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Torture-tainted extraditions undermine treaty obligations

David Sloss is a professor of law at Santa Clara University.



A three-judge panel of the 9th U.S. Circuit Court of Appeals recently upheld a lower court decision authorizing the government to extradite Jose Luis Munoz Santos to Mexico. Munoz's attorneys have petitioned for rehearing. *Santos v. Thomas*, 12-56506 (filed March 9, 2015). The 9th Circuit should grant the petition for

rehearing en banc because the magistrate in the extradition proceeding relied on evidence obtained by torture as the primary basis for his determination that charges against Munoz were supported by probable cause.

Numerous studies conducted by leading criminologists, psychologists and other social scientists demonstrate that testimony obtained by torture is not reliable. To support a finding of probable cause, judges must determine - implicitly or explicitly - that the evidence against the accused is reliable. A finding of probable cause based on torture-tainted testimony is fundamentally flawed because testimony obtained by torturing witnesses is unreliable.

In the extradition proceeding against Munoz, the magistrate relied heavily on statements from two key witnesses, Hurtado and Rosas, as the primary basis for his finding of probable cause. Munoz's attorneys attempted to introduce evidence showing that Hurtado and Rosas both provided their incriminating statements against Munoz after being tortured by Mexican police officers. The magistrate admitted the statements by Hurtado and Rosas, but refused to admit the evidence that both statements were obtained by torture. The magistrate did not even attempt to determine whether the evidence of torture was credible; he simply refused to consider the evidence at all. In a case where the main testimony against the accused was allegedly obtained by torture, and the torture allegations are not frivolous, the judge cannot make a well-reasoned probable cause determination without inquiring whether the evidence of torture is itself credible.

The stakes in Munoz's case are much greater than the plight of one individual. The United States is party to the UN Convention Against Torture, the primary international treaty giving effect to the universal moral condemnation of torture. Article 15 provides: "Each State Party shall 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." The extradition proceeding against Munoz was clearly a "proceeding" within the meaning of Article 15. Statements allegedly made as a result of torture were admitted as evidence in that proceeding. By admitting those statements without considering the evidence of torture, the magistrate invited questions about the sincerity of the United States' pledge to execute its treaty obligation in good faith. This country squanders its moral authority in the human rights field if we do not adhere to our own promise to adopt a zero tolerance policy with respect to torture.

To help promote compliance with Article 15 and reinforce the global ban on torture, the 9th Circuit should ensure that some judicial officer conducts an inquiry to determine whether the statements against Munoz were tainted by torture. If so, the statements should be deemed inadmissible in the extradition proceeding. In short, the Munoz case provides an excellent opportunity for the 9th Circuit to provide guidance to district judges and magistrates about how to handle future extradition cases

Questions and Comments

NEWS RULINGS VERDICTS

Wednesday, May 27, 2015



California Supreme Court Court mulls fix for estate uncertainty

The state Supreme Court appeared poised Tuesday to alter the rulebook when it comes to interpreting wills.

U.S. Supreme Court U.S. Supreme Court rejects Cisco's patent infringement defense

Cisco Systems Inc. can be held liable for inducing other entities to infringe a patent held by Commil USA LLC, even though the networking giant held a "good-faith" belief that the patent was invalid, the U.S. Supreme Court ruled Tuesday.

Intellectual Property Defense won't fly in patent scuffles

On Tuesday, the U.S. Supreme Court held that a good faith belief that a patent is invalid is not a defense to a claim of induced infringement. By **Ben M. Davidson**

California Supreme Court Company, insurer battle over 1872 law in coverage dispute

An insurance company battled its client over the meaning of a 19th century law at oral argument here on Tuesday before the state Supreme Court.

Obituaries

Karl A. Limbach 1932 - 2015

Karl A. Limbach, a noted intellectual property lawyer, has died at age 83.

