

CANADA / JUDGMENT

United States v. Kerfoot

2016 BCCA 306

COURT

British Columbia Court of Appeal

DECIDED

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2016 BCCA 306 United States v. Kerfoot

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

United States v. Kerfoot,

2016 BCCA 306

Date: 20160714

Docket: CA42223

Between:

Attorney General of Canada

On Behalf of the United States of America

Respondent

(Requesting State)

And

Kevin Donald Kerfoot

Appellant

(Person Sought)

- and -

Between:

Kevin Donald Kerfoot

Applicant

And

Minister of Justice

Respondent

Before:

The Honourable Madam Justice Neilson

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated October 3, 2014 (U.S.A. v. Kerfoot, 2014 BCSC 2064, Vancouver Docket 24183).

On judicial review from: An order of surrender issued by the Minister of Justice on June 5, 2015.

Counsel for the Appellant:

K. Tousaw

Counsel for the Respondent:

D. Strachan, Q.C.

K. Swift

Place and Date of Hearing:

Vancouver, British Columbia

May 13, 2016

Place and Date of Judgment:

Vancouver, British Columbia

July 14, 2016

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Madam Justice Neilson

The Honourable Mr. Justice Savage

Summary

The appellant faces narcotics trafficking charges in the United States. Two co-conspirators pleaded guilty after taking plea-bargains. One later died without giving evidence. The other now lives in Canada and says he will refuse to testify against the appellant. That co-conspirator recanted prior statements that implicated the appellant in a trafficking conspiracy. The appellant's application for disclosure of materials in the possession of the United States concerning the plea-bargain negotiations with the other co-accused was dismissed. The extradition judge held she did not have jurisdiction to order a sovereign nation to produce the materials. She did direct the Department of Justice to ask for the disclosure, which the United States complied with in part. The appellant appeals his committal order and seeks judicial review of the Minister of Justice's decision to surrender him to the United States. Held: The appeal from committal is dismissed. The extradition judge did not err in concluding she did not have jurisdiction to compel disclosure from the United States. There is no air of reality to the Appellant's allegation that the United States' conduct concerning disclosure amounted to an abuse of process. There was sufficient available evidence to meet the threshold to warrant committal. Just because it may prove difficult to have a witness testify does not mean the witness's evidence is unavailable. The Minister's decision was reasonable. In addition to the conclusions reached above, the appellant did not establish specified concerns regarding the state of United States prisons that it would shock the Canadian conscience, and it was unnecessary for the Minister to seek assurances that the Appellant would not receive an enhanced sentence.

Reasons for Judgment of the Honourable Madam Justice Bennett:

- [1] Mr. Kerfoot was committed for extradition on charges of conspiracy to traffic and trafficking in cocaine and MDMA (also known as ecstasy) on October 3, 2014. The Minister of Justice made a surrender order on June 5, 2015. Mr. Kerfoot appeals the committal order and seeks judicial review of the surrender order.
- [2] On appeal, Mr. Kerfoot challenges the committal; argues that there was error in failing to order disclosure of documents held by the United States, and erred by refusing to permit an application for a stay of proceedings.

I. Background

- [3] I commence by outlining the relevant proceedings in relation to the committal order under appeal.

The Authority to Proceed

- [4] As a result of an extradition request from the United States, a delegate of the Minister of Justice issued an Authority to Proceed on July 11, 2007 pursuant to s. 15 of the Extradition Act, S.C. 1999, c. 18 [Act]. That authorized the Attorney General of Canada to seek an order for Mr. Kerfoot's committal in relation to conduct that corresponds to the Canadian offences of conspiracy to traffic in a schedule I and a schedule III substance and trafficking in a

schedule I and a schedule III substance, contrary to s. 465 of the Criminal Code, R.S.C. 1985, c. C-46 (conspiracy) and s. 5 of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 (trafficking).

