offenses" in the Extradition Treaty to include charges of criminal forfeiture. And since the United States Department of State "routinely requests a separate charge for forfeiture matters in the extradition requests from foreign countries," *id.* at 575, it should have done so here. As there is no evidence that the United States ever obtained—or even sought—

permission from Mexico to pursue the criminal forfeiture charges against Mr. Guzman, the forfeiture allegations should be dismissed.

B. The Consent Agreement should not be given effect because it was procured through material misrepresentations and omissions.

The Consent Agreement should also not be given effect because it appears to have been procured based on information that the United States knew or should have known was materially false, misleading, and incomplete.

As discussed earlier, the United States provided Mexico with witness declarations in support of its petitions to extradite Mr. Guzman to face the Texas and California indictments. While the defense has been denied discovery of what information was provided to Mexico in connection with the Request for Exception, similar declarations were presumably provided to, and relied upon by, Mexico in connection with that request.

The limited information the defense has been able to gather indicates that the declarations contained false and misleading information, as the United States government knew or should have known. The 2012 declaration of convicted narco-trafficker Fierro Mendez, for example, averred that Fierro Mendez had met Mr. Guzman personally, and had seen him negotiate a firearms deal. But in 2010, Fierro Mendez testified at a trial as a cooperating witness for the government, and swore he "never met" Mr. Guzman. There is no indication that Mexico was ever made aware of this glaring contradiction.

Nor did the United States apparently ever inform Mexico of other contradictions between Fierro Mendez's 2012 declaration and his earlier sworn trial testimony. He claimed at trial, for example, that he did not begin working for the cartel until he left the police force in April 2007. But in his declaration provided to Mexico, he claimed that he began working for the cartel two years earlier, in 2005. He also claimed, contrary to his trial testimony, that he continued to work as a police officer until 2008. Again, there is no evidence that Mexico was advised of these discrepancies.

Further, Fierro Mendez testified at trial that he lied to United States officials about whether he had been the victim of an accidental shooting that disabled him and forced him to resign from the Mexican police force. As far as we can tell, Mexico was never alerted to these lies.

Similarly, the 2015 affidavit of Martinez-Martinez, provided to the Mexican government in support of the California extradition request contained false and misleading statements. Martinez-Martinez swore in his affidavit that he arranged a shipment of cocaine with a Colombian man named Carlos Uribe in 1988. However, nine years earlier, Martinez-Martinez had testified under oath that another Mexican, Alberto Araujo, had arranged this shipment with a man named Lucas Bettencourt and that his (Martinez-Martinez's) role was to accompany the shipment.

Martinez-Martinez's affidavit is written to give the impression that he was personally involved with 160 drug shipments from Colombia to Mexico. However, during his trial testimony, taken years before he swore to the affidavit, he stated that he was only physically present on two flights and that he did not participate in arranging each of the alleged 160 flights. Furthermore, the affidavit makes no mention of Martinez-Martinez's decade and a half abuse of cocaine, which only ended upon his arrest.

The information relevant to the veracity of the "witnesses" who signed affidavits that was kept from Mexico is extremely important. Had it been disclosed, this information would likely have affected not only Mexico's decision to grant Mr. Guzman's extradition to California and Texas, but also its decision to waive the Rule of Specialty.

Moreover, there is no reason to assume that Fierro Mendez and Martinez-Martinez were the only witnesses who gave false and inconsistent testimony in support of Mr. Guzman's extradition and prosecution in this District. Since the defense has not been allowed access to any of the diplomatic correspondence, the government should be required to demonstrate (at least in camera) that the other information provided to Mexico was truthful and accurate. And we renew our request that the government be required to produce to the defense an unredacted version of the Consent Agreement, and the documents submitted to Mexico that led to it.

In summary, the Consent Agreement relied upon by the government appears to have been procured through materially false and misleading information. As a consequence, the Consent Agreement should not be accepted as valid.

C. The Consent Agreement should not be given effect because of the continuing violation of Mr. Guzman's basic human rights.

Finally, the Court should decline to give effect to the Consent Agreement because the extraordinarily harsh conditions of Mr. Guzman's confinement violate his basic human rights, were apparently never disclosed to Mexico, and vitiate the Consent Agreement.

