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# *State v. Pang*: A Narrow Interpretation of the United States-Brazil Extradition Treaty Implying Additional Limitations on Post-Extradition Prosecution

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## CASE NOTE

### **STATE V. PANG: A NARROW INTERPRETATION OF THE UNITED STATES-BRAZIL EXTRADITION TREATY IMPLYING ADDITIONAL LIMITATIONS ON POST-EXTRADITION PROSECUTION**

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#### I. INTRODUCTION

On January 5, 1995, four firefighters died while fighting a fire at the Mary Pang Products, Inc. warehouse in Seattle, King

County, Washington.<sup>1</sup> Fire investigators later determined that the fire had been intentionally set.<sup>2</sup> Martin Shaw Pang ("Pang"), son of the warehouse owners, became a suspect.<sup>3</sup> A fugitive warrant was issued for his arrest,<sup>4</sup> and he fled to Brazil. On March 3, 1995, the King County Prosecuting Attorney charged Pang with four counts of murder in the first degree,<sup>5</sup> and a warrant was issued for his arrest.

The defendant was arrested in Rio de Janeiro, Brazil on March 16, 1995.<sup>6</sup> On March 17, 1995, the Prosecuting Attorney of King County added a charge of arson in the first degree.<sup>7</sup> In July 1995 the United States requested Brazil to extradite Pang to the State of Washington for trial on four counts of murder in the first degree and one count of arson in the first degree.<sup>8</sup> On December 18, 1995, the Federal Supreme Court of Brazil granted extradition on the single count of arson in the first degree, but not on the four counts of murder in the first degree.<sup>9</sup> On February 28, 1996, Pang was surrendered by Brazil into the custody of the United States.<sup>10</sup> He was immediately returned to the United States and the State of Washington.<sup>11</sup>

The United States appealed to the Federal Supreme Court of Brazil seeking clarification of the extradition order.<sup>12</sup> The United States argued in the appeal that the arson statute in the State of Washington was equivalent only to Article 250 (simple arson) of the Brazil Penal Code,<sup>13</sup> which penalizes only the arson itself, not the resulting deaths.<sup>14</sup> The appeal for clarification further argued that the Washington arson statute did not punish the crime in the same way that Article 258 (aggravated arson) of the Brazilian Penal Code<sup>15</sup> would.<sup>16</sup> On March 27, 1996, the Federal Su-

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1. *State v. Pang*, 940 P.2d 1293, 1295 (Wash. 1997), *cert. denied*, 118 S.Ct. 628 (1997).

2. *Pang*, 940 P.2d at 1295.

3. *Id.* at 1295.

4. *Id.*

5. *Id.*

6. *Id.* at 1296.

7. *Id.*

8. *Id.* at 1297.

9. *Id.* at 1304.

10. *Id.* at 1305.

11. *Id.*

12. *Id.*

13. PENAL CODE [C.P.] art. 250 (Braz.).

14. *Pang*, 940 P.2d at 1305.

15. PENAL CODE [C.P.] art. 258 (Braz.).

preme Court of Brazil rejected the appeal, holding that its original decision required no clarification and that it was legally impossible, under Brazilian procedural law, to reconsider the merits of the case because there was no contradiction or obvious error in the decision.<sup>17</sup> On November 12, 1996, the Honorable Larry A. Jordan, King County Superior Court, denied Pang's motion to dismiss or sever the murder charges from the arson charge, holding that because of Brazil's implicit waiver of any objection it could have made to prosecution for murder, the defendant lacked standing to assert a violation of the extradition order issued by the Federal Supreme Court of Brazil and he could be tried for all counts, including the four counts of murder.<sup>18</sup> On December 4, 1996, Pang filed a motion for direct discretionary review by the Supreme Court of the State of Washington, which was granted on February 6, 1997.<sup>19</sup> The Supreme Court of Washington held that: (1) defendant had standing to object to violation of the terms of the extradition order issued by the Federal Supreme Court of Brazil; (2) Brazil did not waive any objection it could have made to prosecution for murder; (3) the specialty doctrine prohibited the State of Washington from prosecuting defendant for crimes excluded in the extradition order; (4) the Extradition Treaty between the United States of America and the United States of Brazil prohibited the State of Washington from prosecuting defendant for crimes not included in the extradition order; and (5) the State of Washington was obligated to follow the decision of the Federal Supreme Court of Brazil.<sup>20</sup> The State of Washington petitioned the U.S. Supreme Court, but on December 15, 1997, the Court denied certiorari.<sup>21</sup> This Note argues that the Washington Supreme Court wrongly decided the issue in *Pang* of whether the State of Washington may prosecute Pang for the felony murder given that Brazil extradited him only for arson. The State of Washington Supreme Court's decision in *Pang* seriously transformed the United States approach to extradition. In doing so, the *Pang* court placed additional limitations on post-extradition prosecution and ignored Ninth Circuit case law. The decision se-

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16. *Pang*, 940 P.2d at 1306.

17. *Id.* at 1306-07.

18. *Id.* at 1312-13.

19. *Id.* at 1314.

20. *Id.* at 1325.

21. *State v. Pang*, 940 P.2d 1293 (Wash. 1997), cert. denied, 118 S.Ct. 628 (1997).

riously impacts future cases involving interpretation of extradition treaties between the United States and other countries.

