

Transnational Gangs: Prosecution of an MS-13 Gang Member Extradited from Mexico

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I. Introduction

This article discusses key aspects of the prosecution of Jaime Balam, a member of the transnational criminal organization *La Mara Salvatrucha* (MS-13). That prosecution was part of “Operation Devil Horns,” a law enforcement initiative against members of a San Francisco-based MS-13 clique, but focused specifically on Balam’s involvement in a February 2009 shooting in Daly City, California. Because Balam was indicted at the end of Operation Devil Horns and after the trial of two gang members who had been identified and indicted for the February 2009 shooting, it proved necessary to extradite Balam from Mexico. This article reviews that process, with particular emphasis on the mandatory approvals from three separate Criminal Division components: the Organized Crime and Gang Section (OCGS), the Capital Case Section (CCS), and the Office of International Affairs (OIA).

Close coordination with OCGS, CCS and OIA in a prosecution of this sort is not only advisable, it is required under applicable provisions of the U.S. Attorneys’ Manual (USAM).¹ Moreover, because of the compressed deadlines imposed by an extradition request, it is important to understand the timing issues and to prepare an efficient work plan. As will be clear from the summary below,² the process can be lengthy, and the prosecutor should plan carefully in order to minimize delays and maximize the chances of success. Ultimately, a successful extradition in a gang case can send a powerful message—that federal law enforcement will pursue those who commit violent gang crimes on U.S. soil, even if it takes arresting them abroad and bringing them back to face charges in United States district court.

II. The MS-13 Attack on February 19, 2009

The factual statement set out below is based on evidence presented by the government at the trial of *United States v. Danilo Velasquez and Luis Herrera*, which commenced on October 24, 2011, and is also based on admissions contained in the written plea agreements of MS-13 defendants, including Luis Herrera and Jaime Balam.³ Defendant Velasquez has a pending appeal of his convictions.

On the evening of February 19, 2009, commuter traffic was backed up in front of the light rail station in Daly City, California. In one of the many cars stopped at a red light sat four young Hispanic males out for a standing Thursday evening dinner engagement. They were about to become victims of a violent crime that would leave one of them dead and two severely wounded. MS-13 gang members

¹ See U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL §§ 9-110.101, .320 (OCGS) [hereinafter USAM]; USAM § 9-10.040 (CCS); USAM § 9-15.210 (OIA).

² For the reader’s convenience, an abbreviated timeline of the *Balam* case is set forth as an appendix at the end of the article.

³ *United States v. Danilo Velasquez*, No. 3:08-cr-0730 WHA, 2011 WL 175887 (N.D. Cal. Oct. 24, 2011).

Danilo Velasquez (a.k.a. “Triste”) and Jaime Balam (a.k.a. “Tweety”), believing the victims to be rivals, walked up and poured gunfire into the victims’ car from pointblank range.

The vehicle driver was shot in the neck and survived. The right front passenger suffered four gunshot wounds but survived. His brother, in the rear right passenger seat, miraculously escaped injury, but the ball cap he wore was pierced by a bullet. The left rear passenger was not so lucky; shot multiple times, he died soon after.

A. Subsequent Investigation Discloses a *Jale* by Members of MS-13 “20th Street”

In the ensuing months, two MS-13 gang members were identified and charged as part of a broader racketeering case. Luis Herrera (a.k.a. “Killer”) was ultimately alleged to be the driver of the shooters’ car. Street leader Danilo Velasquez (a.k.a. “Triste”) was ultimately alleged to be one of the gunmen. Their case was severed and set for trial on October 24, 2011. On November 8, 2011, Herrera pleaded guilty to various racketeering-related charges pursuant to a written plea agreement after the start of that trial. On November 29, 2011, the federal jury returned verdicts of guilty on all four counts against defendant Velasquez. The government subsequently pursued charges against Jaime Balam (a.k.a. “Tweety”), ultimately obtaining a ten-count indictment from a federal grand jury in August 2012. Balam was arrested in Mexico in October 2013 and was extradited to the United States in February 2015. He entered his guilty pleas on August 16, 2016, and was sentenced in United States District Court on November 8, 2016.

Evidence presented by the government at the 2011 trial of MS-13 street leader Danilo Velasquez and admissions in guilty pleas of other MS-13 defendants revealed the following:

On February 19, 2009, members of San Francisco, California’s “20th Street” clique of MS-13 went on a “hunt” for rival *Norteño* gang members. Eventually, their hunt took them into neighboring Daly City, where their attention focused on a car containing four young Hispanic males. Two of the young males wore white baseball-style caps with piping in red (a color associated with the rival *Norteño* gang), and loud hip-hop music emanated from their car. Believing they had found rivals, the MS-13 members now pursued in two cars. Herrera drove the lead car, with gunmen Velasquez (armed with a Cobray M-11/9mm pistol) and Balam (armed with a Lorcin .380-caliber pistol). When the victims’ car stopped at a red light, boxed in by the heavy traffic, the shooters’ car stopped close behind. Velasquez and Balam hopped out, walked up to flank the victims’ car, and poured in gunfire from outside the rear passenger windows.

