Pace International Law Review

Volume 4 | Issue 1 Article 6

January 1992

# International Extradition: The Canadian Example of Justice and Fair Play

Roy Carleton Howell

# ESSAY

# INTERNATIONAL EXTRADITION: THE CANADIAN EXAMPLE OF JUSTICE AND FAIR PLAY

**Roy Carleton Howell†**

## INTRODUCTION

International extradition is a legal and political phenomenon, involving criminal law and political considerations. The legal rights of the accused are balanced in relationship to the political interests of two sovereign states. Because of this balancing act, the observance of comity[1] is necessary.

This essay analyzes the comity of the United States and Canada regarding international extradition. Parts I and II discuss the background of the extradition proceedings and specific federal procedural guarantees afforded a United States citizen accused of committing a crime in Canada. Parts III and IV illustrate the application of these rules in the case of *United States v. Derrick Leon Hills*.[2] The essay concludes that the *Hills* case is the model to emulate in United States-Canadian extraditions.

---

† Kentucky State University, B.S., 1976; Howard University, J.D., 1978; Georgetown University, LL.M., 1980. The author is a former attorney for the Federal Communications Commission and legislative assistant for the Judiciary Committee, United States Congress for Congressman George W. Crockett, Esq. He is also a former adjunct professor of Howard University School of Law and lecturer at the University of Nairobi, Kenya.

I want to thank Attorney Cyril Hall of Pontiac, Michigan for hiring me to research and write a "*Memorandum In Opposition To Certification Of The Accused's Extradition To Canada*," and subsequently a "*Writ Of Habeas Corpus*."

[1] Comity is "[t]he recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation . . . ." BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

[2] U.S. v. Derrick Leon Hills, 765 F. Supp. 381 (E.D. Mich. 1991).

## I. BACKGROUND

International extradition proceedings between the United States and Canada are *sui generis*[3] proceedings controlled by 18 U.S.C. § 3181, *et. seq.*, and the 1971 Treaty of Extradition.[4] The purpose of an international extradition proceeding is to determine whether an accused arrested in the United States for committing a crime abroad can be surrendered to the requesting nation. The United States Department of Justice represents the foreign nation against the accused during the judicial phase.[5] Ultimately, the surrender of the accused is a political decision made by the United States Secretary of State.[6]

In a United States-Canadian extradition case, the United States has the burden of establishing four elements: First, that there are criminal charges pending against the accused in Canada;[7] second, that the crimes with which the accused is charged are enumerated within the Extradition Treaty between the United States and Canada;[8] third, that the individual appearing before the Court is indeed the accused charged by Canada;[9] and fourth, that based on documentary evidence, there is probable cause[10] to believe the accused committed the crimes alleged by Canada.[11]

An international extradition hearing is not a criminal pro-

---

[3] *Sui generis* is defined as "[o]f its own kind or class." BLACK'S LAW DICTIONARY 1434 (6th ed. 1990).

[4] Treaty on Extradition, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 983.

[5] *See* 18 U.S.C. § 3184.

[6] 18 U.S.C. § 3186.

[7] 18 U.S.C. § 3182, *et seq*; Treaty on Extradition, *supra* note 4, at art. 1.

[8] Article 2 of the Extradition Treaty between the United States and Canada, per a schedule annexed to the Treaty, sets out the crimes recognized by the countries. Treaty on Extradition, *supra* note 4, at 986.

[9] Treaty on Extradition, *supra* note 4, at art. 9, § 2.

[10] Probable cause in international extradition has been defined as "evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." Coleman v. Burnett, 477 F.2d 1187, 1202 (D.C. Cir. 1973). *See also* Sindona v. Grant, 619 F.2d 167, 175 (2d Cir. 1980); U.S. *ex rel.* Sakaguchi v. Kaulukukui, 520 F.2d 726, 730-31 (9th Cir. 1975).