By granting extradition only on the basis of the Washington arson statute, the Brazilian Supreme Court's decision in this case will prevent U.S. authorities from prosecuting Pang for the deaths of four firefighters that resulted from the arson. Under the *Pang* court's decision, the deaths of four innocent victims will go unpunished, even though the laws of both Brazil and Washington recognize arson resulting in death as a more serious crime than arson alone. Thus, rather than furthering the ends of justice, the Washington Supreme Court essentially immunized Pang from any liability for the deaths he allegedly caused. Because Pang's prosecution for murder would be consistent with our treaty obligations toward Brazil, Pang should stand trial for murder and arson.

Part II of this Case Note examines the practice and legal nature of extradition under international law. Part III discusses the majority's reasoning and the emphatic dissents in *State v. Pang*. Part IV specifically analyzes and rejects the *Pang* decision and its treatment of the issues in light of the history of extradition, prior case law, and the opposing interpretation. Finally, Part V concludes that the Washington Supreme Court was wrong in construing the specialty doctrine as implying additional limitations on post-extradition prosecution.

## II. INTERNATIONAL LAW AND EXTRADITION

Throughout its history, extradition has remained a system consisting of several processes by which one state surrenders to another state a person accused of or convicted of a select number of crimes.<sup>22</sup> The requested state grants the extradition of the individual to allow the state seeking extradition to prosecute the fugitive offender for the crimes alleged to have been committed against the laws of the requesting state.<sup>23</sup>

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22. "Extradition is the process by which a person charged with or convicted of a crime under the law of one state is arrested in another state and returned for trial or punishment." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 474 at 556-57 (1987).

23. ALONSO GOMEZ-ROBLEDO VERDUZCO, EXTRADICION EN DERECHO INTERNACIONAL ASPECTOS Y TENDENCIAS RELEVANTES 15 (1996). See also 21 TX. JUR. 3d *Criminal Law* § 1765 (1982).

The practice originated in early Middle Eastern and eastern civilizations such as the Egyptian and Chinese.<sup>24</sup> In the early days of the practice, delivery of individuals to a requesting state was usually based on pacts or treaties, but it also occurred on the basis of reciprocity and comity.<sup>25</sup> Surrendering a person sought by another state did not necessarily mean that the extraditee was a fugitive criminal.<sup>26</sup> In fact, from the origins of the practice until the late eighteenth century, such persons were sought for political reasons.<sup>27</sup> However, extradition, which at one time had manifested itself as a practice designed for the preservation of the political and religious interests of states, gradually developed into an international means of cooperation in the suppression of crime.<sup>28</sup>

In contemporary practice, the duty to extradite only by virtue of a treaty has become the prevalent practice among states, though reciprocity and comity still exist as legal bases relied upon by some states.<sup>29</sup> Most common law systems have traditionally required a treaty,<sup>30</sup> whereas the less formally demanding civil law systems rely on national legislation, reciprocity and comity, as well as treaties.<sup>31</sup> Certain South American states such as Venezuela, Argentina and Brazil, occasionally recognize a legal duty to extradite in the absence of a treaty.<sup>32</sup>

Extradition treaties and legislation provide the principles and rules of extradition and dictate the existence of an obligation to surrender fugitive criminals.<sup>33</sup> The framework of extradition thus consists largely of binding bilateral or multilateral international commitments.<sup>34</sup> The viability of these instruments is therefore of great importance in the present state of extradition

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24. M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 1 (3rd rev. ed. 1996).

25. *Id.* at 1. Comity is defined as a willingness on the part of one nation to grant a privilege to another nation, not as a matter of right but out of deference and good will. *BLACK'S LAW DICTIONARY* 242 (5th ed. 1979). See also *OPPENHEIM'S INTERNATIONAL LAW* 50, n.1 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

26. BASSIOUNI, *supra* note 24, at 3.

27. *Id.* at 3.

28. *Id.* at 4.

29. *Id.* at 6.

30. *Id.* See also I.A. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 25 (1971).

31. BASSIOUNI, *supra* note 24, at 16.

32. *Id.* at 7. See also SHEARER, *supra* note 30, at 26.

33. SHEARER, *supra* note 30, at 22.

34. *Id.* at 23.

law and practice.<sup>35</sup> In the absence of a treaty, countries have no legal duty to grant extradition.<sup>36</sup> While a requested country may surrender individuals to other countries solely out of comity, comity is not binding since it is an act of courtesy rather than custom.<sup>37</sup> In fact, the general practice confirms that extradition is not looked upon as an absolute international duty, and if a country wishes to ensure the surrender of its own criminals it must enter into extradition treaties with other countries.<sup>38</sup> It therefore follows that no better way exists of securing clear and firm obligations to extradite, than that of extradition treaties.