The First Committal Decision and Appeal

- [5] In reasons indexed as *United States of America v. Kerfoot*, (4 August 2009), Vancouver 24183 (B.C.S.C.), Ker J. found that the evidence in the records of the case met the requirements of s. 29(1)(a) of the Act and ordered the committal of Mr. Kerfoot. The Minister ordered his surrender on February 18, 2010.
- [6] Following the committal order of Ker J. and the Minister's surrender order, but prior to Mr. Kerfoot's appeal, Mr. Purdom, one of two key witnesses, swore an affidavit on May 18, 2010 recanting his prior sworn statements implicating Mr. Kerfoot, and noted in the record of the case. Mr. Canupp, the other key prosecution witness, passed away at the end of May 2010.
- [7] This Court allowed the appeal as portions of the evidence in the case were either unavailable or significantly altered. This Court was of the view that in light of the changed circumstances, a new committal hearing was required: *U.S.A. v. Kerfoot*, 2011 BCCA 33.
- [8] In response to the affidavit of Mr. Purdom, the Requesting State certified a Second Supplemental Record of the Case ("SSROC"). The SSROC stated that the Requesting State intended to rely on the evidence of Mr. Purdom either through his testimony at trial or in a video-recorded deposition taken in Canada, while acknowledging that Mr. Canupp's statements are no longer available as evidence.

The Second Committal Hearing

- [9] A second committal hearing was heard by Maisonville J. on the basis of the SSROC dated November 15, 2010 and the Revised Record of the Case ("RROC"), dated July 14, 2011, provided by the Requesting State.
- [10] Mr. Kerfoot brought various applications during the committal proceedings in support of his argument that the SSROC and the RROC were manifestly unreliable. In addition, he argued that the Requesting State had coerced the cooperating witnesses, Canupp and Purdom, to provide evidence against him thereby committing an abuse of process which should result in a stay of proceedings.

The Committal Evidence

- [11] In seeking an order of committal pursuant s. 29(1)(a) to the Act, the Requesting State relied upon the following: a) the Authority to Proceed; b) the SSROC; c) the RROC; d) the affidavit of Adrian Law of Health Canada; e) the affidavit of Heather Krystie; and f) the viva voce testimony of Corporal Natasha Dawson.
- [12] The Committal Evidence consisted of the following:

- a) Physical evidence--the analysis of the seized cocaine and ecstasy
 - b) Recorded conversations between Mr. Canupp and Mr. Kerfoot;
 - c) Controlled delivery of cocaine to Mr. Purdom and receipt of ecstasy tablets from Mr. Purdom;
 - d) Telephone records and subscriber information; and
 - e) Anticipated testimony of Mr. Purdom and Mr. Long.
- [13] On the evening of October 4, 2005, police conducted a traffic stop of Mr. Canupp in Washington State and found 41 kilograms of cocaine. Mr. Canupp agreed to cooperate with law enforcement. At approximately 9:18 p.m., the cellular telephone in Mr. Canupp's possession displayed an incoming call from a Canadian telephone number.
- [14] A call came from the same Canadian number to Mr. Canupp at 9:56 p.m. and 10:55 p.m. These phone calls were recorded and took place in the presence of an investigator. Mr. Canupp received instructions from a male that a boat pilot was going to approach him at the delivery site and that Mr. Canupp should give the boat pilot the cocaine in exchange for a telephone number and a package. Mr. Canupp was then to deliver the package to the person associated with the telephone number.
- [15] Canadian authorities later obtained a production order for cell phone records that showed that the Canadian telephone number was subscribed to by Mr. Kerfoot between September 30, 2005 and October 5, 2005. The records also showed that calls made from his phone on October 4, 2005 between 8:31 p.m. and 9:20 p.m. hit off the cell phone tower located a five-minute drive away from Mr. Kerfoot's home in New Westminster, British Columbia. From this evidence the Requesting State asked the Court to infer that it was Mr. Kerfoot using the cell phone in the conversations with Mr. Canupp.
- [16] Mr. Canupp assisted police with the controlled delivery of the 41 kilograms of cocaine to Mr. Purdom, who drove a powerboat to Sandy Point, Washington. In receipt for the cocaine, Mr. Purdom gave Mr. Canupp a package with a telephone number. The telephone number was for an individual named Anthony D'Aloia. The package contained 24,066 tablets of ecstasy with a net weight of 7,836 grams. Police arrested Mr. Purdom after the exchange.
- [17] Mr. Purdom began cooperating with law enforcement authorities immediately upon his arrest and before he was charged with any criminal offence or met with a prosecutor. After being provided with his constitutional rights, including his right to remain silent, Mr. Purdom identified Mr. Kerfoot as the person who sent him to the United States to conclude the drug deal.

