IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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In the Matter of the Extradition of

RAYMOND DONLON

Case No.: 1:19-MJ-18 (DJS)

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GOVERNMENT'S MEMORANDUM OF LAW
IN SUPPORT OF CERTIFICATION OF EXTRADITION

Dated: January 22, 2019

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PRELIMINARY STATEMENT

On November 8, 2018, Ireland formally requested Raymond Donlon's (hereinafter "DONLON") extradition so that he can stand trial in that country on charges related to the sexual abuse of two minors between 2004 and 2009. On January 16, 2019, pursuant to its extradition treaty obligations, the United States filed an extradition complaint in this District, and obtained a warrant for DONLON's arrest. The same day, DONLON was arrested. By statute, this Court must hold a hearing to consider the evidence of criminality presented by Ireland, and to determine whether it is "sufficient to sustain the charge under the provisions of the proper treaty or convention." 18 U.S.C. § 3184. As detailed herein, the evidence submitted by Ireland fulfills the relevant treaty requirements. The Court should therefore "certify the same" to the Secretary of State, who will then decide whether to surrender DONLON. *See* 18 U.S.C. §§ 3184, 3186.

BACKGROUND

I. FACTUAL BACKGROUND

Ireland seeks DONLON's extradition so that he can stand trial on 394 criminal counts arising from his alleged protracted sexual abuse of two minor victims, CM and TK. DONLON came into contact with CM and TK through his involvement as a former coach, sports photographer, and administrator at the Pearse Park sporting ground in Longford, Ireland. In November of 2012, CM disclosed to law enforcement that DONLON had sexually abused him over a period of time between 2005 and 2009 when CM was between the ages of 11 and 16. The abuse consisted of DONLON forcing CM to touch DONLON's erect penis and masturbate DONLON.

In September of 2013, a second alleged victim, TK, came forward and provided a detailed statement of the relentless sexual abuse DONLON allegedly inflicted on him. DONLON is accused of sexually abusing TK for a lengthy period of time, including multiple times per week between 2004 and 2006, beginning when TK was 13 years old. The abuse occurred primarily at the Pearse Park sporting ground, but also took place in DONLON's home and various other locations, including hotel rooms. The abuse consisted of repeated masturbation and oral sex. On one occasion, DONLON attempted to have anal intercourse with TK at DONLON's home, which TK resisted. In conjunction with the abuse, DONLON coached, and groomed TK from the age of at least 12, giving him a job, gifts, money and trips away from a difficult home life. However, DONLON's treatment of TK devolved into a pattern of isolation, sexual assault and physical abuse.

II. PROCEDURAL BACKGROUND

Irish authorities conducted a lengthy investigation following the November 2012 complaint made by CM. According to Ireland, after search warrants were executed on DONLON's residence in November 2013, DONLON's attorney offered to meet with the investigation team. DONLON, however, subsequently fled the jurisdiction. DONLON travelled first to the United States, and then to the United Kingdom. Investigators' attempts to reach DONLON in the United Kingdom by mail and phone were unsuccessful. On September 26, 2017, warrants for DONLON's arrest were issued by the Judge of the District Court, at Longford, Ireland. In September of 2018, investigators from the Department of Homeland Security (DHS), Homeland Security Investigations (HSI) located DONLON, who was residing in Guilderland, New York.

On November 8, 2018, Ireland submitted to the United States a formal request for DONLON's extradition pursuant to its extradition treaty with the United States (the "Treaty").[1] On January 16, 2019, the United States, in accordance with its obligations under the Treaty and pursuant to 18 U.S.C. §§ 3181 *et seq.*, filed a complaint in this District seeking a warrant for DONLON's arrest. United States Magistrate Judge Daniel J. Stewart issued an arrest warrant, and DONLON was arrested on that same date. DONLON is currently in the custody of the United States Marshals Service.

ARGUMENT

This Court should certify DONLON's extradition for the Secretary of State's surrender decision because the requirements for certification have been satisfied.

