UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

CHRISTIAN DAVID,

Petitioner/Appellant,

v. Case No. 85-5118

U. S. DEPARTMENT OF STATE,

Respondent/Appellee

OPPOSITION TO RESPONDENT/APPELLEE'S EMERGENCY MOTION TO DISMISS APPEAL OR AFFIRM SUMMARILY ORDER OF THE DISTRICT COURT DENYING HABEAS CORPUS

Petitioner/Appellant respectfully submits that it would be improper under the General Rules of this Court to grant Respondent/Appellee's emergency motion to dismiss appeal for the reason that said motion does not state sufficient grounds under General Rule 6(j) to support emergency action by the Court. Respondent/Appellee makes no claim in its motion that it will suffer irreparable harm if relief is denied. Petitioner/Appellant is currently in the custody of federal authorities and will remain in custody under current circumstances, and will be susceptible to extradition if that action is ultimately found to be proper. Time delay for the purpose of providing David due process to pursue all legal rights available to him does not constitute irreparable harm to the government, rather it is in the interest of the government to see that due process is upheld.

French authorities will suffer no harm pending the outcome of this appeal because they have stated that they are free to try David when they receive him. Respondent/Appellee makes no

argument as to the public interest involved, and David has previously stated in his motion for an emergency order circumstances which tilt the matter of public interest to his side.

Petitioner/Appellant relies on new grounds and new legal arguments in his petition for habeas corpus relief as more fully developed in his reply to Respondent's answer to order to show cause, a copy of which is attached hereto and incorporated herein. David's new arguments are substantial and are not susceptible to emergency dismissal without the opportunity for submitting a brief of the issues on appeal.

Petitioner/Appellant is entitled to seven days to file a response in opposition to a motion for summary affirmance pursuant to Rule 6(b) of the General Rules of this Court. Lead counsel for David has been required to travel to New York City on behalf of his client and he needs the time provided in the rule to prepare his opposition to the motion for summary affirmance.

WHEREFORE the Petitioner/Appellant respectfully urges the Court to deny the motion for emergency dismissal of the appeal and to take the motion for summary affirmation under advisement pending filing of Petitioner/Appellant's opposition thereto within seven days.

Respectfully submitted,

James H. Lesar
Rensterwald, Alcorn & Bowman, P.C.
Counsel for Christian David
1000 Wilson Blvd., Suite 900
Arlington, VA 22209
(703) 276-9297

CERTIFICATE OF SERVICE

The foregoing opposition to Respondent/Appellee's emergency motion to dismiss appeal was handdelivered to John C. Martin, Esq. Assistant United States Attorney at his office, Room 6400, United States Courthouse, Washington, D.C. this January 23, 1985.

James H. Lesar

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RECEIVED

JAN 22 9 10 AM '85

JAMES F. DAVEY, CLERK
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

CHRISTIAN DAVID,

Petitioner,

v.

U.S. DEPARTMENT OF STATE,

Respondent

Civil Action No. 84-3543

REPLY TO RESPONDENT'S ANSWER AND
ANSWER TO ORDER TO SHOW CAUSE

Petitioner, by and through counsel, replies to respondent's Return and Answer to Order to Show Cause as follows:

ARGUMENT

I. JURISDICTION:

This Court has jurisdiction to entertain this habeas corpus petition.

This Court has jurisdiction to hear this petition for habeas corpus pursuant to specific statutory authority of 28 U.S.C. 2241. Respondent's return raises only one argument in opposition to this Court's jurisdiction -- the effect of Shapiro v. Secretary of State, 162 U.S. App. D.C. 391 (1974). Respondent fails to

Mrs. Adams, Ethyl

address the specific jurisdictional authority in 28 U.S.C. 2241.

The Shapiro v. Secretary of State case must be distinguished from the case at hand, because Shapiro was not based on a petition for habeas corpus. The facts of Shapiro, as stated by the U.S. Court of Appeals for the D.C. Circuit, show that Shapiro "brought suit in the District of Columbia for preliminary and permanent injunction against either extradition or the action of the IRS." 162 U.S. App. D.C. 301, 194. A footnote to the opinion reveals that Shapiro had previously sought habeas corpus relief in the Southern District of New York in the case of Shapiro v. Ferrandina, 355 F. Supp. 563 (S.D.N.Y. 1973), but was unsuccessful. 162 U.S. App. D.C. 391, 393 n-1. Thus, Shapiro is not authority for this Court to reject jurisdiction of a petition for habeas corpus, and instead the Court should review the petition in light of the law relating to claims for habeas corpus relief in the setting of international extradition. Furthermore, petitioner also alleges jurisdiction under 28 U.S.C. 1361 (Mandamus), 1631 (All Writs), and 2201 (Declaratory Relief).