- [18] Mr. Purdom continued to cooperate with authorities. In an interview after his arrest, Mr. Purdom gave a statement consistent with the statements he made on the night of his arrest identifying Mr. Kerfoot as the person he worked for in the drug conspiracy. As part of Mr. Purdom's guilty plea and while represented by counsel, he gave a statement under oath before an American judge, stating that he worked for Mr. Kerfoot in the drug conspiracy.

Expected Testimony of Mr. Purdom

- [19] The Requesting State expects Mr. Purdom to comply with his plea agreement and testify at any trial of Mr. Kerfoot, either in person or by video link. If Mr. Purdom does not testify voluntarily, the Requesting State will seek his attendance through the Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 (4th Supp.) [MLACMA].
- [20] In the fall of 2005, Mr. Purdom participated in several meetings with Mr. Canupp and Mr. Kerfoot regarding smuggling drugs into the United States. Mr. Purdom also met with Mr. Kerfoot at his home in British Columbia to discuss drug smuggling. On or about October 1 or 2, 2005, Mr. Purdom met with Mr. Canupp and Mr. Kerfoot at the Peace Arch Park. At this meeting they discussed Mr. Purdom piloting the boat to meet with Mr. Canupp. In late September or early October, Mr. Kerfoot told Mr. Purdom to take the boat from Canada to Sandy Point, Washington to pick up cocaine from Mr. Canupp. Shortly before Mr. Purdom left, Mr. Kerfoot instructed him to bring the bag containing the ecstasy with him and deliver it to Mr. Canupp in exchange for the cocaine.

Expected Testimony of Mr. Long

- [21] Mr. Long is expected to testify that he provided the cell phone Mr. Canupp used at a meeting between Mr. Kerfoot, Mr. Canupp, and himself on October 1, 2005.
- [22] Mr. Long also called Mr. Kerfoot frequently using a different cell phone to discuss a separate drug transaction. The telephone records of that cell phone were analyzed and showed numerous calls over the month preceding the arrests of Mr. Canupp and Mr. Purdom to Mr. Kerfoot's phone number, from which Mr. Canupp received a call on October 4, 2005.

Drug Analysis

- [23] The drug analysis showed that the drugs seized on October 4, 2005 were cocaine and MDMA (ecstasy).
- [24] In disputing the events as outlined in the Committal Evidence, Mr. Kerfoot relied on affidavits of Mr. Purdom sworn May 18, 2010, and December 15, 2013. These affidavits were admitted as evidence by the committal judge. In the affidavits Mr. Purdom recants his earlier sworn evidence in the United States, and he swears he will not testify against Mr. Kerfoot.

The Disclosure Ruling

- [25] Mr. Kerfoot sought documents in the possession and control of the Requesting State relating to the plea agreements of the co-conspirators, Mr. Purdom, Mr. Canupp, and Mr. Long.
- [26] While the extradition judge did not order disclosure regarding either Canupp or Long, given the recantation by Mr. Purdom, the extradition judge found there was an air of reality to an argument regarding the availability and reliability of Mr. Purdom's evidence in the SSROC and the RROC.
- [27] The Court noted it did not have the jurisdiction to order the Requesting State to produce documents. Therefore, the Court ordered counsel for the Attorney General of Canada to produce documents in relation to Mr. Purdom in its possession, control or power, and to request from the Requesting State those documents in their possession, control or power.
- [28] Specifically, the Court ordered the production of notes, transcripts or recordings in relation to Mr. Purdom, the indictment to which Mr. Purdom pleaded guilty, the plea agreement, correspondence relating to the plea agreement, any documents relating to the availability of Mr. Purdom to testify at trial, any criminal records of Mr. Purdom in the Requesting State and Canada, and the present status of Mr. Purdom with respect to the proceedings against him in the Western District of Washington.
- [29] In his factum at para. 32, Mr. Kerfoot states that the Court erred in not ordering disclosure of the Canadian-gathered evidence--that being the production order for his cell phone records described in the RROC. In her decision on disclosure, the extradition judge noted that this issue was briefly argued at the end of the application but the Court found it would be beneficial to hear further from counsel on this point at the next hearing date, prior to deciding whether to make the order (para. 148). Mr. Kerfoot did not raise the issue at any of the further hearing dates. Therefore, the Court did not rule on this aspect of the disclosure application.