I. LEGAL FRAMEWORK OF EXTRADITION PROCEEDINGS

A. The Limited Role of the Court in Extradition Proceedings

Extradition is primarily an executive function with a specially defined role for a judicial officer, who is authorized by statute to determine whether to certify to the Secretary of State of the United States that the evidence provided by the requesting country is "sufficient to sustain the charge." *See* 18 U.S.C. § 3184; *see also, e.g.*, *Cheung v. United States*, 213 F.3d 82, 88 (2d Cir.

[1] *See* Treaty on Extradition Between the United States of America and Ireland, U.S.-Ir., July 13, 1983, T.I.A.S. No. 10813 (the "1983 Treaty"), and the Instrument as contemplated by Article 3(2) of the Agreement on Extradition between the United States of America and the European Union signed 25 June 2003, as to the application of the Treaty on Extradition between the United States of America and Ireland (the "Instrument"). The Annex to the Instrument reflects the applicable integrated text of the provisions of the 1983 treaty and the U.S.-E.U. Extradition Agreement (hereinafter collectively referred to as the "Treaty"). A copy of the Instrument (with Annex) is included in the government's Exhibit 1 to its Complaint in this matter (EXT-DONLON-00007-20).

2000). The Secretary of State, not the Court, makes the ultimate decision regarding whether the fugitive should ultimately be surrendered to the requesting country. *See* 18 U.S.C. §§ 3184, 3186; *see also, e.g.*, *Lo Duca v. United States*, 93 F.3d 1100, 1103-04 (2d Cir. 1996). "This bifurcated procedure reflects the fact that extradition proceedings contain legal issues peculiarly suited for judicial resolution, such as questions of the standard of proof, competence of evidence, and treaty construction, yet simultaneously implicate questions of foreign policy, which are better answered by the executive branch." *United States v. Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997).

If there is an extradition hearing in this matter, the Court's role will be limited to considering the requesting country's evidence and determining whether the legal requirements for certification of extraditability—as defined in the applicable extradition treaty, statutes, and case law—have been established. *See, e.g.*, *Cheung*, 213 F.3d at 88; *Lo Duca*, 93 F.3d at 1103-04. If the Court finds that the requirements for certification have been met, it must provide the certification to the Secretary of State, and must commit the fugitive to the custody of the U.S. Marshals Service to await the Secretary's final determination regarding surrender. *See* 18 U.S.C. § 3184.

B. The Requirements for Certification

The Court should certify to the Secretary of State that a fugitive is extraditable when the following requirements have been met: (1) the judicial officer is authorized to conduct the extradition proceeding; (2) the Court has jurisdiction over the fugitive; (3) the applicable extradition treaty is in full force and effect; (4) the crimes for which surrender is requested are covered by the treaty; and (5) there is sufficient evidence to support a finding of probable cause as

to the crimes for which extradition is sought. *See* 18 U.S.C. § 3184; *see also, e.g.*, *Cheung*, 213 F.3d at 88; *In re Extradition of Mujagic*, 990 F. Supp. 2d 207, 214-20 (N.D.N.Y. 2013).

II. THE REQUIRMENTS FOR CERTIFICATION HAVE BEEN MET IN THIS CASE

A. This Court has Authority over the Proceedings

The extradition statute authorizes proceedings to be conducted by "any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State." *See* 18 U.S.C. § 3184. As such, the judicial officer conducting the extradition hearing prescribed by Section 3184 does not exercise "any part of the judicial power of the United States," *In re Kaine*, 55 U.S. 103, 120 (1852), but rather is acting in a "non-institutional capacity by virtue of a special authority," *In re Extradition of Howard*, 996 F.2d 1320, 1325 (1st Cir. 1993). Both magistrate judges and district judges may render a certification under Section 3184. *See Austin v. Healey*, 5 F.3d 598, 601-02 (2d Cir. 1993); *see also* N.D.N.Y. L.R.Cr.P. 58.1(a)(2)(B) ("A Magistrate Judge is also authorized to . . . [c]onduct extradition proceedings in accordance with 18 U.S.C. § 3184."). Consequently, this Court may render a "certification" under Section 3184.