The United States and Brazil entered into the Treaty of Extradition Between the United States of America and the United States of Brazil with the desire of making more effective the cooperation of their respective countries in the repression of crime.<sup>39</sup> *State v. Pang* is the first published decision that considers the United States-Brazil extradition treaty.<sup>40</sup> This Note analyzes *Pang* with a focus on the Washington Supreme Court's interpretation of the specialty doctrine.<sup>41</sup>

### III. *STATE V. PANG*

#### A. *The Majority Decision*

On July 31, 1997, the Supreme Court of Washington, sitting en banc, held that the State of Washington was prohibited from prosecuting Petitioner Martin Shaw Pang for the four counts of murder in the first degree because Brazil had extradited him

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35. *Id.*

36. GOMEZ-ROBLEDO VERDUZCO, *supra* note 23, at 15. See also *United States v. Rauscher*, 199 U.S. 407, 412 (1886) (stating that according to principles of international law, states are not obligated to surrender fugitives to the state in which their crimes were committed).

37. BASSIOUNI, *supra* note 24, at 17.

38. SHEARER, *supra* note 30, at 27.

39. The Treaty of Extradition Between the United States of America and the United States of Brazil became effective on December 17, 1964. Treaty of Extradition Between the United States of America and the United States of Brazil, Jan. 13, 1961, U.S.-Braz., 15 U.S.T. 2093.

40. *State v. Pang*, 940 P.2d 1293, 1295 (Wash. 1997), *cert. denied*, 118 S.Ct. 628 (1997).

41. In the United States, the specialty doctrine dictates that prosecution of an extradited person may go forward if the crime charged is one included in the applicable treaty as well as in the request for extradition. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 cmt. a (1987).

only for arson in the first degree.<sup>42</sup> The court found that the Treaty of Extradition between the United States and Brazil prohibited the State of Washington from prosecuting Pang for crimes not authorized in the extradition order.<sup>43</sup>

The court acknowledged that the doctrine of specialty was incorporated into the Treaty of Extradition through Article XXI.<sup>44</sup> Nevertheless, the court concluded that the specialty doctrine prohibited the State of Washington from prosecuting Pang for crimes excluded in the extradition order.<sup>45</sup>

Consequently, the court ruled that the State of Washington could proceed to trial only on Count I of the second amended information that charged Pang with the crime of arson in the first degree.<sup>46</sup>

Finally, in three additional holdings, the Supreme Court of Washington held that: (1) Pang had standing to object to violation by the State of Washington of the terms of the order of extradition issued by the Federal Supreme Court of Brazil; (2) Brazil did not explicitly or implicitly waive any objection it could have made to prosecution by the State of Washington of Pang for murder in the first degree; and (3) the State of Washington was obligated to follow the decision of the Federal Supreme Court of Brazil which granted extradition only on the arson count.<sup>47</sup>

### *B. The Dissents*

Chief Justice Durham, writing for the four dissenting justices, strongly disagreed with the majority's interpretation of the United States-Brazil extradition treaty and its rulings concerning the application of the specialty doctrine.<sup>48</sup> Judge Durham ar-

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42. *Pang*, 940 P.2d at 1325.

43. *Id.* at 1325. The court clearly erred in its interpretation of the United States-Brazil extradition treaty, which treaty expressly permits prosecution for offenses included in the extradition request. Treaty of Extradition Between the United States of America and the United States of Brazil, *supra* note 39, art. XXI, 15 U.S.T. 2093. Article XXI reads in pertinent part: "A person extradited by virtue of the present Treaty may not be tried or punished by the requesting State for any crime or offense committed prior to the request for his extradition, other than that which gave rise to the request. . . ."

44. *Pang*, 940 P.2d at 1325.

45. *Id.* at 1325.

46. *Id.* at 1325-26.

47. *Id.* at 1325.

48. *Id.* at 1326 (Durham, J., dissenting).



gued that the plain language of the treaty of extradition expressly permitted prosecution for offenses included in the extradition request.<sup>49</sup> Judge Durham further maintained that the majority erroneously concluded that the doctrine of specialty prohibited the State of Washington from prosecuting Pang for anything other than the arson count for which he was extradited.<sup>50</sup> Judge Durham noted that the majority's conclusion was based on a misunderstanding of the specialty doctrine and was inconsistent with the vast weight of authority, which holds that the scope of any specialty limitations on prosecution is determined solely by the language of the applicable treaty.<sup>51</sup>

#### IV. ANALYSIS

*Pang* is a narrow interpretation of the United States-Brazil extradition treaty and the specialty doctrine. The Washington Supreme Court's decision to impose additional limitations on post-extradition prosecution contravened the State of Washington's unambiguous rights under the treaty.

##### *A. Applicable State of Washington Law*

Pang was charged in the King County Superior Court in Count I with arson in the first degree, a class A felony, under RCW 9A.48.020(1)(a) and (d) and in Counts II-V with four counts of murder in the first degree, a class A felony, under RCW 9A.32.030(1)(c).<sup>52</sup>

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49. *Id.*

50. *Id.*

51. *Id.*

52. WASH. REV. CODE ANN. § 9A.48.020 (West 1988); WASH. REV. CODE ANN. § 9A.32.030 (West 1988). 9A.48.020(1)(a) and (d) and 9A.32.030 (1)(c) reads in pertinent part:

9A.48.020(1)(a) and (d) Arson in the first degree

(1) A person is guilty of arson in the first degree if he knowingly and maliciously:

(a) Causes a fire or explosion which is manifestly dangerous to any human life, including firemen; or. . .

(d) Causes a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.

(2) Arson in the first degree is a class A felony.