[11] *See* Fernandez v. Phillips, 268 U.S. 311, 312 (1925); U.S. *ex rel.* Sakaguchi v. Kaulukukui, 520 F.2d 726, 730-31 (9th Cir. 1975); Merino v. U.S. Marshall, 326 F.2d 5, 11 (9th Cir. 1963), *cert. denied*, 377 U.S. 977, *reh'g denied*, 379 U.S. 872 (1964); Jimenez v. Aristeguieta, 311 F.2d 547, 562 (5th Cir. 1962); *In re* Ryan, 360 F. Supp. 270, 273 (E.D.N.Y.), *aff'd*, 478 F.2d 1397 (2d Cir. 1973).

ceeding.[12] As a matter of law, "[t]he function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, not whether the evidence is sufficient to justify a conviction."[13] Hence, an accused is not entitled to all the fundamental rights guaranteed in a criminal trial at common law.[14] International extradition proceedings are exempt from the Federal Rules of Criminal Procedure[15] and the Federal Rules of Evidence.[16] These proceedings are also exempt from the protections enumerated in the Fifth and Sixth Amendments to the United States Constitution; specifically, the concepts of speedy trial, freedom from double jeopardy, the right to confront witnesses, and the requirement of an indictment are inapplicable.[17]

The international extradition proceeding is not designed to function as a trial. As stated in *Peroff v. Hylton*,[18] "[t]he purpose is to inquire into the presence of probable cause to believe that there has been a violation of one or more of the criminal laws of the extraditing country, *and* that the alleged conduct, if committed in the United States, would have been a violation of

---

[12] Benson v. McMahon, 127 U.S. 457, 463 (1888); U.S. *ex rel.* Oppenheim v. Hecht, 16 F.2d 955, 956 (2d Cir.), *cert. denied*, 273 U.S. 769 (1927).

[13] Collins v. Loisel, 259 U.S. 309, 316 (1922).

[14] Glucksman v. Henkel, 221 U.S. 508, 512 (1911).

[15] Fed. R. Crim. P. 54(b)(5) states: "[t]hese rules are not applicable to extradition and rendition of fugitives . . . ."

[16] Fed. R. Evid. 1101(d)(3) states: "[t]he rules (other than with respect to privileges) do not apply . . . [to] . . . [p]roceedings for extradition or rendition . . . ."

[17] *Ex parte* La Mantia, 206 F. 330 (D.C.N.Y. 1913); *In re* Neely, 103 F. 631 (C.C.S.D.N.Y. 1900), *aff'd*, Neely v. Henckel, 180 U.S. 109, 126 (1901). U.S. v. Galanis, 429 F. Supp. 1215, 1224 (D. Conn. 1977), held that an extraditee could not raise as a defense a three and one-half year delay between issuance of a warrant and extradition proceedings. The decision was based on the fact that the right to a speedy trial is not available in extradition proceedings. Jhirad v. Ferrandina, 536 F.2d 478, 485 n. 9 (2d Cir.), *cert. denied*, 429 U.S. 833, *reh'g denied*, 429 U.S. 988 (1976), stated that "the Sixth Amendment's guarantee to a speedy trial . . . is inapplicable to international extradition proceedings." *Cf.* Middendorf v. Henry, 425 U.S. 25 (1976). *See also* United States *ex rel.* Bloomfield v. Gengler, 507 F.2d 925 (2d Cir. 1974), which held that extradition to Canada was proper even if double jeopardy would bar trial in the United States. *In Re* Ryan, 360 F. Supp. 270, 274 (E.D.N.Y. 1973), *aff'd*, 478 F.2d 139 (2d Cir. 1973); Holmes v. Laird, 459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972); Gallina v. Fraser, 177 F. Supp. 856, 866 (D. Conn. 1959), *aff'd*, 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851, *reh'g denied*, 354 US 906 (1960).