B. This Court has Jurisdiction over DONLON

It is also well settled that the Court has jurisdiction over a fugitive, such as DONLON, who is found within its jurisdictional boundaries. *See* 18 U.S.C. § 3184 ("[A judge] may, upon complaint made under oath, charging any person found within his jurisdiction . . . issue his warrant for the apprehension of the person so charged."). The Court has jurisdiction over DONLON because he was found and arrested within the Northern District of New York.

C. The Treaty Between Ireland and the United States is in Full Force and Effect

Section 3184 provides for extradition in specifically defined situations, including whenever a treaty or convention for extradition is in force between the United States and the requesting state. As set forth in the declaration of Tom Heinemann, an Assistant Legal Adviser in the Office of the Legal Adviser of the U.S. Department of State, there is an extradition treaty in full force and effect between the United States and Ireland. *See* Exhibit 1 to the government's Complaint in this matter (hereinafter, "Exhibit 1"), EXT-DONLON-00001-20. The Court should defer to the Department of State's determination in this regard. *See Terlinden v. Ames*, 184 U.S. 270, 288 (1902).

D. DONLON's Alleged Crimes are Covered by the Treaty

Extradition treaties create an obligation for the United States to surrender fugitives under the circumstances defined in the treaty. In this case, Article II(1) of the Treaty states that "[a]n offence shall be an extraditable offense only if it is punishable under the law of both Contracting Parties by imprisonment for a period of more than one year, or by a more severe penalty." *See* Treaty, Art. II(1) of the Treaty's Annex, Exhibit 1, EXT-DONLON-00012.

In assessing whether such a dual criminality requirement is met, the Court should examine the description of criminal conduct provided by Ireland in support of its charges and decide whether that conduct would be criminal under U.S. federal law, the law of the state in which the hearing is held, or the law of a preponderance of the states, if it had been committed here. "The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions." *Collins v. Loisel*, 259 U.S. 309, 312 (1922); *see also, e.g., In re Pena Bencosme*, 341 Fed. App'x

681, 684 (2d Cir. 2009) (dual criminality requirement satisfied if "the *conduct* of the accused . . . falls within the proscription of American criminal law") (emphasis in original, internal quotation marks and citations omitted).

In fulfilling its function under Section 3184, the Court should construe liberally the applicable extradition treaty in order to effectuate its purpose, namely the surrender of fugitives to the requesting country. *Factor v. Laubenheimer*, 290 U.S. 276, 298-300 (1933); *see also, e.g.*, *Martinez v. United States*, 828 F.3d 451, 463 (6th Cir. 2016) (en banc) ("default rule" is that any ambiguity in extradition treaty must be construed in favor of "facilitat[ing] extradition"). Accordingly, because extradition treaties should be "interpreted with a view to fulfil our just obligations to other powers," *Grin v. Shine*, 187 U.S. 181, 184 (1902), the Court should "approach challenges to extradition with a view towards finding the offenses within the treaty," *McElvy v. Civiletti*, 523 F. Supp. 42, 48 (S.D. Fla. 1981).

The dual criminality requirement is satisfied in this case. Ireland has provided evidence showing that DONLON has been charged with 394 criminal counts arising from his sexual abuse of two minors, TK and CM, who he came into contact with through his involvement as a former coach and sports photographer at the Pearse Park sporting ground in Longford, Ireland. DONLON is accused of abusing victim TK for a lengthy period of time between 2004 and 2006, starting when TK was just 13 years-old. DONLON is also charged with falsely imprisoning TK, harassing him, and damaging TK's property. *See* Exhibit 1, EXT-DONLON-00215 through 583, and EXT-DONLON-00610 through 987; *see also* Exhibit 2, pages 1 – 62. As to the second minor victim, CM, DONLON is accused of sexually assaulting CM, who was between the ages of twelve and

sixteen, from 2005 through 2009. *See* Exhibit 1, EXT-DONLON-00584 through 609, and EXT-DONLON-00988 through 1004*; see also* Exhibit 2, pages 62 - 66.