It was over in moments. The left rear passenger received multiple gunshot wounds and died shortly afterwards. The vehicle driver was shot in the neck. He survived. The right front passenger suffered four gunshot wounds in the neck, chest, and right arm, including a bullet lodged between his jugular vein and carotid artery. He, too, survived his wounds. That victim’s brother, in the rear right passenger seat, miraculously escaped injury, but the ball cap he wore was pierced (and some of his hair clipped off) by a bullet.

The four victims, it turned out, were not rivals of MS-13. They were not gang members at all. The murdered man was a San Francisco City College student supporting himself by working at the local water district. The right front passenger was a first-year law student in San Francisco. That passenger’s brother, sitting directly behind him in the car, was a University of California, Berkeley graduate and an AT&T engineer. The driver was a Bank of America employee.

Velasquez and Balam returned to the stolen Honda, and Herrera drove off toward San Francisco. San Francisco Police found the Honda abandoned the following day in the Castro District of San Francisco. The .380-caliber pistol used by Balam was recovered by San Francisco Police officers on March 5, 2009, during a traffic stop effected in the Mission District of San Francisco; gang member Luis Herrera was one of the occupants of that car, and the officers learned that the gang members and

associates in the car were engaged in a “hunt” for rivals to shoot. Approximately eight months later, the mother of a juvenile in San Francisco turned in to the police the Cobray 9mm firearm used by Velasquez.

On February 24, 2009—long before investigators came to learn of Balam’s role in the Daly City attack—Balam was encountered by Homeland Security Investigations (HSI) special agents and placed into removal proceedings. He was removed to Mexico on February 26, 2009. Balam, a citizen of Mexico, had previously been encountered in New Mexico in 2006 and was given a voluntary return to Mexico in October 2006. He was found again in San Francisco in October 2008 and removed to Mexico in November 2008. He returned to San Francisco again.

Jaime Balam, the investigation revealed, was “jumped in” to the 20th Street clique of MS-13 in approximately 2008. With membership came the obligation to perform *jale* (literally, “work,” but in this context meaning a violent act committed on behalf of the gang). *Jales* often took the form of acts of violence designed to protect and enhance MS-13 and 20th Street’s territorial claims and reputation. Many of the acts of violence committed by 20th Street members were directed at known members of the rival *Norteño* street gang, which also operates in San Francisco and the San Francisco Bay Area.

B. Background: *La Mara Salvatrucha* and Operation Devil Horns

La Mara Salvatrucha, or MS-13, is a violent transnational criminal street gang with members and associates in the United States and Central America. In October 2012, the U.S. Treasury Department designated MS-13 as a Transnational Criminal Organization (TCO), meaning that U.S. persons are now prohibited from conducting financial transactions with MS-13 and any property of MS-13 in the United States is blocked. Following a July 2011 executive order authorizing the Treasury Department to target TCOs with economic sanctions, this designation added MS-13 to a list that already included the Brother’s Circle, the Camorra, the Zetas, and Yakuza.⁴

MS-13 has garnered a reputation as an extremely violent and dangerous gang whose members are often (but not always) recognizable by their tattoos. Some law enforcement estimates place its membership at 30,000 or more in a variety of countries, including El Salvador, Guatemala, Honduras, and Mexico. In the United States, its numbers are believed to exceed 8,000, operating in more than forty states and the District of Columbia. In this country, the TCO has been linked to numerous crimes, including murder, drug trafficking, sex trafficking, and human trafficking. MS-13, including its leadership, members, and associates, is alleged to be a criminal enterprise as defined by 18 U.S.C. §§ 1961(4)⁵ and 1959(b)(2)⁶—that is, a group of individuals who engage in activities affecting interstate commerce.⁶

MS-13 is believed to have formed in Los Angeles, California, during the 1980s. Its members are principally of El Salvadoran background, although many other MS-13 members have roots in other countries, such as Honduras, Guatemala, and Mexico. MS-13 has local chapters, or “cliques,” located throughout the world. Within the United States, major MS-13 cliques are well established in Virginia, the District of Columbia, Maryland, New York, Texas, North Carolina, and California. These cliques typically hold meetings to plan criminal activity, to collect illicit proceeds generated from criminal activity, and to have members pay their monthly dues into the clique treasury, a portion of which is remitted to MS-13 leaders in El Salvador, including gang leaders imprisoned there.⁷

⁴ See Samuel Rubinfeld, *Treasury Labels MS-13 Transnational Criminal Organization*, WALL ST. J. (Oct. 11, 2012).

⁵ 18 U.S.C. §§ 1961(4) (2012 & Supp. III 2015), preempted by *Melanson v. U.S. Forensic, LLC*, 183 F. Supp. 3d 376 (E.D.N.Y. 2016).

⁶ *Id.* § 1959(b)(2) (2012), declared unconstitutional by *United States v. Conyers*, 227 F. Supp. 3d 280, 287 (S.D.N.Y. 2016), appeal filed, No. 17-1188 (2d Cir. April 24, 2017).

⁷ *The MS-13 Threat: A National Assessment*, FBI (Jan. 14, 2008).