[18] 542 F.2d 1247, 1247 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062, *reh'g denied*, 429 U.S. 1124 (1977).

our criminal law . . . ."[19]

## II. Federal Procedural Guarentees to the Accused

Although the accused loses a great deal of rights in an international extradition matter,[20] the accused still has certain rights as prescribed by the 1971 Treaty of Extradition[21] and articulated by federal common law. There are five procedural guarantees to an accused in an international extradition case:

First, the accused has a federal common law right to oppose certification of extradition by filing a pleading entitled "*Memorandum In Opposition To Certification Of The Accused's Extradition To Canada.*"[22]

Second, if the accused's opposition fails and the federal magistrate certifies extradition, the accused becomes an extraditee, and the extraditee may file a "Writ Of Habeas Corpus"[23] before a United States district court judge.[24] This subsequent *habeas corpus* review tests only the legality of the international extradition proceedings.[25]

Third, after an exhaustion of federal district court remedies, the extraditee acquires a federal common law right to appeal.[26] The correct forum in which to enter this appeal is the appropriate United States court of appeals.[27]

---

[19] *Id.* at 1249 (emphasis added).

[20] *See* sources cited *supra* notes 13-16.

[21] *Supra* note 4.

[22] *See* Defendant's "Memorandum In Opposition To Certification of The Accused's Extradition To Canada" filed in U.S. v. Derrick Leon Hills, a/k/a Stacy Shelby, No. 91-X-71682 (E.D. Mich. July 17, 1991). A federal magistrate must order a Certificate of Extraditability forwarded to the U.S. Secretary of State. 18 U.S.C. § 3184. The magistrate must certify a finding of probable cause to believe that the accused committed the crimes alleged by Canadian authorities. *See generally* Coleman v. Burnett, 477 F.2d 1187, 1202 (D.C. Cir. 1973); the question of guilt or innocence is not relevant to this proceeding. *Id.* at 1202. The alleged crimes must be among those extraditable offenses enumerated in the Treaty on Extradition, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 983, 997-99.

[23] The rule firmly states: "An extraditee's sole remedy from an adverse decision granting the government's request to certify the extraditee as a fugitive from a foreign country is to seek a writ of habeas corpus . . . ." Ahmad v. Wigen, 910 F.2d 1063, 1063 (2d Cir. 1990).

[24] *See* Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980).

[25] *See generally* Greci v. Birkens, Jr., 527 F.2d 956 (1st Cir. 1976).

[26] *Id.* at 956.

[27] *Id.* "In reviewing denial of writ of habeas corpus to person held for extradition, the Court of Appeals is limited to deciding whether proper evidentiary standards were

Fourth, after exhaustion of federal district court and federal circuit court remedies, the extraditee may seek judicial review before the United States Supreme Court.[28] However, the extraditee may appeal the extradition certification as long as judgments from the lower courts are final.[29]

Fifth, the final remedy for an extraditee is political, and is issued from the federal executive branch.[30] Ultimately it is the United States Secretary of State who has the authority to return the extraditee to the requesting foreign nation.[31] However, counsel for the extraditee can seek a political remedy by coordinating appeals to the White House and the Committees on Foreign Affairs in both the House of Representatives and the Senate.[32]

## III. THE EXTRADITION OF DERROCK LEON HILLS A/K/A STACY SHELBY[33]

In Windsor, Canada, on January 4, 1991, an American citizen, Derrick Leon Hills, a/k/a Stacy Shelby,[34] allegedly entered the Bank of Montreal and committed armed robbery. Shelby, the accused, allegedly made his "get-away" by automobile through the international tunnel which connects Windsor, Canada, and Detroit, Michigan.[35]

As the accused entered the Canadian side of the tunnel he was observed by a member of the Windsor Police Department. The policeman immediately pursued the accused into the tunnel and retrieved a discarded handgun as evidence. Then, the Canadian authorities radioed American customs officials to inform them of their hot pursuit of the bank robber. The American authorities responded by telling the Canadians of a particular vehi-

---

applied and, if so, whether there was some support for [the] magistrate's determination."

[28] *See* Collins v. Miller, 252 U.S. 364 (1919).