Litigation

Golden State Warriors ask judge to dismiss ticket reseller's antitrust suit

Attorneys representing the Golden State Warriors have filed a motion to dismiss the lawsuit brought by StubHub Inc. against the team and Ticketmaster LLC, arguing that the team's tickets do not form a relevant antitrust market.

Corporate

Facilities management company names chief legal officer

San Diego-based facilities management company Pristine Environments Inc. announced the hiring of Michael O'Sullivan as chief legal officer on

implicating Article 15 of the Torture Convention. By getting this case right, the 9th Circuit can send a powerful signal to the world that the United States will play a leadership role in the global struggle to eradicate torture.

A finding of probable cause based on torture-tainted testimony is fundamentally flawed because testimony obtained by torturing witnesses is unreliable.

Two counter-arguments merit consideration. First, one could argue, it is the responsibility of the political branches, not the courts, to convey signals to the world about U.S. compliance with international norms. Second, when the United States ratified the Torture Convention, it adopted a declaration stating that Articles 1-16 are "not self-executing." That declaration reinforces the point that implementation of Article 15 is a legislative function, not a judicial function.

These arguments overlook the fact that Congress has already decided, in 18 U.S.C. Section 3184, that judges and magistrates in extradition proceedings must determine whether "the evidence [against the accused is] sufficient to sustain the charge under the provisions of the proper treaty or convention." In evaluating the sufficiency of the evidence against the accused, judges and magistrates necessarily make judgments about the reliability of that evidence. If there are non-frivolous allegations that testimony has been obtained by torture, judges and magistrates cannot determine whether that testimony is "sufficient to sustain the charge" without examining the torture allegations. In sum, by exercising their authority under Section 3184, judges and magistrates make decisions implicating U.S. compliance with Article 15 whenever torture-tainted evidence is introduced in extradition proceedings. Unless Congress directs otherwise, judges and magistrates should exercise that authority in a manner that is respectful of U.S. treaty commitments.

In Australia, Canada and the United Kingdom, all treaties are non-self-executing. Nevertheless, judges in all three countries routinely apply the "presumption of conformity" - a canon of statutory interpretation directing judges to interpret statutes in a manner that is consistent with the nation's international obligations. The 9th Circuit should direct judges and magistrates to apply a similar presumption whenever extradition cases under Section 3184 implicate concerns related to Article 15 of the Torture Convention. Failure to do so would undermine this country's obligation to abide by Article 15 and the international community's commitment to root out the scourge of torture in all its dimensions.

David Sloss is a professor of law at Santa Clara University.

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Saturday.

California Supreme Court State Supreme Court hears case on the reach of CEQA for university expansion projects

Some justices pepper the attorney for the California State University with skeptical questions over the university's contention that it lacks the money to remedy the traffic impacts of its planned San Diego campus expansion.

Intellectual Property Oracle-Google fallout will be far-reaching

The fundamental question facing the high court as it decides the pending petition for writ of certiorari is one that affects all walks of life. By **Charles Duan**

Health Care & Hospital Law Take a closer look at physician-assisted suicide bill

Senate Bill 128 deserves a closer and more cold-eyed look than most seem to be giving it - a look that ought to be divorced from emotion and sad stories. By **Dan Lawton**

Criminal Taxpayers may avoid paying for sex change

Due to an unexpected parole recommendation, taxpayers may avoid paying for sex change operation for a transgender prisoner. By **Mark Pulliam**

International Torture-tainted extraditions undermine treaty obligations

The 9th Circuit should grant the petition for rehearing en banc in a recent case because the magistrate in the extradition proceeding relied on evidence obtained by torture. By **David Sloss**

Judicial Profile Robert S. Harrison

Superior Court Commissioner Los Angeles County (Stanley Mosk Courthouse)

Government Former White House counsel, now at Latham, is a government believer

As co-chair of the white collar and investigations practice at Latham & Watkins LLP, Ruemmler is guiding clients through crisis — and sometimes delivering unpleasant news.