9A.32.030. Murder in the first degree

(1) A person is guilty of murder in the first degree when:

(c) He or she commits. . .the crime of. . .(4) arson in the first or second degree. . .and in the course of or in furtherance of such crime or in immediate

Under the Sentencing Reform Act of 1981, RCW 9.94A.310, arson in the first degree has a seriousness score of VIII.<sup>53</sup> If convicted of arson in the first degree, Pang would be subject to a standard sentence range of 21 to 27 months.<sup>54</sup> However, the trial court in *Pang* suggested that under RCW 9.94A.390, a court may, in its discretion, impose an aggravated exceptional sentence above the standard range if statutory criteria are met.<sup>55</sup> In this respect, the trial court's error was to presuppose that the firefighters' deaths could be used as aggravating factors justifying the imposition of an exceptional sentence. Indeed, as the trial court pointed out, the Brazilian Supreme Court assumed that Pang could be as severely punished whether the deaths served as the basis for an aggravated sentence or separate felony murder sentences.<sup>56</sup>

Nevertheless, the "real facts" concept of RCW 9.94A.370(2) would prohibit the trial court from considering the firefighters' deaths as aggravating factors in sentencing.<sup>57</sup> The real facts doctrine excludes consideration during sentencing of uncharged crimes or charged crimes which were later dismissed.<sup>58</sup> The firefighters' deaths cannot be used to impose an exceptional sentence because they establish an essential element of first degree felony murder,<sup>59</sup> a separate and more serious crime than arson.

The Washington Supreme Court's ruling dismissing the murder charges and the trial court's inability to consider the arson deaths otherwise gave the trial court no choice but to enter a

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flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants. . . (2) Murder in the first degree is a class A felony.

53. WASH. REV. CODE ANN. § 9.94A.310 (West 1988); *Pang*, 940 P.2d at 1315.

54. *Pang*, 940 P.2d at 1315.

55. WASH. REV. CODE ANN. § 9.94A.390 (West 1988); *Pang*, 940 P.2d at 1315.

56. *Pang*, 940 P.2d at 1315-16.

57. WASH. REV. CODE ANN. § 9.94A.370 (West 1988). This section reads in pertinent part:

"(2) . . . Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the presumptive sentence range except upon stipulation or when specifically provided for in RCW 9.94A.390(2)(c), (d), and (e)."

These statutory exceptions, which are for certain major economic offenses or series of offenses, major violations of the Uniform Controlled Substances Act, or sexual abuse, would not apply in *Pang*.

58. *Accord State v. Houf*, 841 P.2d 42, 46 (Wash. 1992).

59. WASH. REV. CODE ANN. § 9A.32.030 (West 1988).

standard-range sentence for first degree arson, that is, approximately two years.<sup>60</sup>

### B. Petitioner's Standing

The United States' circuit courts are divided on the issue of standing to assert violations of the terms of an extradition order. Some courts hold that an extraditee has standing to raise any objections to post-extradition proceedings which the requested nation might have raised, subject to the limitation that the rendering country may waive its right to object to a treaty violation.<sup>61</sup> Others have left the question of standing unanswered, with some suggesting approval of the rule favoring standing.<sup>62</sup> Still, a minority of the courts deny standing absent affirmative protest by the requested state.<sup>63</sup> In failing to grant certiorari in *Pang*, the United States Supreme Court allowed the circuits to remain divided.

The trial court in *Pang* held that Brazil had implicitly waived objection by not objecting when it had the opportunity to do so, therefore, *Pang* lacked standing to raise objections to the violation of the terms of the extradition order.<sup>64</sup> However, the

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60. *Pang*, 940 P.2d at 1315 (citing RCW 9.94A.310).

61. See, e.g., *United States v. Puentes*, 50 F.3d 1567, 1575 (11th Cir. 1995), cert. denied, 116 S.Ct. 341 (1995); *United States v. Fowlie*, 24 F.3d 1059, 1064 (9th Cir. 1994), cert. denied, 513 U.S. 1086 (1995). See also, *Leighnor v. Turner*, 884 F.2d 385, 389 (8th Cir. 1989).

62. See, e.g., *United States v. Saccoccia*, 58 F.3d 754, 767 n.6 (1st Cir. 1995) ("[W]hile we take no view of the [standing] issue, we realize that there are two sides to the story, and the side that favors individual standing has much to commend it." (citations omitted)); *United States v. Rauscher*, 119 U.S. 407, 424 (1886) (referring to the doctrine of specialty as a "right conferred upon persons brought from a foreign country" under extradition proceedings); *United States v. Alvarez-Machain*, 504 U.S. 655, 659-60 (1992) (suggesting the continuing validity of the Rauscher decision). See also, *United States v. Sensi*, 879 F.2d 888, 892 n.1 (D.C.Cir. 1989) ("The authority on this [standing] point is uncertain.") (reserving the question of standing). See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 cmt. b (1987) ("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.").

63. See, e.g., *Fioconni v. Att'y Gen.*, 462 F.2d 475, 481 (2nd Cir. 1972). The Second, Fifth and Sixth Circuits allow a defendant to raise a specialty violation only when the nation from which he or she has been extradited formally protests. The rule is otherwise in the Eighth, Ninth and Eleventh Circuits. See generally Mary-Rose Papandrea, Comment, *Standing to Allege Violations of the Doctrine of Specialty: An Examination of the Relationship between the Individual and the Sovereign*, 62 U. Chi. L. Rev. 1187, 1196-1202 (1995).