The Vukelich Application on Whether to Conduct a Charter Breach Inquiry

- [30] In response to the disclosure order, the Attorney General of Canada provided documents in possession of Canadian authorities relating to Mr. Purdom, including Mr. Purdom's Canadian criminal record and an affidavit of his bail supervisor, advising that he is living in Kelowna.
- [31] The Requesting State provided a letter to the Attorney General of Canada in answer to the request for further information. The Requesting State advised of the length of Mr. Purdom's sentence and his release date and that Mr. Purdom had a conviction for conspiracy to distribute cocaine and ecstasy. The Requesting State stated that it would make arrangements for Mr. Purdom to testify in person or compel his deposition in Canada for use at trial in the Requesting State in accordance with the provisions of the MLACMA. It noted that a failure of Mr. Purdom to cooperate would amount to a breach of his sentencing and plea bargain.

- [32] The Requesting State advised that it was unable to provide the additional information regarding Mr. Purdom as the information is subject to legal privileges in the Requesting State.
- [33] Mr. Kerfoot sought a voir dire to argue that the Requesting State's conduct had violated his Charter rights and to seek a judicial stay of proceedings. Mr. Kerfoot argued that the Requesting State had engaged in "tactical conduct" by modifying the ROC on several occasions, certified the RROC and SSROC before knowing if Mr. Purdom was available to testify, and provided a reply that was "not responsive" to Mr. Kerfoot's request for disclosure.
- [34] The Court found there was no air of reality to Mr. Kerfoot's argument that there had been an abuse of process and declined to hear an application for a stay of proceedings. As for the response of the Requesting State, the Court concluded it is not for the extradition judge to review foreign law and that the Court must accept the American law as summarized in the Requesting State's letter on its face.

The Application to Adduce Evidence

- [35] Mr. Kerfoot brought an application to adduce evidence in the extradition proceeding pursuant to s. 32(1)(c) of the Extradition Act. Specifically, the Appellant sought to adduce the affidavit of Mr. Purdom sworn May 18, 2010, and the viva voce evidence of Mr. Purdom.
- [36] Mr. Purdom stated in his affidavit of May 18, 2010 that he pled guilty to the offences of conspiracy to distribute cocaine and conspiracy to distribute ecstasy in Washington State, and received a reduced sentence. He said that as a condition of his plea, he provided prosecutors with further information regarding the offences. However, he implicated Mr. Kerfoot under duress and it was a complete fabrication. He explained that both he and Mr. Canupp were pressured by Assistant United States Attorney Lombardi to provide information to investigators in order to receive a reduced sentence. Mr. Purdom said that he and Mr. Canupp created a false story in which they named Mr. Kerfoot as their co-conspirator, thinking this was plausible as they both knew him.
- [37] Mr. Kerfoot argued that that further evidence was necessary to allow the Court to perform the limited weighing of evidence required in a committal hearing. He stated this function is particularly important when a witness retracts his statement, as the availability and reliability of the evidence of the Requesting State is brought into doubt.
- [38] In ruling on the application, the Court found the affidavit evidence of Mr. Purdom met the low threshold to adduce evidence as it was potentially relevant to the extradition judge's assessment of the sufficiency of the committal evidence. As no evidence was led regarding the contents of the proposed viva voce evidence, there was no basis on which the Court could make a finding with regard to the relevance or admissibility of that evidence, therefore, that portion of the application was dismissed.

- [39] After the disclosure application and prior to the committal hearing, Mr. Purdom swore a second affidavit on December 15, 2013. In the second affidavit Mr. Purdom reiterated that he had falsely implicated Mr. Kerfoot and in addition stated he would not travel to the United States to testify at Mr. Kerfoot's trial. Furthermore, he would not attend to give video evidence in Canada pursuant to the MLACMA. The Court found this affidavit admissible on the same basis as the first affidavit.