[29] *Id.* at 364.

[30] Sindona v. Grant held that the ". . . question of [the] wisdom of extradition remains for the executive branch to decide." 619 F.2d at 174 (quoting Wacker v. Bisson, 348 F.2d 602, 606 (5th Cir. 1965)).

[31] 18 U.S.C. § 3186.

[32] *See* Wacker v. Bisson, 348 F.2d 602, 606 (5th Cir. 1965).

[33] No. 91-X-71682 (E.D. Mich. July 17, 1991).

[34] Hills had his name legally changed to Stacy Shelby on July 31, 1990. U.S. v. Derrick Leon Hills, a/k/a Stacy Shelby, 765 F. Supp. 381, 382 n.1 (E.D. Mich. 1991).

[35] Windsor, Canada and Detroit, Michigan are border cities connected by the Canadian/U.S. tunnel under the Detroit River.

cle making U-turns in the tunnel. The Canadian police officer arrived on the American side of the tunnel and immediately reentered to continue the search. Approximately two hundred yards into the tunnel, the Canadian police officer recognized the accused and his car and observed him throwing Canadian money into the tunnel. While on American territory, the Canadian police officer arrested the accused. Thereupon, the accused was transported to the Windsor police headquarters in Canada.[36]

The evidence clearly established probable cause that the accused committed the crimes alleged by Canadian authorities. Faced with such evidence, the accused argued that the arrest by Canadian police of an American on United States soil violated international law. As a result of political protests filed with the United States Department of State and the Committee on Foreign Affairs of the House of Representatives, the American Embassy in Ottawa delivered an official protest to Canadian officials on April 8, 1991.[37] Subsequently, at the request of the Canadian government, the Ontario authorities released the accused from custody on condition that he leave Canada within two hours.[38] The United States Federal Bureau of Investigation immediately arrested the accused upon his arrival at his home in Detroit, Michigan. The Canadian government then sought the extradition of the accused as a fugitive pursuant to Treaty rights with the United States.[39]

## IV. Rights of the Accused Pursuant to the Canadian-American Extradition Treaty

In opposition to extradition certification in federal court, the accused argued that since he was arrested by Canadian police upon the sovereign soil of the United States, his extradition was barred.[40] In support of this theory, the accused cited Article

---

[36] *Hills*, No. 91-x-71682 at 2-3; *see also* Chris Vander Doelen, *Money, Money Everywhere*, The Windsor Star (Canada), Jan. 5, 1991, at A1, A4.

[37] *Hills*, No. 91-x-71682 at 3.

[38] Her Majesty The Queen v. Stacy Shelby, No. 2541/91 (Ontario Ct. Gen. Div., Apr. 16, 1991); Justice J.P. McMahon issued an order that the accused shall be released from Canadian custody.

[39] *Hills*, No. 91-x-71682 at 5.

[40] U.S. v. Derrick Leon Hills, a/k/a Stacy Shelby, No. 91-x-71682 (E.D. Mich., July 17, 1991).

8 of the United States-Canadian Extradition Treaty, which provides: "The determination that extradition would or should not be granted shall be made in accordance with the law of the requested State and the person whose extradition is sought shall have the right to use all remedies and resources provided by such law."[41] Pursuant to Article 8, the law of the requested State would be that of the United States. Hence, pursuant to *Jaffe v. Boyles*[42] the accused acquires no private right of action for kidnapping as a defense against extradition.[43] The accused argued that Article 8 affords him Canadian remedies in a United States district court.[44] If that were so, the vital inquiry would focus on how Canadian law would treat a Canadian in the accused's position; that is, a Canadian citizen who committed a crime in the United States, and was arrested in Canada by United States police.

Since a Canadian court would refuse jurisdiction because of a treaty violation,[45] arguably a United States district court must likewise do so. This argument is illusory for several reasons: First, the accused was neither tricked nor kidnapped,[46] and second, the Canadian officials did return the accused to the United States and subsequently sought international extradition in accordance with the Treaty.[47] Therefore, the Article 8 argument is not an available defense against extradition to Canada, because the accused was returned to the United States.