Beginning in approximately 2005 in the Northern District of California, agents of HSI initiated Operation Devil Horns, partnering with various local law enforcement agencies to address the violent crimes of a San Francisco-based MS-13 clique known as “20th Street MS-13,” or simply “20th Street.” The gang included approximately 140 active members with an area of operation in the Mission District of San Francisco, California. The gang was primarily composed of foreign nationals from Central America, many of them present unlawfully in the United States. Investigation revealed that 20th Street was a criminal enterprise participating in a variety of criminal activities, including murder, attempted murder, drug distribution, the manufacturing and distribution of identity documents, illegal sales of firearms, burglary, robbery, assaults on rival gang members, and vehicle theft.

As reflected in the public court records, this federal investigation resulted in more than forty criminal arrests. At least twenty-eight individuals were charged with violations of 18 U.S.C. § 1962(d) (RICO conspiracy)⁸ or 18 U.S.C. § 1959 (the Violent Crime in Aid of Racketeering, or “VICAR,” statute), including, in some cases, murder in aid of racketeering activity.⁹ Several 20th Street MS-13 gang members and associates were prosecuted under 8 U.S.C. § 1326 (illegal re-entry after deportation).¹⁰ Others were prosecuted for violating 18 U.S.C. § 922(g)(5) (unlawful possession of a firearm by an alien).¹¹ Many defendants entered guilty pleas. Eleven went to trial, and HSI San Francisco Special Agents and the HSI National Gang Unit collaborated with DOJ Gang Squad trial attorneys in pursuit of RICO convictions. While two secured acquittal of all charges, seven were convicted and sentenced to life in prison. At least twelve other defendants received sentences ranging from seven to thirty-five years in prison.¹²

Jaime Balam (a.k.a. “Tweety”) was the last of the MS-13 defendants to be charged in connection with Operation Devil Horns, and he was the last to be convicted.

C. Charging and Extraditing the MS-13 Member from Mexico

Prosecuting Jaime Balam in this case required coordination with three separate Department of Justice components: the Organized Crime and Gang Section (OCGS), the Capital Case Section (CCS), and the Office of International Affairs (OIA). Each handled a different aspect of the prosecution, but the particular requirements and deadlines were in some cases intertwined. The prosecutor should plan to contact each component and ascertain the requisite procedures and their associated deadlines well before seeking charges. For instance, as is described below, the extradition process influences in no small way the particular charges included in the indictment. Similarly, an extradition request to the Mexican government cannot succeed without first obtaining the necessary authorization not to seek the death penalty for death-eligible charges.

1. The Mandatory Approval Process with the Organized Crime Gang Section

In this case, we believed that charges against Jaime Balam should include murder and attempted murder in aid of racketeering (with one count for each victim). We considered adding associated conspiracy charges (pertaining to both RICO and VICAR statutes), as well as a § 924(c) charge and a

⁸ 18 U.S.C. § 1962(d) (2012).

⁹ *Id.* § 1959 (2012), declared unconstitutional by *United States v. Conyers*, 227 F. Supp. 3d 280, 287 (S.D.N.Y. 2016), appeal filed, No. 17-1188 (2d Cir. April 24, 2017).

¹⁰ 8 U.S.C. § 1326 (2012).

¹¹ 18 U.S.C. § 922(g)(5) (2012).

¹² See *United States v. Ivan Cerna, et al.*, 3:08-cr-00730-WHA; *United States v. Jaime Balam*, 3:12-cr-00625-WHA; *United States v. Eliseo Patino*, 3:05-cr-00666-CRB; *United States v. Sebastian Pacajoj-Riqueq*, 4:07-cr-00019-MJJ; *United States v. Oliver Marota*, 3:08-cr-00406-MMC; *United States v. Josue Hernandez*, 3:09-cr-00292-MMC; *United States v. Rony Avila*, 3:09-cr-01146-MHP; *United States v. Javier Pacheco-Ake*, 3:11-cr-00261-WHA.

substantive firearm charge under § 922(g)(5).¹³ Ultimately, we settled on a ten-count indictment, but only after confirmation with OIA that each charge would satisfy the “dual criminality” requirement (discussed below). However, the first step in this process was consultation with OCGS.

No RICO criminal charges may be brought without prior approval of OCGS.¹⁴ The review and approval process, centralized with OCGS, requires the AUSA to submit a final draft of the proposed charging document along with a RICO prosecution memorandum.¹⁵ Each new charging document requires separate approval.¹⁶ There are similar requirements with a similar review process for charges under the VICAR statute (18 U.S.C. § 1959).¹⁷

It is advisable to allow at least fifteen working days, and typically more if there is a backlog at OCGS, for securing the mandatory approval. Anticipate the need for revisions. Be aware that the fact that a grand jury has been scheduled to return the indictment and is about to expire will not excuse the review process.¹⁸

Here, the trial jury had returned its guilty verdicts against street leader Velasquez on November 29, 2011.¹⁹ Velasquez was sentenced on February 15, 2012. Driver Herrera had entered guilty pleas on November 8, 2011, and was sentenced the following January. The decision to continue the investigation and seek charges against Balam was made in the months following trial. After several months of follow-up investigation and several drafts of proposed charges, there were intensive discussions with the OCGS reviewer in early August 2012. OCGS approved racketeering-related charges on August 13, 2012.