The Committal Decision

- [40] In considering the committal evidence, the extradition judge applied the test for committal of "whether there is evidence upon which a reasonable jury properly instructed could return a verdict of guilty", as outlined in *United States of America v. Ferras*, 2006 SCC 33 at paras. 48, 65. The extradition judge concluded the evidence tendered by the Requesting State was admissible, available, presumptively reliable, and sufficient to justify committal.
- [41] The Court considered the evidence of Mr. Purdom outlined in the SSROC and the RROC and the effect of the affidavits in which he recanted his implication of Mr. Kerfoot in the conspiracy. The extradition judge found that the mere fact the witness is an alleged co-conspirator and has contradictory testimony does not make that witness' evidence manifestly unreliable. Mr. Kerfoot failed to rebut the presumption the SSROC and RROC were reliable.
- [42] The Court also found the recantation was insufficient to rebut the presumption of availability. In particular, the existence of a sworn statement referenced in the SSROC and the RROC was found to support a common sense determination that the evidence is available. The Court found that two sets of testimony are available and the issue is the credibility of Mr. Purdom. She concluded that the issue of credibility is properly to be put before the trier of fact.
- [43] The evidence of Mr. Purdom as summarized in the SSROC and RROC was therefore found to be available and reliable and was not omitted from consideration.
- [44] The Court concluded that the evidence disclosed in the SSROC and RROC constituted conduct that, had it occurred in Canada, would justify committal for trial for the offences of trafficking and conspiracy to traffic.

II. Discussion

A. COMMITTAL ORDER

Standard of Review

- [45] An appellate court may allow an appeal and set aside an order for committal if the order is:
- a) unreasonable or cannot be supported by the evidence; b) a result of a wrong decision on a question of law; or c) is a result of a miscarriage of justice: *United States v. Costanzo*, 2009 BCCA 120 at paras. 19-20 citing ss. 53-54 of the Act.

Disclosure

- [46] Mr. Kerfoot applied to the committal judge for an order disclosing information that would permit him to: (i) argue an abuse of process based on the conduct of the Assistant United States Attorney, Mr. Lombardi; (ii) challenge the reliability and sufficiency of the evidence on the committal hearing; and (iii) show that Canadian-gathered evidence was obtained illegally. The disclosure he sought is set out in the committal judge's reasons on the disclosure application at paras. 87-89:
- [87] Those specific items are set out in the Notice of Application as follows:
- (a) all documents referring or relating to the statement or statements of Reginald Purdom, Randall Canupp and Ben Long, in whatever form it or they exist, including, but not limited to, notes, transcripts, audio and/or video recordings, and any materials resulting from their contacts with agents of the [United States Drug Enforcement Agency] and/or US Attorney and referred to in the Record of the Case certified May 4th, 2007 and Supplemental Records of the Case certified July 20th, 2007 and November 15, 2010 and the Revised Record of Case certified July 14, 2011;
 - (b) a copy of the Indictment containing the charge to which Reginald Purdom, Randall Canupp and Ben Long pled guilty to and a copy of any other Indictments charging the same persons;
 - (c) copies of any correspondence referring, relating or which led to the plea agreement(s) entered into by Reginald Purdom, Randall Canupp and Ben Long and the U.S. Attorney's office for the Western District of Washington and copies of the plea agreement(s) themselves;
 - (d) any documents referring or relating to the availability of Reginald Purdom to testify at trial in the Requesting State;
 - (e) the present status of Reginald Purdom and Ben Long with respect to any proceedings against them in the Western District of Washington;
 - (f) copies of any criminal record, whether in Canada or the United States of America, relating to Reginald Purdom, Randall Canupp and Ben Long under that name or any other;
- [88] In relation to the Canadian-gathered material;