Had DONLON's charged conduct occurred in the United States, the vast majority of the charged conduct (Sexual Assault (210 counts), Rape (177 counts), and Assault Causing Harm (3 counts)), could be punished under, *inter alia*, the following federal statutes: 18 U.S.C. §§ 2243 (Sexual Abuse of Minor or Ward); 2244 (Abusive Sexual Contact with Minor); and 113(a)(2) (Assault with the Intent to Commit any Felony), all of which are punishable by a maximum prison term of more than one year.

DONLON's additional charged conduct (False Imprisonment (1 count), Damage to Property (1 count), and Harassment (1 count)), could be punished, *inter alia*, under the following New York state statutes: N.Y. Penal Law §§ 135.05 & 135.10 (Unlawful Imprisonment, First and Second Degrees); N.Y. Penal Law 145.00 & 145.05 (Criminal Mischief, Third and Fourth Degrees); and N.Y. Penal Law 240.30 (Aggravated Harassment in the Second Degree), which, depending on the charge, may be punishable by a maximum prison term of more than one year, or up to one year imprisonment.[2]

Further, the State Department has opined that the offenses for which Ireland has requested DONLON's extradition are covered by the Treaty, a view to which this Court should defer. *See* Heinemann Declaration, Exhibit 1 (EXT-DONLON-00001-20); *see also*, *In re Extradition of*

[2] Under Article II(4) of the Treaty's Annex, it does not matter if all of the equivalent U.S. charges would be punishable by over one year of imprisonment, as long as some are. *See* Treaty, Art. II(4)) of the Treaty's Annex (EXT-DONLON-00012) ("If extradition is granted for an extraditable offence, it may also be granted for any other offence for which extradition is requested that meets all the requirements for extradition other than the periods of imprisonment specified in paragraph 1 of this Article.").

Salazar, No. 09-MJ-2545, 2010 WL 2925444, at *4 (S.D. Cal. July 23, 2010) (State Department opinion that treaty covers the offenses constitutes "substantial evidence of extraditability") (citing *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)).

E. There is Probable Cause to Believe that DONLON Committed the Offenses

To certify the evidence to the Secretary of State, the court must also conclude that there is probable cause to believe DONLON committed the crimes charged by Ireland. Significantly, it is not the role of this Court to determine DONLON's guilt or innocence. *See, e.g., In re Pena-Bencosme*, 341 F. App'x 681, 682-83 (2d Cir. 2009) (summary order) ("'An extradition hearing is not the occasion for an adjudication of guilt or innocence. Rather, its purpose is to determine whether there is reasonable ground to believe that the person whose extradition is sought is guilty . . .'") (quoting *Melia v. United States*, 667 F.2d 300, 302 (2d Cir.1981)); *Hoxha v. Levi*, 465 F.3d 554, 561 (3d Cir. 2006) ("[T]hus, the magistrate's role is 'to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction.'") (quoting *Sidali v. I.N.S.*, 107 F.3d 191, 198 (3d Cir. 1997)).

The evidence is sufficient and probable cause is established if a person of ordinary prudence and caution can conscientiously entertain a reasonable belief in the probable guilt of the accused. *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975). The Supreme Court stated in *Benson v. McMahon* that:

> the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which

> will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him.

127 U.S. 457, 463 (1888); *see also* *Collins*, 259 U.S. at 316 ("The function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction."); *Fernandez*, 268 U.S. at 312 ("Competent evidence to establish reasonable grounds is not necessarily competent evidence to convict.").