The grand jury returned a sealed²⁰ ten-count indictment on August 21, 2012. These were as follows:

- (1) Racketeering conspiracy, in violation of 18 U.S.C. § 1962(d).²¹ This count focused on Balam’s agreement to participate in the conduct of the affairs of MS-13, alleged to be a racketeering enterprise within the meaning of the statute.
- (2) Conspiracy to commit murder in aid of racketeering activity, in violation of 18 U.S.C. § 1959(a)(5).²² In simple terms, this count was based on the agreement to murder rivals, cooperators, and others defying the will of the gang.

¹³ *Id.* §§ 924(c), 922(g)(5).

¹⁴ *See* USAM § 9-110.101 (2009).

¹⁵ USAM § 9-110.210; *see also* U.S. DEP’T OF JUSTICE, USAM, CRIMINAL RESOURCE MANUAL §§ 2071–2083 (1997) (giving guidance on preparing the RICO memorandum).

¹⁶ USAM § 9-110.101.

¹⁷ *Compare* USAM §§ 9-110.800–816 (2011) *with* 18 U.S.C. § 1959 (2012), *declared unconstitutional by* *United States v. Conyers*, 227 F. Supp. 3d 280, 287 (S.D.N.Y. 2016), *appeal filed*, No. 17-1188 (2d Cir. April 24, 2017).

¹⁸ *See* USAM § 9-110.210.

¹⁹ *See infra* Appendix.

²⁰ The original sealing order was based upon concern that public filing of the charges might warn the defendant that he had been charged in connection with the February 19, 2009 incident—or draw the attention of MS-13 members and associates, who would then tip him off. We obtained a limited unsealed order on November 19, 2012, allowing the government to obtain certified copies of the sealed indictment for use in connection with any future extradition proceedings. Four days after Balam’s October 21, 2013 arrest in Mexico, we obtained an order unsealing the entire case.

²¹ 18 U.S.C. § 1962(d) (2012).

²² *Id.* § 1959(a)(5).

(3) Conspiracy to commit assault with a dangerous weapon in aid of racketeering activity, in violation of 18 U.S.C. § 1959(a)(6).²³ This count mirrored the preceding count and encompassed attacks falling short of murder.

(4) Three counts of attempted murder in aid of racketeering activity, and aiding and abetting the same, in violation of 18 U.S.C. §§ 1959(a)(5) and 2(a).²⁴ Each surviving victim in the car was the subject of a separate count.

(5) Murder in aid of racketeering activity, and aiding and abetting the same, in violation of 18 U.S.C. §§ 1959(a)(1) and 2(a).²⁵ This count charged the gang-related murder of the victim in the rear seat and was alleged in such a way as to accommodate Balam's responsibility for his own firing and that of his companion—although forensic analysis indicated that the victim died from wounds received from a .380-caliber pistol, and witness testimony indicated that the Lorcin pistol was used by Balam.

(6) Using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence, and causing death thereby, and aiding and abetting the same, in violation of 18 U.S.C. §§ 924(j)(1) and 2(a).²⁶ This count was also based on the murder resulting from the hunt and included both Balam's own use of a handgun and his assisting the second shooter in the attack.

(7) Using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence, and aiding and abetting the same, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2(a).²⁷ This count was based not only on the February 19, 2009 attack, but logically encompassed other instances of the gang's use of firearms.²⁸

(8) Knowingly possessing a firearm and ammunition while being an alien illegally in the United States, in violation of 18 U.S.C. § 922(g)(5).²⁹ The evidence revealed that Balam was a citizen of Mexico, was present in the United States without having obtained permission as required, and had in fact been removed to Mexico prior to the February 19, 2009 attack.

Of special note is that the charges based on violations of §§ 1959(a)(1) and 924(j)(1) were death-eligible and so required review by CCS.

Securing the sealed indictment was only the first step in bringing Jaime Balam to court. The next steps involved close coordination with both CCS and OIA to obtain authorization not to seek the death penalty in this case so that, in turn, we could provide the necessary assurances to the government of Mexico that the death penalty would not be sought—a precondition to extradition from Mexico.

In addition, it was necessary to ascertain precisely where the defendant could be found by Mexican authorities. We obtained sealed search warrants for social media data pertaining to accounts

²³ *Id.* § 1959(a)(6) (2012).

²⁴ *Id.* § 1959(a)(5); *id.* § 2(a).

²⁵ 18 U.S.C. § 1959(a)(1) (2012), *declared unconstitutional by United States v. Conyers*, 227 F. Supp. 3d 280, 287 (S.D.N.Y. 2016), *appeal filed*, No. 17-1188 (2d Cir. April 24, 2017); *id.* § 2(a).

²⁶ 18 U.S.C. § 924(j)(1) (2012); *id.* § 2(a).

²⁷ 18 U.S.C. § 924(c)(1)(A); *id.* § 2(a). Prosecutors seeking to charge aiding and abetting a violation of 18 U.S.C. § 924(c) (2012) should review *Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014), which requires proof that the defendant learned of any circumstance constituting an element of the crime at a time when the defendant still had a realistic opportunity to withdraw from the crime. *See Rosemond v. United States*, 134 S. Ct. 1240, 1245, 1251–52 & n.10 (2014).

²⁸ Our indictment did not explicitly allege brandishing and discharging of a firearm; it would have been better practice to do so.