64. *Pang*, 940 P.2d at 1317.

State of Washington's implicit waiver argument was based on an erroneous reading of Brazil's Justice Minister Nelson A. Jobim's letter of September 26, 1996 to United States Attorney General Janet Reno.<sup>65</sup> The State of Washington claimed that this letter indicated that Brazil did not object to Pang's prosecution for four counts of murder in the first degree.<sup>66</sup> Nevertheless, nothing in the letter supported such a conclusion.<sup>67</sup> The letter from Minister of State Jobim simply stated that Pang was extradited to stand trial "for the crime of arson in the first degree, resulting in four deaths and the consequences thereof under United States law."<sup>68</sup> Additionally, the State of Washington's argument that Justice Minister Jobim waived objection on behalf of Brazil failed because Minister Jobim lacked the power to waive objections to post-extradition prosecution.<sup>69</sup> Under Brazil's three-branch government system, the Judicial Branch alone is responsible for interpreting treaties,<sup>70</sup> and the Federal Supreme Court has exclusive jurisdiction to rule on any extradition request by a foreign nation.<sup>71</sup> Accordingly, the Executive Branch may not limit the scope of rulings made by the Federal Supreme Court of Brazil, the highest authority of an independent branch of government.<sup>72</sup> Consequently, as stated by Minister of State for Justice Nelson A. Jobim, any interpretative statements made by the Executive

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65. *Id.* at 1317-18.

66. *Id.* at 1317.

67. *Id.*

68. *Id.* at 1312.

69. *Id.* at 1311-12.

70. BRAZ. CONST. ch. III, § II, art.102(III)(b). Art.102(III)(b) provides:

The Supreme Federal Court is responsible, essentially, for safeguarding the Constitution, and it is within its competence:

(III) to judge, on extraordinary appeal, cases decided in a sole or last instance, when the decision appealed:

(b) declares a treaty or a federal law unconstitutional . . .

Once treaties are incorporated into Brazil's domestic legal system, they are equivalent to federal statutes. *See* BRAZ. CONST. ch. III, § III, art.105(III)(a).

Art.105(III)(a) provides:

The Superior Court of Justice has the competence to:

(III) judge, on special appeal, the cases decided, in a sole or last instance, by the Federal Regional Courts or by the courts of the states, of the Federal District and Territories, when the decision appealed:

(a) is contrary to a treaty or a federal law, or denies it effectiveness. . . .

71. BRAZ. CONST. ch. III, § II, art.102(I)(g). Art.102(I)(g) provides: "The Supreme Federal Court is responsible, essentially, for safeguarding the Constitution, and it is within its competence: (I) to institute legal proceeding and trial, in the first instance, of: (g) extradition requested by a foreign state. . . ."

72. *Pang*, 940 P.2d at 1311-12.

Branch regarding the content of rulings handed down by the Federal Supreme Court would be unenforceable.<sup>73</sup>

While some federal courts have declined to address whether an extraditee has standing to object to the violation of the terms of the extradition order, and others have questioned the issue, the prevailing rule is that an extraditee may raise any objection the surrendering state could make, as long as that country has not waived its right to object.<sup>74</sup>

Since Brazil did not implicitly or explicitly waive its right to make post-extradition objections to the prosecution of Pang by the State of Washington, the Washington Supreme Court found that Pang had standing to assert limitations on his post-extradition prosecution.<sup>75</sup>

### *C. The Court's Misunderstanding of the Specialty Doctrine*

In the absence of a treaty, the obligation of one country to surrender a fugitive to another has never been recognized as a principle of international law, but as a principle of international comity.<sup>76</sup> Many nations, including the United States, have entered into extradition treaties to facilitate the surrender and prosecution of fugitives.<sup>77</sup> Extradition treaties usually include provisions that limit prosecution for separate crimes unrelated to the extradition request.<sup>78</sup> Such limitations on post-extradition prosecution are referred to as the specialty doctrine and serve to guard against indiscriminate prosecution, especially for political crimes.<sup>79</sup> However, there are variations of the specialty doctrine. In the most restrictive version of the specialty doctrine, some treaties of extradition prohibit prosecution for any offenses other than those for which extradition is specifically granted.<sup>80</sup> It was

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73. *Id.* at 1312.

74. *See* *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1355 (9th Cir. 1991) ("Our decisions involving the principle of specialty make clear that in those cases at least the person extradited may raise whatever objections the rendering country might have.") (citing *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir. 1986)).

75. *Pang*, 940 P.2d at 1317.

76. *United States v. Rauscher*, 119 U.S. 407, 411-12 (1886).

77. SHEARER, *supra* note 30, at 21.

78. *See* *Fioconni v. Att'y Gen.*, 462 F.2d 475, 481 (2nd Cir. 1972).

79. *Id.* at 481 (citing *Rauscher*, 119 U.S. at 419-20).