In this case, Ireland has included in its request a sworn affidavit by Ireland's Senior Prosecution Solicitor in its Office of the Director of Public Prosecutions, Michael Brady, summarizing DONLON's pending charges and their bases (*See* Exhibit 1, EXT-DONLON-01006 through 1070), as well as provided copies of the arrest warrants for DONLON, and the informations in support of those warrants (*See* Exhibit 1, EXT-DONLON-00215 through 1004). The prosecutor's summary, and the warrants and informations, include detailed descriptions of DONLON's charged criminal acts. *Id.*

Moreover, Ireland's request also included a summary of the Garda's (Ireland's national police force) investigation, and description of the evidence incriminating DONLON. *See* Exhibit 1, EXT-DONLON-00033 through 00187. That evidence includes summaries of the victims' lengthy, independent statements – which detail the numerous instances of abuse by DONLON, who they each had repeated, and separate, contact with over a number of years. It also includes references to the statements of other corroborating witnesses, and descriptions of corroborating physical evidence seized pursuant to a search warrant on DONLON's residence. *See id.* In addition, Ireland supplemented its extradition request by including additional information

provided by Rebecca Coen, Principal Prosecutor in the Office of the Director of Public Prosecutions, verifying that DONLON is the individual charged in this case. *See* Exhibit 1, EXT-DONLON-01072 through 1075.

This foregoing information is sufficient to establish probable cause. *See, e.g., Haxhiaj v. Hackman,* 528 F.3d 282, 289-91 (4th Cir. 2008) (excerpts of Italian appeals court decision that contained detailed description of evidence against fugitive sufficed); *Afanasjev v. Hurlburt*, 418 F.3d 1159, 1163-66 (11th Cir. 2005) (upholding probable cause determination based on unsworn bill of indictment); *Bovio v. United States*, 989 F.2d 255, 259-61 (7th Cir. 1993) (investigator's sworn statement recounting evidence sufficient); *Emami v. U.S. Dist. Court for the N. Dist. of Cal.*, 834 F.2d 1444, 1450-52 (9th Cir. 1987) (upholding probable cause determination based on affidavit of German prosecutor); *United States v. Amabile*, 14-M-1043, 2015 WL 4478466, at *9 (E.D.N.Y. July 16, 2015) ("the certificate of extradition may be based on written statements provided by a foreign prosecutor, investigator or judge"); *Suyanoff v. Terrell*, No. 12-cv-05115, 2014 WL 6783678, at *8 (E.D.N.Y. Dec. 2, 2014) ("written summaries of evidence, including witness testimony, are both permitted and frequently utilized in establishing probable cause within the extradition context").

III. EXTRADITION IS *SUI GENERIS* AND FOLLOWS UNIQUE PROCEDURES

A. An Extradition Hearing is Not a Criminal Proceeding

"An extradition hearing is not a criminal prosecution." *Id.* Accordingly, the Federal Rules of Criminal Procedure do not apply. *See* Fed. R. Crim. P. 1(a)(5)(A) ("Proceedings not governed by these rules include . . . the extradition and rendition of a fugitive."); *see also, e.g.*, *Skaftouros*, 667 F.3d at 155 n.16. Further, many constitutional protections applicable in criminal cases do not

apply. For example, there is no Sixth Amendment right to a speedy trial, *see, e.g.*, *Jhirad v. Ferrandina*, 536 F.2d 478, 485 n.9 (2d Cir. 1976), the exclusionary rule is not applicable, *see, e.g., Simmons v. Braun*, 627 F.2d 635, 636-37 (2d Cir. 1980), and the fugitive does not have the right to confront his accusers, *see, e.g., Bingham v. Bradley*, 241 U.S. 511, 517 (1916).