²⁹ 18 U.S.C. § 922(g)(5) (2012).

operated by Jaime Balam. These yielded photographs evidencing continued participation in MS-13 (and so pertaining to the charged RICO conspiracy) as well as data that provided Balam's location within Mexico. These efforts, supplemented by discreet surveillance, allowed us to provide the Mexican authorities with a specific residence address, ultimately leading to the defendant's arrest on the Provisional Arrest Warrant issued by the Mexican government.

2. Obtaining Expedited Post-Indictment Review from the Capital Case Section

Coordination with CCS began well before presentation of the indictment. It should be noted that the USAM provisions then in effect provided for an expedited *post-indictment* review in such cases as ours; pre-indictment review is now mandatory. Of greatest relevance to this discussion, we learned, were two points: the Mexican government requires assurances that the death penalty will not be sought for a defendant extradited from Mexico, and CCS will not present a "no seek" recommendation based on the need to extradite *until* the defendant is in custody. These policies effectively require recourse to the provisional arrest procedure followed by a formal extradition package.

USAM sections 9-10.000 to 9-10.200 set forth the requirements and procedures for obtaining review of any death-eligible charge, regardless of whether the intent is to seek the death penalty or not.³⁰ Effective April 7, 2014, every case involving an offense punishable by death must be submitted for pre-indictment review by CCS, absent "extenuating circumstances."³¹ At the time of the *Balam* indictment, however, this mandatory provision was not yet in effect. Nonetheless, because the government of Mexico will not grant extradition without assurances that the death penalty will not be sought, it was necessary to contact CCS and start the process early.

Fortunately, CCS provides for expedited review in appropriate cases. USAM section 9-10.070 addresses the situations in which prosecutors may seek expedited review, including a case where extradition of the defendant or a crucial witness will be requested from a country that, as a precondition to granting extradition, requires assurances that the death penalty will not be sought or requires that the evidence from the crucial witness will not be used to seek the death penalty.³² Section 9-10.070 describes the contents of the submission.³³ In a case such as that involving Balam's contemplated indictment and extradition, the submission should provide a description of the relevant facts, the defendant's criminal history, the federal interest in prosecuting the case, the rationale for why the death penalty should not be sought, and any applicable deadlines for decision.³⁴ It is wise to start gathering the information early. The submission should also include, on its face, the basis on which the case qualifies for an expedited decision. The CCS submission will be reviewed by the Chief of CCS, and if it satisfies the requirements for expedited decision, the case will be transmitted to the Attorney General, through the Deputy Attorney General, for final decision; this process now bypasses the otherwise applicable review by the Capital Review Committee.

In this case, we submitted a CCS memorandum to be vetted through the Attorney General's Review Committee on Capital Cases (AGRCCC). With the CCS memorandum seeking expedited review, we submitted a copy of the prosecution memorandum and indictment, the required Death Penalty Evaluation Form, and a sealed non-decisional, case-identifying information form. The CCS memorandum on its face highlighted the applicable timetable for decision: sixty days (minus time for translation) from the date of the defendant's apprehension in Mexico pursuant to a provisional arrest warrant. The CCS memorandum included a discussion of pertinent facts and charges, information about the defendant

³⁰ USAM §§ 9-10.000–.200.

³¹ USAM §§ 9-10.040, .060.

³² See USAM § 9-10.070(A).

³³ USAM § 9-10.070.

³⁴ USAM § 9-10.070(B).

(including his citizenship, age, and lack of criminal history), information about the victim and victim impact (including the position of the victim's family about seeking the death penalty in this case), reasons for not seeking the death penalty (including an assessment of statutory and non-statutory aggravating and mitigating factors under 18 U.S.C. § 3592(a)-(c)), and an evaluation of the quality of the evidence.³⁵

The intertwined deadlines merit some explication. Here, we contacted CCS several weeks before the anticipated indictment date (and, internally, we had started drafting the necessary paperwork approximately one month earlier). The indictment contained the Special Findings that would, if necessary, support a request for the death penalty. The indictment was returned on August 21, 2012. While the focus of our efforts shifted to locating Balam in Mexico and obtaining his extradition, we worked with CCS to prepare a fully vetted CCS memorandum, with accompanying attachments and related forms, that could be signed by the U.S. Attorney and submitted on a moment's notice. In sum, we had the necessary paperwork essentially completed by early 2013, and we were in a position, once Balam was actually in custody, to submit the fully prepared, signed CCS memorandum and attachments within a matter of days.

As it turned out, on October 21, 2013, Balam was arrested in Mexico pursuant to a provisional arrest warrant. We forwarded our submission to CCS within days. Soon afterward, we received the AGRCCC draft memorandum with its recommendation and promptly returned the U.S. Attorney's written certification of the accuracy of the facts set forth in the AGRCCC memorandum, which provided the basis for its recommendation. Within approximately two weeks, the U.S. Attorney received the Attorney General's letter authorizing and directing her, in order to facilitate the extradition of Balam from Mexico, not to seek the death penalty against him. This letter arrived a full month before the deadline for receipt of the final extradition package in Mexico—a deadline which, as it turned out, we met with only days to spare.