There is no evidence that Mexico was made aware that Mr. Guzman would be detained under extraordinarily harsh and inhumane conditions of solitary confinement, coupled with restrictive Special Administrative Measures. These conditions, as applied to Mr. Guzman, are tantamount to torture. Had Mexico been advised of these conditions, it almost certainly would not have consented to Mr. Guzman's detention and prosecution in this District. Thus, the conditions of Mr. Guzman's confinement, under which he has no access to fresh air, has been cut off from any communication with his wife (she has still not received the letter he sent more than a month ago), and thus far has been allowed no contact with any member of his own family, render the Consent Agreement ineffective and unenforceable.

As the Court is aware, Mr. Guzman has been held in isolation in a Special Housing Unit ("SHU") at the Metropolitan Correctional Center since his arrival in the United States on January 19, 2017. His only outside contact with human beings is with his legal team. The Justice Department's Office of the Inspector General ("OIG") recently deemed this kind of detention to be solitary confinement, notwithstanding the Bureau of Prison's ("BOP") euphemistic use of terminology such as "restrictive housing" to describe its isolation practices. Office of the Inspector General, U.S. Dep't of Justice, *Review of the Federal Bureau of Prisons' Use of Restrictive Housing for Inmates with Mental Illness* 15 (2017), https://oig.justice.gov/reports/2017/e1705.pdf ["OIG Report"]. Indeed, the former BOP Director and the former Attorney General have both acknowledged that the Bureau employs solitary confinement in its facilities. *Id.* at 15–16.

The profound and lasting damage wrought by solitary confinement is extensively documented. *See* Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime & Just. 441, 475 (2006) ("[R]esearch on effects of solitary confinement has produced a massive body of data documenting serious adverse health effects."). The OIG report recognized that confinement in units like the SHU, "even for short periods of time, can cause psychological

harm and significant adverse effects on … inmates' mental health," including "anxiety, depression, anger, cognitive disturbances, perceptual disorders, obsessive thoughts, paranoia, and psychosis—some of which may be long lasting." OIG Report at 1 (citation omitted); *see also Reassessing Solitary Confinement: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 75 (2012) (statement of Prof. Craig Haney) ("[T]he consequences of … long-term solitary confinement are truly extreme. Serious forms of mental illness can result from these experiences."). The extreme isolation in the SHU causes "many" individuals to "come out of these units damaged and functionally disabled." OIG Report at 26 (citation omitted); Supreme Court Fiscal Year 2016 Budget, C-SPAN (Mar. 23, 2015), http://www.c-span.org/video/?324970-1/supreme-court-budget-fiscal-year-2016&live (Testimony of Anthony M. Kennedy, Associate Justice, Supreme Court of the United States) ("Solitary confinement literally drives men mad."). "The BOP's own policy also recognizes that 'an inmate's mental health may deteriorate during restrictive housing placement.'" OIG Report at 1 (quoting U.S. Dep't of Justice, Bureau of Prisons Program Statement No. 5310.16 (May 1, 2014)).

So grave are the effects of solitary confinement on detainees that the OIG report quoted a psychologist at a BOP facility concluding that it is "a form of torture on some level." OIG Report at 21. This conclusion has been echoed by,

among others, the United Nations Special Rapporteur on Torture, who stated that "[c]onsidering the severe mental pain or suffering solitary confinement may cause, it can amount to torture," particularly when used "during pre-trial detention, indefinitely or for a prolonged period"—as it has been in Mr. Guzman's case. *Solitary Confinement Should be Banned in Most Cases, UN Expert Says*, United Nations News Centre (Oct. 18, 2011), http://www.un.org/apps/news/story.asp?NewsID=40097#.WXDzTYQrKHt. The Mexican Government's Consent did not contemplate that Mr. Guzman would be subject to long-term solitary confinement that is tantamount to torture. Had Mexico been informed of this harsh confinement, it almost certainly would not have agreed to Mr. Guzman's detention and prosecution on the current charges in this District. *Cf.* Sadhbh Walshe, *Britain's Double Standard on Extradition to US Prison Abuse*, The Guardian (Nov. 8, 2012), http://www.guardian.co.uk/commentisfree/2012/nov/08/britain-double-standard-extradition-us-prison-abuse (explaining that Britain's Home Secretary denied extradition of a man accused of hacking into the Pentagon's computer system, after concluding that, because the accused has Asperger's syndrome, extraditing him to America "where he would face up to 70 years of isolation in a maximum security prison, 'would give rise to such a high risk of him ending his life that the decision to extradite would be incompatible with

[his] human rights'"). Accordingly, the Consent Agreement should not be given effect.

CONCLUSION

For these reasons, the Court should dismiss the Fourth Superseding Indictment and grant any other relief that may be just and proper.

Respectfully submitted,

/s/

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