The Federal Rules of Evidence also do not apply to extradition proceedings. *See* Fed. R. Evid. 1101(d)(3) ("These rules—except for those on privilege—do not apply to . . . miscellaneous proceedings such as extradition or rendition."); *see also, e.g.*, *Skaftouros*, 667 F.3d at 155 n.16. Hearsay evidence is admissible at an extradition hearing and a certification of extraditability is properly based on the authenticated documentary evidence and information provided by the requesting government. *See, e.g.*, *Collins*, 259 U.S. at 317; *Skaftouros*, 667 F.3d at 155 n.16. Nothing more is required, and typically nothing more is provided. *See, e.g.*, *Harshbarger v. Regan*, 599 F.3d 290, 294 (3d Cir. 2010) (affidavits of Canadian law enforcement officers are competent and "provided ample evidence of probable cause"); *Bovio v. United States*, 989 F.2d 255, 259 (7th Cir. 1993) (police detective's statement summarizing results of investigation established probable cause); *Zanazanian v. United States*, 729 F.2d 624, 627-28 (9th Cir. 1984) (police report describing witness statements is competent evidence). Extradition treaties do not require, or even anticipate, the testimony of live witnesses at the hearing. *See, e.g.*, *Shapiro*, 478 F.2d at 902. Indeed, requiring the "demanding government to send its citizens to another country to institute legal proceedings, would defeat the whole object of the treaty." *Bingham*, 241 U.S. at 517.

A fugitive has no right to discovery. *See, e.g.*, *Messina v. United States*, 728 F.2d 77, 80 (2d Cir. 1984); *Jhirad*, 536 F.2d at 484. Relatedly, a fugitive's right to present evidence is severely constrained. A fugitive may not introduce evidence that contradicts the evidence submitted on

behalf of the requesting country, but rather may only introduce evidence explaining the submitted evidence. *See, e.g.*, *Charlton v. Kelly*, 229 U.S. 447, 461-62 (1913); *Shapiro*, 478 F.2d at 905. A contrary rule might compel the "demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter." *Collins*, 259 U.S. at 316 (quoting *In re Extradition of Wadge*, 15 F. 864, 866 (S.D.N.Y. 1883)). The admission of explanatory evidence is largely within the discretion of the Court. *See, e.g.*, *Extradition of Sindona*, 450 F. Supp. 672, 685 (S.D.N.Y. 1978) (citing *Collins*, 259 U.S. at 315-17). In addition, courts routinely reject technical and affirmative defenses in extradition proceedings. *See, e.g.*, *Shapiro*, 478 F.2d at 904 (rejecting objections "savor[ing] of technicality") (quoting *Bingham*, 241 U.S. at 517); *Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir. 1978) (noting that extradition court "properly may exclude evidence of alibi, or facts contradicting the government's proof, or of a defense such as insanity"). These issues, which require factual or credibility determinations, are for the courts in the requesting country to resolve at trial.

B. Extradition Hearings Rely on Written Submissions and Do Not Require Live Testimony

A certification of extradition may be, and typically is, based entirely on the authenticated documentary evidence and information provided by the requesting government. *See, e.g., Harshbarger v. Regan*, 599 F.3d 290, 294 (3d Cir. 2010) (affirming district court's denial of habeas following magistrate judge's determination, based on documentary evidence, that defendant was extraditable, and noting that "it would 'defeat the whole object of the treaty' to require officials [from the requesting country] to appear in the United States in order to offer live testimony at extradition hearings") (quoting *Bingham v. Bradley*, 241 U.S. 511, 517 (1916)); *Shapiro v. Ferrandina*, 478 F.2d 894, 901-02 (2d Cir. 1973) (noting that magistrate judge had "based his

finding primarily, indeed entirely, on written statements and records . . . "). The finding may also be based upon written statements by the foreign prosecutor or judge summarizing the evidence. *See Rice v. Ames*, 180 U.S. 371, 375-76 (1901); *accord Glucksman v. Henkel*, 221 U.S. 508, 513-14 (1911).

Extradition treaties do not require or even anticipate the testimony of live witnesses at the hearing because to do so "would defeat the whole object of the treaty." *Yordi v. Nolte*, 215 U.S. 227, 231 (1909); *see also Afanasjev*, 418 F.3d at 1163-65; Shapiro, 478 F.2d at 902. Hearsay evidence is admissible at extradition hearings and fully supports the court's findings leading to a certification under Section 3184. *Bingham*, 241 U.S. at 517; *Collins*, 259 U.S. at 317; *Melia*, 667 F.2d at 302; *Shapiro*, 478 F.2d at 902 (obviating need for accused to confront witnesses against him is "one of the prime objects of bi-lateral extradition agreements").