80. *See Rauscher*, 119 U.S. at 423-24.

this version of the doctrine that the Supreme Court applied in *United State v. Rauscher*,<sup>81</sup> and the rule that the court in *Pang* erroneously suggested is implied in every extradition treaty.<sup>82</sup>

In *Rauscher*, the United States Supreme Court addressed the issue of whether the treaty of extradition between the United States and England prohibited prosecution of the extraditee for a crime other than that for which he was extradited.<sup>83</sup> This was the first case in which the Supreme Court recognized the doctrine of specialty. In *Rauscher*, an American merchant ship officer had been extradited from England under an extradition treaty, to be charged with the murder of a crew member.<sup>84</sup> He was subsequently convicted of assault, and of inflicting cruel and unusual punishment, neither of which were crimes listed as extraditable offenses in the treaty.<sup>85</sup> The court in *Rauscher* held that a person who had been brought within the jurisdiction of a court by virtue of an extradition treaty can only be tried for one of the offenses described in that treaty and for the offense with which he was charged in the extradition proceedings.<sup>86</sup> The court in *Rauscher* based its conclusion upon the terms and history of the extradition treaty with England, the practice of nations in regards to extradition treaties, the case law from the states, and the writings of jurists.<sup>87</sup>

Although some nations follow the strict interpretation of the specialty doctrine, the permissive approach, which is generally followed in the United States, permits the prosecution to go forward if the charge is based on the same facts as those included in the request for extradition.<sup>88</sup> Yet, prosecution may not go forward

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81. *Rauscher*, 119 U.S. at 429-30.

82. *State v. Pang*, 940 P.2d 1293, 1321 (Wash. 1997), cert. denied, 118 S.Ct. 628 (1997).

83. *Rauscher*, 119 U.S. at 409-10.

84. *Id.* at 409.

85. *Id.* at 409-11.

86. *Id.* at 430.

87. *Id.* at 410-11, 429.

88. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 cmt. a (1987); See generally Papandrea, *supra* note 63, at 1187 ("The doctrine of specialty dictates that once the asylum state extradites an individual to the requesting state under the terms of an extradition treaty, that person can be prosecuted only for the crimes specified in the extradition request."); David B. Sweet, Annotation, Application of Doctrine of Specialty to Federal Criminal Prosecution of Accused Extradited from Foreign Country, 112 A.L.R. FED. 473, 517 (1993) ("[I]n order to avoid a violation of the doctrine of specialty . . . the prosecution must be based upon the same evidence, facts, or acts as set forth in the request for extradition."); 21 TX. JUR. 3D *Criminal Law* § 1765 (1982).

if the crime charged is not listed in the extradition treaty or in the request for extradition, unless the surrendering state explicitly or implicitly consents to the charge.<sup>89</sup> The United States-Brazil extradition treaty expressly incorporates the permissive version of the specialty doctrine.<sup>90</sup> Nonetheless, both versions of the specialty doctrine accomplish the purpose of the rule: protection against indiscriminate prosecution of crimes unrelated to the extradition request.

In *Pang*, the Washington Supreme Court specifically noted that under *Rauscher*, "for an extradited defendant to be charged with a crime, that crime must be specified in the treaty (the approval of which is within the sole discretion of the asylum state), and be included in the *extradition petition* (the content of which is within the sole discretion of the requesting state)."<sup>91</sup> The court's ruling on this issue prohibits post-extradition prosecution for crimes not mentioned in the *warrant of extradition*.<sup>92</sup> The Washington Supreme Court further cited *Rauscher* for the proposition that it is unreasonable that the asylum country should be expected to surrender a fugitive without any limitation on post-extradition prosecution.<sup>93</sup> However, in the instant case, the request for extradition and the United States-Brazil extradition treaty defined the limitations on post-extradition prosecution.<sup>94</sup> The State of Washington could prosecute Pang for any crimes included in the extradition request and the treaty.

Pang argued that because the order of extradition excluded the charges of murder in the first degree, under the specialty doctrine the State of Washington could not prosecute him on these charges.<sup>95</sup> In holding that under the treaty and the specialty doctrine Pang could not be prosecuted for any crime but arson in the first degree,<sup>96</sup> the Washington Supreme Court assumed, without support, that the doctrine of specialty is exclusively defined as

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89. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 cmt. a (1987).

90. Treaty of Extradition Between the United States of America and the United States of Brazil, *supra* note 39.

91. *State v. Pang*, 940 P.2d 1293, 1320 (Wash. 1997), *cert. denied*, 118 S.Ct. 628 (1997) (emphasis added).

92. *Id.* at 1325 (emphasis added).

93. *Id.* at 1320.

94. Treaty of Extradition Between the United States of America and the United States of Brazil, *supra* note 39.

95. *Pang*, 940 P.2d at 1320.

96. *Id.* at 1325-26.

limiting prosecution to offenses for which extradition was granted.