3. Securing the Provisional Arrest and then Extradition of Balam Through the Office of International Affairs

We began consulting with OIA well before presenting the indictment to the grand jury. Given the interplay of the “dual criminality” provision and the “rule of specialty,” such consultation is necessary. Moreover, as will be clear from the timeline presented below, the extradition process involves other entities and persons (including, for instance, the Department of State, translators, Mexican authorities and courts, and the defendant himself) over whom the prosecutor has no control. As it turned out, we succeeded in obtaining Balam's extradition, but it took nearly two years.

Accordingly, prosecutors who believe that the case will involve extradition should contact the appropriate country desk at OIA as soon as possible. Here, we contacted OIA's Mexico Desk shortly after deciding to seek an indictment. OIA guided us through several key steps at the outset, including review of the applicable extradition treaty, discussion of the key requirements for an extradition request, and the need to present affidavits or declarations from two non-government witnesses in support of the extradition request. Equally important was OIA's guidance regarding the various deadlines involved, including the critical requirement that the government of Mexico receive the fully completed, translated extradition package no later than sixty days after the defendant's arrest in Mexico.

The logical starting point following the initial contact with OIA is to review the applicable extradition treaty. OIA maintains an online list of United States extradition treaties.³⁶ In the case of Mexico, we found that the treaty incorporates several significant provisions that must be taken into account in shaping the indictment. Chief among these are the “dual criminality” provision and the “rule of specialty.” Under the dual criminality provision, extradition will be granted only for offenses that are

³⁵ See 18 U.S.C. §3592(a)-(c) (2012).

³⁶ Additionally, the Extradition Treaty Between the United States of America and the United Mexican States is reproduced at [Extradition Treaty, Mex.-U.S., May 4, 1978, 31 U.S.T. 5059](#).

criminal in both the United States and Mexico.³⁷ It is not required, however, that the crimes in both countries contain identical elements; it is enough if the two countries punish the same basic evil.³⁸ As it happened, each of the ten felony counts in the indictment returned on August 21, 2012, and listed above, was an extraditable offense under the treaty.

Under the rule of specialty,³⁹ on the other hand, defendants can only be prosecuted in the United States for those crimes on which their extradition has actually been granted.⁴⁰ This significant restriction means that obtaining a superseding indictment to adjust the charges closer to trial, but after extradition, will not be possible. Accordingly, before framing the indictment, prosecutors should consider their evidence carefully by referring to the extradition treaty to ensure that “dual criminality” can be satisfied for each charge in the indictment. If the investigation is not yet complete, it may be necessary to delay the prosecution and the extradition request. This, of course, can raise the risk that the defendant learns of the charges, or simply fears the possibility of charges in the United States, and takes steps to hide. In our case, fortunately, the investigation was completed well before presentation of the proposed indictment, and we were able to draft all of the charges that our evidence supported and that we thought we would want to present at trial.

The government of Mexico requires the prosecutor to submit an affidavit addressing points of law, the precise charges on which extradition is sought, the essential elements of those crimes, and the absence of certain legal impediments (e.g., double jeopardy or statute of limitations).⁴¹ It also requires a case agent to submit an affidavit setting forth the probable cause showing for each charge. But in addition, it requires affidavits or declarations from two non-government witnesses in support of the probable cause showing. In this case, we benefited from the availability of cooperating defendants who could provide the required declarations. The second unusual requirement—a commitment that the government will not seek the death penalty—is discussed above.⁴²

From the outset, we grappled with the strategic question of how to initiate the extradition request. One option was simply to present the completed extradition package to the government of Mexico. Choosing this approach means taking the time to assemble all of the necessary affidavits and exhibits and to have them translated. In this case, that meant two declarations from non-government witnesses, a prosecutor’s affidavit, and a case agent’s affidavit. Because extradition will not be granted without the formal extradition package,⁴³ it sometimes makes best sense to proceed directly to this step.

However, if there is urgency to the case—including the risk that the defendant may learn of the effort to secure his arrest abroad and so flee—it may be preferable to proceed with a request for a provisional arrest warrant.⁴⁴ This second approach entails submitting a diplomatic note that contains the particulars of the defendant and information on the crime or crimes with which he is charged. This presents a way to have the defendant arrested and to also complete the necessary preparations so that the fully completed, translated extradition packet can be submitted within the sixty days required by the applicable extradition treaty.⁴⁵

³⁷ *Id.* at Article 1.

³⁸ See e.g., *Zhenli Ye Gon v. Holt*, 774 F.3d 207, 214–17 (4th Cir. 2014) (deciding case where Mexican citizen challenged determination that he was extraditable to Mexico; court applied Blockburger “elements” test).

³⁹ Extradition Treaty, Mex.-U.S., May 4, 1978, 31 U.S.T. 5059, Article 17.

⁴⁰ See *Zhenli Ye Gon*, 774 F.3d at 220–21 (discussing rule of specialty but declining to reach appellant’s claim).

⁴¹ Extradition Treaty, Mex.-U.S., May 4, 1978, 31 U.S.T. 5059, Article 10.

⁴² *Id.* at Article 8.

⁴³ Of course, it is always possible that a defendant, once in custody, will waive formal extradition and agree to be transported to the United States. The risks inherent in depending on that circumstance are apparent.