II. PETITIONER IS ENTITLED TO HABEAS CORPUS RELIEF

Respondent alleges that all of the arguments contained in David's amended petition were contained in his 1975 petition and that therefore the instant case should be dismissed.

Respondent is not correct, as David has raised five new issues:

1) the running of the French statute of limitations

2) expiration of the arrest warrant

3) non-compliance with Article IV of the 1909 convention

4) constructive extradition

5) ineffective assistance of counsel

Petitioner has also developed new evidence on the question of identification, discussed infra. Furthermore, petitioner alleges a major change in circumstance in that France is now ruled by the left-wing Socialist Party, and Communists now occupy positions in the Cabinet and other high places in the government. The Mitterand Government is acutely aware that David, as a member of SAC, a special unit of the French Secret Service, engaged in numerous and often successful political clandestine activities designed to undermine the Socialist and Communist Parties. (See Petitioner's Consolidated Petition for Habeas Corpus Relief at 5-12.) David is prepared to provide substantiation on this issue, and to demonstrate that "the requisition for his surrender has, in fact, been made with a view to ... punish him for an offense of a political character." (Article IV of the 1970 Supplementary Convention.)

An additional reason why habeas corpus relief is available is that David did not receive a full and fair hearing in connection with his 1975 petition in that he did not receive effective assistance of counsel. The District Court in Illinois did not appoint a translator to assist him, nor did his attorneys

secure one for the purpose of assisting with the habeas corpus procedings.* Because of this he was unable effectively to participate in the procedings. This specifically resulted in his inability to present evidence as to the political nature of the extradition by France. Thus, no court has ever heard evidence regarding the political nature of the extradition.

*During an interview with the petitioner on January 19, 1985, he advised the undersigned counsel that his attorneys did utilize a Spanish translator to explain to him the contract retaining them to represent him.

III. U.S. - FRENCH TREATY

A. David's Extradition is Barred by the French Statute of Limitations

Article IV of the 1970 Supplementary Convention amended Article VI of the 1909 Convention to read, in pertinent part:

> Extradition shall not be granted in any of the following circumstances:
>
> * * *
>
> 3. When the person claimed has, according to the law of either the requesting or requested Party, become immune by the reason of lapse of time from prosecution or punishment.

The Respondent concedes that the French statute of limitations for murder and attempted murder is ten (10) years. (Article 7 du Code de procedure penale; Exhibit 5 to Return Answer to Order to Show Cause) Furthermore, the government of France concedes that the last procedural act in this case took place on November 10, 1972, when the warrant of arrest was issued. The Respondent contends, however, that the statute of limitations was tolled while David was serving his sentence in the United States, citing a decision of the French Court of Cassation dated June 2, 1964.

It should first be noted that case law plays a relatively unimportant role in a civil law country, such as France, where the Code is considered the definitive source of law. The Respondent has not cited a Code section for its proposition and a single Court of Cassation case is generally not considered as binding precedent. Moreover, Petitioner has

located the case cited by the Respondent and has found that it concerns a completely different statute of limitations than the one at issue in this case.

In case No. 189, Court of Cassation, June 2, 1964, Petitioner Georges Klapka had appealed the decision of a lower court approving his extradition from France to Greece. Klapka had been convicted of two crimes in Greece in 1956, apparently in abstentia. From April 13 to October 1, 1960 and from July 24, 1961 to February 24, 1963, Klapka served time for another offense in an Italian prison. Klapka argued that his extradition was barred because Article 764 of the French Code of Criminal Procedure forbids the imposition of any criminal penalty initiated more than five years after the defendant's conviction becomes final. Klapka noted that five years had lapsed since his convictions in Greek court in 1956. The Court of Cassation rejected Klapka's argument, observing that it was impossible for the Greek court to initiate punishment for the Athenian crimes while Klapka was serving time in Italy. Accordingly, the court held that the statute of limitations set out in Article 764 was tolled while Klapka was in prison in Italy. The present case does not involve Article 764, but Article 7 instead. Article 764 deals with the passage of time between conviction and imposition of sentence. Article 7 concerns the lapse of time subsequent to the last "procedural act." (See Exhibit 5 to Return and Answer to Order to Show Cause) In the case of Klapka, it was clearly impossible for the Greek government to have initiated its punishment while Klapka was in an Italian prison. By contrast, no such impossibility prevented the French government

from taking action against David. Since French law provides that a defendant can be tried in absentia (see Article 320, Code of Criminal Procedure), nothing prevented France from taking action against David during the ten year period between 1972 and 1982. Consequently, the Klapka decision has no applicability to this case and the statute of limitations has run, precluding the extradition of David pursuant to Article IV of the 1970 Supplementary Convention.