However, in *United States v. Saccoccia*,<sup>97</sup> the court recognized that specialty "is not a hidebound dogma, but must be applied in a practical, commonsense fashion. Thus, obeisance to the principle of specialty does not require that . . . the prosecution always be limited to specific offenses enumerated in the surrendering state's extradition order."<sup>98</sup> The *Saccoccia* court further stated that the inquiry into specialty is whether the court in the requesting state reasonably believes that prosecuting the defendant on particular charges contradicts the surrendering state's intentions.<sup>99</sup>

In the instant case, the doctrine of specialty is expressly incorporated into the United States-Brazil extradition treaty.<sup>100</sup> However, the Washington Supreme Court in *Pang* implied additional limitations on prosecution beyond the express specialty provisions agreed upon by the United States and Brazil. The court relied on *Rauscher*<sup>101</sup> for the proposition that an implied term of every extradition treaty is that an extraditee may be prosecuted only for crimes for which he was surrendered. Yet, in *Rauscher*, the Supreme Court limited its holding as an interpretation of the extradition treaty with England.<sup>102</sup> The court originally looked at the language of the treaty itself.<sup>103</sup> It was only after it concluded that the treaty was silent on this issue that the court in *Rauscher* looked beyond the express terms of the treaty to determine whether the parties intended to limit the scope of post-extradition prosecution.<sup>104</sup> Hence, the *Rauscher* court turned to the comity principles in general and the history between the United States and England on this issue only in the absence of express specialty provisions in the treaty.<sup>105</sup> Thus, *Rauscher* stands for the proposition that a court is authorized to look be-

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97. *United States v. Saccoccia*, 58 F.3d 754, 767 (1st Cir. 1995).

98. *Id.* at 767 (citing *United States v. Levy*, 905 F.2d 326, 329 (10th Cir. 1990)).

99. *Id.*

100. Treaty of Extradition Between the United States of America and the United States of Brazil, *supra* note 39.

101. *United States v. Rauscher*, 119 U.S. 407, 430 (1886).

102. *Rauscher*, 119 U.S. at 422.

103. *Id.* at 410-11.

104. *Id.* at 411-12.

105. See *United States v. Alvarez-Machain*, 504 U.S. 655, 659 (1992) (noting how the *Rauscher* court meticulously examined the terms and history of the treaty between the United States and England).



yond a treaty only when the text of the treaty fails to provide expressly for limitations on post-extradition prosecution. Unlike the extradition treaty in *Rauscher*, the United States-Brazil treaty of extradition expressly provides limits on post-extradition prosecution.<sup>106</sup>

In conclusion, comports with the case law, the only limitations on post-extradition prosecution are those contained in the applicable treaty of extradition.<sup>107</sup> This conforms with Brazil's intent with respect to any limitations on prosecution: "[P]rovided that the terms of the Treaty of Extradition. . . are respected, it will be incumbent upon the justice system of the United States of America to establish a suitable punishment for the crime of arson in the first degree, resulting in four deaths and the consequences thereof, under U.S. law."<sup>108</sup>

*D. The United States-Brazil Extradition Treaty  
Prohibits Prosecution only for Charges that are  
not Included in the Extradition Request*

The State of Washington requested Pang's extradition on arson and first degree murder charges arising out of his act of intentionally setting a fire that resulted in four deaths.<sup>109</sup> It is undisputed that arson and murder are extraditable offenses.<sup>110</sup>

Case law supports the rule giving effect to the plain language of the treaty and refusing to imply greater limitations on prosecution in the face of express treaty limitations. The Washington Supreme Court in *Pang* acknowledged that two circuit courts have affirmed convictions on charges other than those for

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106. Treaty of Extradition Between the United States of America and the United States of Brazil, *supra* note 39.

107. See *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994).

108. *State v. Pang*, 940 P.2d 1293, 1312 (Wash. 1997), *cert. denied*, 118 S.Ct. 628 (1997).

109. *Id.* at 1297.

110. See Treaty of Extradition Between the United States of America and the United States of Brazil, *supra* note 39, art. II, 15 U.S.T. 2093. Article II of the Treaty states in part:

Persons shall be delivered up according to the provisions of the present Treaty for prosecution when they have been charged with, or to undergo sentence when they have been convicted of, any of the following crimes or offenses:

1. Murder. . .

7. Arson. . .

which extradition was granted based on the plain language of the treaties at issue.<sup>111</sup>

In *Fiocconi v. Attorney General*, the defendants were extradited from Italy to the United States on charges of conspiring to import heroin into the United States.<sup>112</sup> They were later additionally charged and convicted of the substantive crimes of receiving, concealing, selling and facilitating the transportation, concealment and sale of heroin in New York.<sup>113</sup> The defendants appealed their convictions, arguing that prosecution for charges other than the conspiracy charge included in the request for extradition was an act of bad faith toward the Government of Italy.<sup>114</sup> In upholding their convictions the circuit court looked to the United States-Italy treaty of extradition, which provided that "the person . . . delivered up for the crimes enumerated . . . shall in no case be tried for any . . . crime, committed previously to that for which his . . . surrender is asked."<sup>115</sup> The *Fiocconi* court further stated that "if the countries had intended that the requesting government could not try the accused for any crime committed before the time of his surrender other than the crime for which he was extradited, they could have accomplished this by adopting one of the standard clauses to that end."<sup>116</sup>

In *United States v. Sensi*,<sup>117</sup> the defendant was extradited for transportation of stolen property and convicted of mail fraud, possession or receipt of stolen securities in excess of \$5,000, first-degree theft, and transportation in interstate and foreign commerce of stolen securities and money in excess of \$5,000.<sup>118</sup> The court in *Sensi* upheld the convictions on the basis that the United States-United Kingdom extradition treaty prohibited prosecution only "for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted. . . ."<sup>119</sup> The court noted that though the crimes

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111. See *Fiocconi v. Att'y Gen.*, 462 F.2d 475, 481-82 (2nd Cir. 1972); *United States v. Sensi*, 879 F.2d 888, 895-96 (D.C.Cir. 1989).