⁴⁴ Extradition Treaty, Mex.-U.S., May 4, 1978, 31 U.S.T. 5059, Article 11.

⁴⁵ *Id.*

In this case, however, there was yet another compelling reason to proceed via provisional arrest. As we learned from CCS, in cases involving an expedited “no seek” request based upon the need to extradite, the request will typically not be processed until the defendant is actually in custody pursuant to the provisional arrest. In practice, this means that, even while preparing the Provisional Arrest request, the prosecutor will need to start drafting the extradition affidavits and associated attachments and to prepare the CCS memorandum and its attachments. The defendant’s arrest in the foreign country sets in motion a number of interlocking deadlines, all of which culminate in the presentation of a fully translated, sworn extradition package that contains the necessary assurances that the death penalty will not be sought.⁴⁶ This package must be presented no later than sixty days following the defendant’s arrest.⁴⁷

With these various points in mind, we began drafting the paperwork to request that the Mexican government issue a provisional arrest warrant for Balam, while we simultaneously gathered materials to prepare the full extradition package. Key in this process was learning the defendant’s specific whereabouts in Mexico. In this case, we were lucky enough to learn of the defendant’s social media presence and obtained the issuance of a search warrant under seal some weeks before the presentation of the indictment. The search warrant results yielded digital data which helped to locate the defendant at his home village in the Yucatán. Following indictment, we acted on this data in submitting a similar sealed search warrant request that confirmed the defendant’s presence. HSI agents detailed to Mexico worked with Mexican law enforcement officials to conduct surveillance and obtain an address for use in the provisional arrest request.

The extradition process teaches patience. In this case, we contacted OIA in August 2012 prior to obtaining a sealed indictment on August 21, 2012. Thereafter, we drafted documents to request Balam’s provisional arrest and simultaneously started to prepare the affidavits, declarations, and associated exhibits that would be required for the formal extradition package. The defendant was located at an address in Mexico in early January 2013, and that allowed us to put the provisional arrest request into final form. The completed paperwork—including the prosecutor’s formal commitment to prepare the extradition package, to assume the costs of translation, and to provide the requisite assurances that the death penalty would not be sought—went to OIA in April 2013. It was then forwarded to the Department of State, sent on to the U.S. Embassy in Mexico City, and ultimately presented to the Mexican government on or about May 8, 2013. Meanwhile, we were revising the affidavits and attachments for the extradition package.

The Mexican government issued a provisional arrest warrant in or about early June 2013. There ensued a period of preparation for the actual arrest, which required the presence of an Interpol representative. In October 2013, Mexican law enforcement agents went to arrest Balam at his residence. He was not there. It turned out that he had left for Cancun with a load of produce to sell. It was unclear whether he would be tipped off to the agents’ attempt to arrest him. However, to their great credit, on October 21, 2013, Mexican law enforcement agents took Balam into custody.

It is not an overstatement to say that furious activity ensued. The final extradition package was due in Mexico, fully translated and delivered through diplomatic channels to the Mexican government, no later than December 19, 2013. In November 2013, the complete set of affidavits went into final form. Affidavits from the prosecutor and case agent and declarations from two cooperating defendants were sworn in triplicate originals. (One fully executed set was retained in the Northern District of California.) Before that could happen, however, we needed authorization from the Attorney General not to seek the death penalty. On November 19, 2013, the Attorney General sent a letter authorizing and directing the U.S. Attorney, in order to facilitate the extradition of Jaime Balam from Mexico, not to seek the death penalty against him. Thus, by early December 2013, the entire package, in final form and fully translated,

⁴⁶ *Id.*

⁴⁷ *Id.*

was ready to be forwarded to the Department of State. On December 17, 2013, we were notified that the U.S. Embassy had forwarded the translated extradition package to the government of Mexico.

That was not the end of the waiting. In June 2014, a Mexican court ordered the extradition of Jaime Balam pursuant to the formal request of the United States. The defendant exercised his right of appeal. That appeal was eventually denied, and in October 2014, a Mexican court signed off on the extradition request. The decision now moved to *La Secretaria de Relaciones Exteriores* (the counterpart of our Department of State) for final approval of the extradition request. Final approval would then require U.S. law enforcement to effect Balam's transportation to the United States within sixty days. On February 20, 2015, Jaime Balam arrived in the United States. On February 23, 2015, he made his initial appearance before the duty Magistrate-Judge in the United States District Court in San Francisco. Just more than six years had elapsed since the MS-13 attack in nearby Daly City.

One other practice pointer bears note. Through OIA, we had requested that Mexican authorities arresting Jaime Balam also conduct a search for evidence of the charged crimes. This search resulted in the seizure and forwarding to the United States of a cell phone with a SIM card in it, a second SIM card seized from the defendant's wallet, and a blue belt. (Blue is a color associated with MS-13.) It also resulted in the opportunity for Spanish-speaking HSI agents to conduct a *Mirandized* interview of the defendant at the offices of the Mexican state police who arrested Balam on the provisional arrest warrant. Both procedures were requested and accommodated under the extradition treaty. We subsequently obtained a federal search warrant for the cell phone and second SIM card in the Northern District of California. These efforts yielded evidence for possible use at trial, including evidence of the defendant's continuing membership in MS-13.