B. Respondents Have Failed to Establish Compliance with Article IV of the 1909 Convention.

Article IV of the 1909 Convention provides, in pertinent part:

> In both countries, the person provisionally arrested shall be released, unless within forty days from the date of arrest in France, or from the date of commitment in the United States, the requisition for surrender with the documentary proofs herein before prescribed be made as aforesaid by the diplomatic agent of the demanding government or, in his absence, by a consular officer thereof.

Petitioner's incarceration in the United States commenced on November 17, 1972. The Government of France was acutely aware of this fact as evidenced by the cable traffic obtained under the Freedom of Information Act. Accordingly, it was incumbent on the French Government to have served the necessary requisition for surrender and documentary proofs within the prescribed forty days. Respondent's Return and Answer to the Order to Show Cause failed to establish that the necessary papers were timely served.

Respondent cannot prevail until it has established compliance with all treaty requirements.

C. Respondent Seeks to Try or Punish Respondent for an Offense of a Political Character

Article VI of the French Extradition Treaty, as amended, provides in pertinent part:

> 4. If the offence for which the individual's extradition is requested is of a political character, or if he proves that the requisition is of a political character, or if he proves that the requisition for his surrender has, in fact been made with a view to try or punish him for an offense of a political character.

In the face of the express language of the treaty, which invites petitioner to prove that France is in fact seeking his extradition "with a view to try or punish him for an offense of a political character," respondent's argument that "the motives of the Government of France are beyond the scope of the Court's jurisdiction" is obviously unavailing. This Court clearly has jurisdiction to enforce compliance with the terms of the treaty.

Respondent notes that the offenses for which France seeks to extradite petitioner are Murder and Attempted Murder of Police officials in Paris, France. Petitioner alleges that these offenses were committed in connection with the Ben Barka affair. This establishes the political character of what otherwise would

be viewed as a nonpolitical offense, murder.

Courts sometimes distinguish between a "pure" political offense and a "relative" political offense, the latter being one in which a common crime is so connected with a political act that the entire offense is regarded as political. Presented with such circumstances, American courts have refused to extrated the offenders even where they stand accused of murder. See, e.g., Karadozle v. Artukovic, 170 F. Supp. 383 (D.C.Cal. 1959); Ramos v. Rodrianez Diaz, 179 F. Supp. 459 (D.C.Fla. 1959).

Whether the crime of which France accuses petitioner is "of a political character" or whether the requisition for his surrender to France has been made with a view to try or punish him for an offense of a political character are questions involving disputed facts. Where such facts are in dispute, an evidentiary hearing must be held so that the court may reliably find the relevant facts. Townsend v. Sain, 372 U.S. 293, 318 (1963).

IV. CONSTRUCTIVE EXTRADITION

Petitioner's amended petition for habeas corpus relief argues that the process by which he was turned over to the United States authorities amounted to "constructive extradition." In support of this argument, Petitioner submitted State Department documents showing that (1) the United States intended to extradite Petitioner, (2) that the United States told the Brazilian authorities where he could be arrested, and (3) the State Department prepared documents for Petitioner's extradition. See Amended Petition, pp. 13-16. Petitioner was ultimately tried on the charge for which U.S. authorities had planned to extradite him.

Respondent asserts that "[p]etitioner was not extradited from Brazil." Return at p. 10. Respondent does not, however, dispute any of the facts upon which Petitioner's "constructive extradition" argument is based. Rather, Respondent simply asserts in conclusory fashion that "any argument as to the applicability of the extradition treaty between the United States and Brazil to this petition obviously lacks any merit." Id. Respondent supplies no reasoning or policy argument in support of this bald conclusion.

Black's Law Dictionary defines "constructive" as:

> That which is established by the mind of the law in its act of construing facts, conduct, circumstances, or instruments; that which has not the character assigned to it . . . but acquires such character in consequence of the way in which it is regarded by a rule or policy of law . . . . Middleton v. Parke, 3 App.D.C. 160 (1984)

Extradition treaties are entered into to provide for an orderly

process by which one state may lawfully transfer a person accused of crime to another state. The procedures followed in this case, if sanctioned by the courts, would undermine this policy and invite lawlessness by states willing to use any means necessary to obtain jurisdiction over an accused person not found within its own borders. Thus, there is a sound policy reason for applying a "constructive extradition" concept to the facts of this case.