C. The Accused's Ability To Challenge Evidence at an Extradition Hearing Is Circumscribed

Due to the nature and limited purpose of an extradition hearing under Section 3184 and the importance of the international obligations of the United States under an extradition treaty, an accused's opportunity to challenge the evidence introduced against him is very circumscribed. "Generally, evidence that explains away or completely obliterates probable cause is the only evidence admissible at an extradition hearing, whereas evidence that merely controverts the existence of probable cause, or raises a defense, is not admissible." *Barapind v. Enomoto*, 400 F.3d 744, 749 (9th Cir. 2005) (quoting *Mainero v. Gregg*, 164 F.3d 1199, 1207 n.7 (9th Cir. 1999); *Shapiro*, 478 F.2d at 905 ("The magistrate's function is to determine whether there is 'any' evidence sufficient to establish reasonable or probable cause . . . and the extraditee's right to

introduce evidence is thus limited to testimony which explains rather than contradicts the demanding country's proof.") (internal quotation marks and citation omitted).

D. The Accused Is Precluded from Introducing Evidence at the Extradition Hearing of Technical and Affirmative Defenses

A court should reject defenses against extradition that "savor of technicality," as they are "peculiarly inappropriate in dealings with a foreign nation." *Shapiro*, 478 F.2d at 904. It is also well settled that affirmative defenses to the merits of the charges are not to be entertained in extradition hearings. *Collins*, 259 U.S. at 316-17; *DeSilva v. DiLeonardi*, 125 F.3d 1110, 1112 (7th Cir. 1997) ("Affirmative defenses not specified in the treaty may not be considered."). For example, courts have held that an accused may not introduce evidence that (1) merely conflicts with the evidence submitted on behalf of the demanding state, *Collins*, 259 U.S. at 315-17; (2) attempts to establish an alibi, *Shapiro*, 478 F.2d at 901; (3) suggests an insanity defense, *Charlton*, 229 U.S. at 462; or (4) seeks to impeach the credibility of the demanding country's witnesses, *Bovio*, 989 F.2d at 259; *Shapiro*, 478 F.2d at 905 ("The judge's refusal to examine the credibility of the testimony and statements included in the translated material was clearly proper . . . ."). Issues that require factual and credibility determinations are for the court in the requesting country to resolve at a trial of the charges.

E. The Executive Considers Matters Other Than Sufficiency; Rule of Non-Inquiry

Other than the sufficiency of the evidence, all matters that may be raised by the accused as defenses to extradition are to be considered by the Secretary of State, not by this Court. *See* 18 U.S.C. §§ 3184, 3186. In making extradition determinations, "[t]he Secretary exercises broad discretion and may properly consider factors affecting both the individual defendant as well as

foreign relations—factors that may be beyond the scope of the magistrate judge's review." *Sidali*, 107 F.3d at 195 n.7. The Secretary, not the Court, takes into account humanitarian claims and applicable statutes, treaties, or policies regarding appropriate treatment in the receiving country. *See, e.g., Ahmad v. Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990) ("It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds."); *accord Martin*, 993 F.2d at 830 n.10 (noting that "humanitarian considerations are matters properly reviewed by the Department of State"). It also is not the role of the Court to investigate the fairness of the requesting country's criminal justice system. *See e.g., Ahmad*, 910 F.2d at 1066 ("The interests of international comity are ill-served by requiring a foreign nation such as Israel to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced."); *United States v. Lui Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997) ("It is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed."); *Jhirad*, 536 F.2d at 484-85 ("It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation.").

CONCLUSION

Accordingly, the government requests that the court certify the extradition of DONLON on the 394 counts for which his extradition is sought by Ireland, and commit him to the custody of the U.S. Marshals Service pending the Secretary of State's surrender decision.