D. Resolution of the Case

Under the circumstances of the case, not the least of which was the battle over extradition, Balam was ordered detained pending trial. The government turned over voluminous discovery on a hard drive pursuant to a protective order designed to maximize protections for victims and civilian witnesses. Due to defense counsel's schedule, trial was set for April 2017. The defendant, although offered an earlier trial date with different counsel, expressed his preference to keep the attorney with whom he started. In order to forestall any later due process challenge to lengthy pretrial detention, we requested on the record at various appearances that the district court repeat its advice concerning the defendant's right to a speedy trial, reconfirming his choice to waive speedy trial rights in order to prepare for trial with the original attorney.

On August 16, 2016, nearly five years after the trial that produced the convictions of driver Herrera and gunman Velasquez, Jaime Balam entered into a written plea agreement with the government. He entered guilty pleas to all but the VICAR murder count, which carries a mandatory life sentence where the death penalty is not sought. The parties jointly recommended a sentence of 330 months (twenty-seven and one-half years) in federal prison.

On November 8, 2016, the district court held a sentencing hearing. The murder victim's family had an opportunity to address the court (and the defendant) at the sentencing hearing. The district court sentenced Jaime Balam to a term of 330 months in federal prison.

III. Conclusion

Pursuing racketeering charges, especially those involving gang-related murders, where the defendant is located in a foreign country, is typically a time-consuming and complicated process. Any RICO or VICAR charges require approval from OCGS. Further constraints are imposed by the following: the need to ensure that charges are extraditable under the appropriate treaty; the need to obtain necessary approvals in the case of death-eligible charges, including authorization to provide the necessary

assurances as a precondition to extradition; the need to provide affidavits from two non-government witnesses; and the need to abide by the rule of specialty. Further complications may arise from difficulties in locating the defendant (a process in which social media search warrants may prove useful), preparing a request for provisional arrest, and needing to react swiftly once the defendant is in custody in the foreign country.

But all this work is surely worth the effort when a murder has been committed on United States soil. The message we send is powerful: if members of a transnational criminal organization such as MS-13 commit violent crimes in the United States, we will pursue them relentlessly, even if it takes years. We will find them, arrest them, and bring them back to face charges in the courts of the country where they committed their crimes. It may take years, but one day, law enforcement agents will knock at their door. It is no exaggeration to say that the rule of law is at stake. We cannot afford the risk that members of a TCO may come to believe that they can elude responsibility for their violent crimes.

ABOUT THE AUTHOR

Andrew M. Scoble has been an AUSA in the Northern District of California since 1992. He has previously served as Deputy Chief and Chief of OCDETF and as an SLC. Since 2010, he has been assigned to the Organized Crime Strike Force and has prosecuted a variety of gang cases involving RICO and VICAR charges. He has earned an Attorney General Award (2012) and a Director's Award (2016) in connection with two of these prosecutions.

APPENDIX: An Abbreviated Timeline of the *Balam* Case

10/24/2011:	Trial of Luis Herrera and Danilo Velasquez commences
11/08/2011:	Luis Herrera enters guilty pleas
11/29/2011:	Jury convicts gunman Danilo Velasquez of all pending charges
by 2/2012:	Luis Herrera (driver) and Danilo Velasquez (gunman) sentenced
by 4/2012:	Decision made to seek indictment and extradition of Balam
by 8/10/2012:	Contact made with OCGS, CCS and OIA
8/21/2012:	Indictment returned against Jaime Balam (second gunman)
late 2012:	AUSA drafts paperwork for requesting Provisional Arrest Warrant (PAW) and extradition, as well as CCS memorandum
12/2012:	AUSA forwards first drafts of extradition affidavits to OIA.
2/2013:	Balam residence in Mexico confirmed and location forwarded to OIA
3/25/2013:	Fully vetted, internally approved memorandum prepared and ready for forwarding from USAO to CCS once defendant is in custody
4/08/2013:	AUSA forwards completed request for OIA to open provisional arrest/extradition file with Mexico; commitment to prepare extradition package in timely fashion, to pay costs of extradition, and to provide assurances that death penalty will not be imposed
5/08/2013:	Diplomatic note requesting provisional arrest delivered to GOM
10/09/2013:	Updated extradition affidavits and exhibits submitted to OIA
10/21/2013:	Balam arrested on PAW in Yucatán, Mexico (starts sixty-day clock)
10/25/2013:	CCS memorandum submitted for expedited review
11/19/2013:	Attorney General authorizes “no seek” based on need to facilitate the extradition of Balam from Mexico
12/02/2013:	Entire extradition package, translated, ready for Department of State
12/17/2013:	U.S. Embassy confirms delivery of translated extradition package to GOM
6/17/2014:	Mexican court orders extradition of Balam, who files appeal
by 10/07/2014:	Mexican district court has denied defendant’s appeal and found him extraditable; decision now lies with <i>La Secretaria de Relaciones Exteriores</i>

2/20/2015: Law enforcement transports Balam to the United States
2/23/2015: Balam's initial appearance in U.S. District Court, San Francisco
8/16/2016: Balam enters guilty pleas to nine counts of pending indictment
11/08/2016: Balam sentenced to 330 months in prison