The circumstances of this case warrant the application of equitable considerations, as well. It is an ancient maximum that "equity looks upon that as done which ought to have been done." In this case, the United States Government prepared the papers necessary to comply with extradition formalities but resorted to an unlawful kidnapping instead of waiting for the necessary extradition order by the appropriate Brazilian magistrate. The U.S. Government should have obtained such an order before removing Petitioner to this country. Under the circumstances present here, this Court should regard as having been done that which should have been done.

Petitioner should be treated as if he had been formally extradited from Brazil to the United States. As noted in the Petitioner's Consolidated Petition for habeas corpus relief, Article XXI of the Brazilian - U.S. Treaty requires that David be released and allowed thirty days to leave the United States.

V. IDENTIFICATION

Since the 1975 hearing, Petitioner has developed new evidence regarding the issue as to whether he is the person sought by France for the crimes set forth in the extradition papers. By use of the Freedom of Information Act counsel for the Petitioner has obtained numerous State Department cables concerning David and the events of late 1972. These cables reveal many discrepancies in the name and physical characteristics of the individual sought by the U.S. and French authorities. A Sampling of these discrepancies follows:

1) In a Department of State cable of 10-10-72 there is reference to a tattoo of the four aces on the subject's left wrist. (David has never had such a tattoo.)

2) In the same cable there is a reference to the subject's wife "Lucie", who is said to operate a restaurant in Sao Paulo, Brazil. (David's wife's name is Elita, and she has always resided in Montevideo, Uruguay. She has never owned a restaurant.)

3) A U.S. Government Memorandum, Division of Investigations dated May 2, 1973 gives subject's height as 5' 8" and date of birth as 1930. (David's height is 5' 5" and date of birth, 1931)

4) A letter from the French Embassy, Washington, D.C. to the State Department dated Nov. 6, 1973 names the subject as Michel David. (This is a name which David never used.) He is further refered to as Michel David in letters between the Embassy and the State Department dated Feb. 24, 1978, Aug. 20, 1973, Feb. 11, 1974 and Aug. 31, 1973.

5) A State Department cable of Oct. 10, 1972 gives subject's height as 6' 2".

Such discrepancies point up the need for further development of the evidence on this issue which can best be accomplished by holding a hearing pursuant to 28 U.S.C. 2243.

VI. THE TOSCANINO PRINCIPLE

Petitioner has invoked the "Toscanino principle", a doctrine which requires a federal court to "divest itself of jurisdiction over the person of a defendant where it had been acquired as a result of the Government's deliberate, unnecessary, and unreasonable invasion of the accused's constitutional rights". United States v. Toscanino, 500 F. 2d 267 (2d Cir. 1974). Respondent argues that the Seventh Circuit concluded that the Toscanino principle "is clearly inapplicable in the circumstances of [David's case". David v. Attorney General, 699 F.2d 411, 414 (1983).

The Seventh Circuit essentially based its decision on two considerations: (1) requiring the extradition magistrate to divest himself of jurisdiction would not serve to deter illegal conduct on the part of the United States' officials since the fruit of that conduct, the guilty plea and subsequent sentence would be unaffected; and, (2) David's allegations do not implicate France in any unconstitutional conduct "within our jurisdiction".

This ruling ignores the reality adverted to by the Toscanino court in posing the legal issue presented:

> In an era marked by a sharp increase in kidnapping activities, both here and abraod, see e.g. New York Times, Jan. 5, 1974 at 25 col. 6, Dec. 13, 1973, at 2, col. 5, Oct. 17, 1973, at 14, col. 5, we face the question... whether a federal court must assume jurisdiction over the person of a defendant who is illegally apprehended abroad and forcibly

> abducted by government agents to the United States for the purpose of facing criminal charges here.

Toscanino, supra, at 271. In the years since Toscanino, the problem has not diminished. To the contrary, one authority flatly states that: "The United States increasingly resorts to extraordinary rendition devices, including abduction, thus circumventing traditional extradition processes". See M. Cherif Bassiouni, International Extradition: United States Law and Practice, Ch. V, "Abduction and Unlawful Seizure as Alternatives to Extradition", § 4-11 (February, 1983). The same authority has decried the fact that decisions refusing to apply the Toscanino principle "can only encourage disregard for extradition procedure and the resort to extrajudicial procedings and abuse by law enforcement officials". Id., § 4-18.