The accused, Derrick Leon Hills a/k/a Stacy Shelby, was certified for extradition to Canada by a federal magistrate after a finding of probable cause. Subsequently the extraditee did file a "Writ of Habeas Corpus" before a federal district court judge,

---

[41] Treaty on Extradition, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 983, 990.

[42] 616 F. Supp 1371 (D.C.N.Y. 1985).

[43] *Id.* at 1379.

[44] *Supra* note 22. *See* Defendant's "Memorandum In Opposition To Certification Of The Accused's Extradition To Canada" at 6-7.

[45] "In cases involving accused kidnapped or tricked into Canada by government officials from a foreign country with which Canada has . . . a treaty . . . Canadian courts ought to refuse to accept jurisdiction by reason of the violation of the treaty." C.E. Lewis, *Unlawful Arrest: A Bar to the Jurisdiction of the Court, or Mala Coptus Bene Detentus? Sidney Jaffey: A Case in Point*, 28 CRIM. L. Q. 341, 364.

[46] U.S. v. Derrick Leon Hills, a/k/a Stacy Shelby, No. 91-x-71682 (E.D. Mich. July 17, 1991).

[47] *Id.*

and it was denied. Currently the extraditee is fighting his return to Canada through federal circuit court remedies.

## CONCLUSION

The Canadian government's return of the accused (Derrick Leon Hills a/k/a Stacy Shelby) to the United States, and its subsequent effort of international extradition must be applauded, because Canada complied with the letter and spirit of international law on extradition. However, while Canada is moving in the direction of justice and fair play in international extradition, the United States, unfortunately, is not.

According to *Jaffe v. Boyes*,[48] a case concerning an extradition between the United States and Canada, an accused does not acquire a private right of action because of a violation of international law. Although the American courts have shown an unwillingness[49] to curtail extradition treaty violations by the Executive Branch, Congress is now acting to check these excesses.[50] Perhaps as a result of this inquiry, Congress will enact new laws that will vest an accused with private rights of action when certain violations of international law occur. If so, "the merit of *Toscanino*[51] is clear to point out that a violation of international law is not merely a political matter to be settled through diplomatic channels by the states involved but can also be relied

---

[48] 616 F. Supp 1371 (D.C.N.Y. 1985).

[49] *See* U.S. v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988); Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990) and Jaffe v. Boyles, 616 F. Supp. 1371, 1379 (D.C.N.Y. 1985).

[50] Congress is currently investigating the U.S. Justice Department for the formation of an illegal secret force, within the FBI, to kidnap fugitives abroad in violation of international law:

> A House judiciary subcommittee moved toward a constitutional showdown with the Bush administration yesterday by subpoenaing a secret document authorizing the FBI to kidnap fugitives in foreign countries. The panel's demand for the 1989 opinion by the Justice Department's Office of Legal Counsel comes as the department faces court challenges to its authority to prosecute defendants who were seized in foreign countries and spirited to the United States to stand trial.

*Justice Department Balks at Panel's Demand — House Subcommittee Subpoenas Opinion On Fugitive Kidnapping*, WASH. POST, July 26, 1991, at A21. *See also* July 18, 1991 *News Release*, Committee on the Judiciary, U.S. House of Representatives, 102d Congress of the United States, titled *Attorney General Refuses to Testify Before Committee Panel on Justice Department's Budget Request*, at 2.

[51] United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

upon by the accused in the domestic courts. Not only does the territorial state have a claim against the arresting state under international law, but the accused has a defense based upon the arrest in violation of customary or conventional international law."[52] It is time for the United States to follow the Canadian lead on justice and fair play in international extradition matters.

[52] S. A. Williams, *Criminal Law — Jurisdiction — Illegal Arrest — Due Process — Violation of International Law*, 53 CAN. BAR REV. 404, 410 (1975).