112. *Fiocconi*, 462 F.2d at 476.

113. *Id.* at 477.

114. *Id.*

115. *Id.* at 481 (quoting Extradition Convention, 1868, U.S.-Italy, art. III, 15 Stat. 631).

116. *Id.* at 481 (citing 1 John B. Moore, A Treatise on Extradition and Interstate Rendition §§ 148-49, at 194-96 (1891)).

117. *United States v. Sensi*, 879 F.2d 888, 895-96 (D.C.Cir. 1989).

118. *Id.* at 891-92.

119. *Id.* at 895 (quoting Extradition Treaty, June 8, 1972, U.S.-U.K., art. XII, 28

charged were not those for which extradition was granted, they were based on the same underlying facts, and therefore, complied with the specialty provisions in the extradition treaty.<sup>120</sup> Similarly, had United States and Brazil intended to limit prosecution only for crimes included in the grant of extradition, they could have used language in the treaty to that end.

The court in *Pang* cited *United States v. Khan*<sup>121</sup> for the proposition that a fugitive cannot be prosecuted for offenses other than those for which extradition was granted.<sup>122</sup> In *Khan* the defendant was charged in the United States with conspiracy to import heroin (Count II) and use of a communication facility to facilitate the heroin conspiracy (Count VIII).<sup>123</sup> A jury found Khan guilty of both counts.<sup>124</sup> Khan argued that the Pakistani extradition documents referred only to the conspiracy charge and therefore his conviction on Count VIII should be dismissed.<sup>125</sup> The *Khan* court agreed and held that because Pakistan did not agree to extradite the defendant on the communications facility charge, the specialty doctrine had not been satisfied and the conviction on that charge should be reversed and dismissed.<sup>126</sup> However, the holding in *Khan* was based on the express language of the treaty. The United States-Pakistan extradition treaty contained the following language: "A person surrendered can in no case be [prosecuted]. . . for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place."<sup>127</sup>

Nonetheless, the United States-Brazil treaty of extradition provides that: "A person extradited by virtue of the present Treaty may not be tried or punished by the requesting State for any crime or offense committed prior to the request for his extradition, other than that which gave rise to the request. . . ." <sup>128</sup> Be-

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U.S.T. 233).

120. *Id.* at 895-96.

121. *United States v. Khan*, 993 F.2d 1368, 1374 (9th Cir. 1993).

122. *State v. Pang*, 940 P.2d 1293, 1324 (Wash. 1997), *cert. denied*, 118 S.Ct. 628 (1997).

123. *Khan*, 993 F.2d at 1368.

124. *Id.* at 1368.

125. *Id.* at 1373.

126. *Id.* at 1375.

127. *Id.* at 1374 (quoting Extradition Treaty, Dec. 22, 1931, U.S.-Pak., art. VII, 47 Stat. 2124).

128. Treaty of Extradition Between the United States of America and the United States of Brazil, *supra* note 39.

cause Pang was not charged with any offenses other than those for which the United States requested extradition, and the extradition treaty with Brazil limits the offenses for which a fugitive may be prosecuted only to those that gave rise to the request for extradition, Pang's prosecution for murder would not violate the United States-Brazil treaty of extradition.

## V. CONCLUSION

Instead of construing the specialty doctrine as implying additional limitations on post-extradition prosecution, the *Pang* court could have reached the correct result by looking to the express terms of the United States-Brazil extradition treaty.

In *Pang*, the United States requested and Brazil granted extradition for the same criminal act: intentionally setting a fire that resulted in death. Thus, allowing the State of Washington to prosecute Pang for murder is not to doubtfully construe the treaty to prosecute him for an offense that "is entirely different from the one for which he was extradited."<sup>129</sup> As discussed earlier, this is the unifying purpose of the various versions of the specialty doctrine.<sup>130</sup> Therefore, giving effect to the positive provisions of the United States-Brazil extradition treaty does not violate the State of Washington's obligation to construe treaties in good faith.

The weight of authority strongly indicates that the Washington Supreme Court was mistaken in concluding that the specialty doctrine prohibited the State of Washington from prosecuting Pang for murder in the first degree. Under the *Pang* court's holding, the deaths of four firefighters will go unpunished even though under the laws of both Brazil and Washington arson resulting in death is more severely punished than simple arson. Unless Pang is prosecuted for murder, he cannot be punished for the firefighters' deaths because the real facts doctrine in Washington State's sentencing laws excludes from sentencing facts

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129. See *Johnson v. Browne*, 205 U.S. 309, 321 (1907) (emphasizing that: "a treaty . . . between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought, by doubtful construction of some of its provisions, to obtain the extradition of a person for one offense and then punish him for another and different offense.").

130. See *Johnson*, 205 U.S. at 316 (showing concern with the government's manipulation of the extradition process to obtain extradition for one offense as an excuse for obtaining jurisdiction for another).

that establish the elements of a more serious crime. Thus, the *Pang* court's decision to dismiss the murder charges did not further the ends of justice, but violated Washington State's rights under the United States-Brazil extradition treaty and ensured that neither nation's will is done by immunizing Pang from liability for the deaths he allegedly caused.

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