The instant case presents circumstances whereby extradition procedures are flouted so that one country can obtain custody over a person and subsequently extradite him to a country which would not have been able to obtain custody over him absent the original abduction. This practice is particularly insidious because two or more nations may combine to evade or violate established extradition procedures with impunity, and then secure the sanction of American courts for their unlawful conduct. This not only encourages lawless conduct by law enforcement officials and violates the rights of persons secured by international treaties and the U.S. Constitution, but it also inevitably tarnishes the

integrity of American judicial processes.

The only way for the courts to deter this kind of lawless conduct by American officials is to break the cycle by refusing to sanction extraditions made possible by such conduct. No country must be allowed to be extradition-beneficiary of abductions which violate or evade established rendition procedures. This is the only tool which the courts have to halt this practice. This consideration, which was not expressly considered by the Seventh Circuit in David, is now before this Court for determination. This Court should apply the Toscanino doctrine to the facts of this case in light of this consideration and divest itself of jurisdiction to extradite David to France.

VII. A WRIT OF MANDAMUS SHOULD ISSUE DIRECTING THE SECRETARY OF STATE TO EXERCISE HIS AUTHORITY UNDER 18 U.S.C. §3186 AND DETERMINE SPECIAL CIRCUMSTANCES WARRANT DENIAL OF EXTRADITION

On December 27, 1984, counsel for Petitioner wrote an eight-page, single-spaced letter to Andre Surena, Assistant Legal Advisor, United States Department of State, urging the Department of State not to extradite the Petitioner, inter alia, on equitable and humanitarian grounds, as well as for reasons of national interest. The letter also proposed an arrangement whereby David would provide valuable information to the U.S. Government on matters of considerable national interest if he were not extradited.

The State Department never responded to this letter and there is no indication in the record that the Department of State ever considered the points raised by Petitioner's counsel prior to its decision to approve extradition.

28 U.S.C. §1361 provides that "(t)he District Courts shall have original jurisdiction in any action in the nature of a mandamus to compel an officer or any employee of the United States or any agency thereof to perform a duty owed to the plaintiff". Section 3186 of Title 18 provides that the Secretary of State may order the person committed to be delivered to a foreign government. This language has been interpreted as meaning that the Secretary of State always has authority to refuse to extradite, even where a magistrate has found extradition to be proper. Escobedo v. United States, 623 F. 2d 1098, 1105 (5th Cir. 1980); Collier v. Vaccaro, 51 F. 2d 17 (4th Cir. 1931).

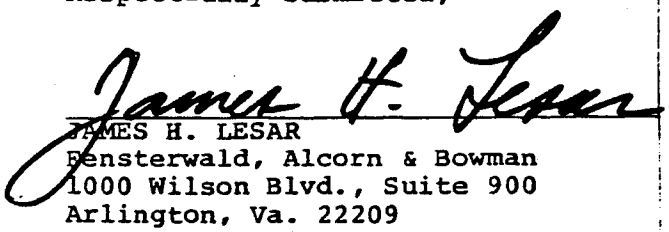
There can be no doubt that the Secretary was granted this authority so that extradition would be denied where humanitarian considerations or the national interest demanded it. However, the Secretary's duty to exercise his authority in appropriate cases cannot be met unless he specifically considers the evidence submitted to him by individuals subject to extradition. Accordingly, this Court should compel the Secretary of State to perform his duty to consider the humanitarian, equitable and national security aspects as set forth in the counsel's letter of December 27, 1984.

(Petitioner is willing to provide this Court with a copy of the December 27, 1984 letter to the Department of State. However, because this letter sets forth some sensitive matters, including some which are not set forth in the letter of the undersigned counsel to this Court dated January 18, 1985, petitioner requests that this letter be placed under seal.)

CONCLUSION

In view of the foregoing, petitioner respectfully requests that the Court grant the writ of habeas corpus and compel the State Department to consider the special circumstances of this case.

Respectfully submitted,

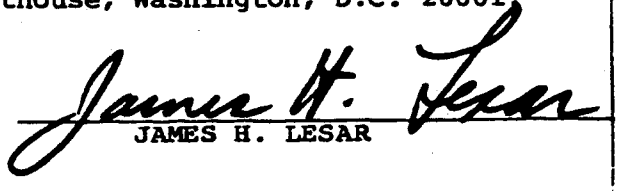


JAMES H. LESAR
Fensterwald, Alcorn & Bowman
1000 Wilson Blvd., Suite 900
Arlington, Va. 22209
Phone: 276-9297

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of January, 1985, hand-delivered a copy of the foregoing Reply to Respondent's Answer and Return to Order to Show Cause to the office of AUSA John Martin, United States Courthouse, Washington, D.C. 20001.



JAMES H. LESAR