- (g) records of any telephone communications allegedly between any of the three individuals and the Applicant and all subscriber information obtained from Telus including details of whether any warrant(s) were obtained before recording any telephone communications and/or obtaining any subscriber information (and if so, the basis for any such warrants including copies of any affidavits or applications for warrants, requests for assistance pursuant to the Mutual Legal Assistance Treaty, Production Orders, and all material related to RCMP File Number 2005E-9489 as referenced in the various Records of Case filed in this matter and any warrants themselves);
- [89] In relation to Mr. Canupp, the following is sought:
- (h) all documents referring or relating to Randall Canupp's release from prison on compassionate end-of-life grounds;
- (i) all documents referring or relating to Randall Canupp's death in May, 2010 including, without limitation, documents reflecting when Canada was made aware of his death and when Canada transmitted that information to Mr. Kerfoot;...
- [47] The committal judge reviewed the evidence in relation to the potential argument for abuse of process by Mr. Lombardi, including affidavit evidence in relation to discussions between Mr. Lombardi and previous Canadian counsel, and the position Mr. Lombardi would take if Mr. Kerfoot entered a plea.
- [48] The committal judge characterized the evidence as "plea negotiations" and concluded that there was no air of reality to an abuse of process, as it is defined in the authorities. In my view, she committed no error in her conclusion, and there was no basis to order further disclosure. Whether she had the jurisdiction to order disclosure will be discussed below.
- [49] Mr. Kerfoot sought information regarding the plea agreements in relation to his co-accused to essentially challenge their credibility. The committal judge correctly concluded that this was not a basis on which to order disclosure. Assessing the credibility of witnesses is an issue for the trier of fact in the Requesting State. It goes beyond the scope of the limited task before the extradition judge except in very rare cases: see *M.M. v. United States of America*, 2015 SCC 62 at paras. 71-72, 81-85.
- [50] The committal judge, in her reasons on the disclosure application, sought further submissions on the argument with respect to the Canadian-gathered evidence (paras. 145 and 148). These submissions from Mr. Kerfoot were never produced. It cannot now be said that the judge erred in failing to order disclosure.
- [51] The committal judge did order production of documents in relation to Mr. Purdom, at para. 146:
- [146] The materials that I order relate to the production only of matters in respect of Mr. Purdom. I order production of the materials, outlined as follows, which are in the possession or control of the Attorney General of Canada. If the materials are not in the

possession or control of the Attorney General I order that those materials be sought from the Requesting State. Thus the materials to be produced, are those in the possession of the Attorney General of Canada and those requested from the Requesting State which are as follows:

- (a) all documents referring or relating to statements or statements of Reginald Purdom in whatever form it exists, but not limited to notes, transcripts, audio or video recordings, or any material resulting from the contact of agents with Reginald Purdom;
- (b) a copy of the indictment containing the charge to which Reginald Purdom pleaded guilty;
- (c) a copy of correspondence referring or relating or which led to the plea agreement entered into by Reginald Purdom and the United States Attorney's Office for the Western District of Washington and copies of the plea agreement of Reginald Purdom itself, if any;
- (d) any documents referring or relating to the availability of Reginald Purdom to testify at trial;
- (e) the present status of Reginald Purdom with respect to proceedings against him in the Western District of Washington; and
- (f) any copies of any criminal record, whether in Canada or the United States, relating to Reginald Purdom.

[52] In response to the order, the following occurred, as outlined in separate reasons for judgment, referred to as the Vukelich application, and indexed at 2013 BCSC 776, at paras. 18-24:

[18] A letter in response to the Court ruling was prepared on behalf of the Requesting State and is dated January 24, 2013. It was forwarded to the Court and to counsel. The Requesting State's response provided documentation for item (b) and (f) which included as well Mr. Purdom's Canadian record.

[19] With respect to item (a), the Requesting State asserted that it had fully complied with the extradition treaty between Canada and the US. It further asserted privilege (the nature of the privilege unspecified) protecting the information. It additionally advised the Court that the Jencks Act, Title 18, United States Code, Section 3500 [Jencks Act] provides that in a criminal prosecution by the US, no statement or report made by a witness or a prospective government witness in the possession of the US shall be the subject of subpoena, discovery or inspection until said witness has testified on direct examination in the trial of the case. In other words, its laws prevent it from granting disclosure of evidence relating to witnesses before trial.

[20] With regard to item (c), the Requesting State asserted that it had complied with its treaty obligations and that that the documents requested were in any event covered by privilege. It also advised that the plea agreement materials were sealed but would normally be unsealed and produced to the defence shortly prior to any trial at which Mr. Purdom testified.

- [21] The Requesting State maintained in respect to item (d) that it had fully complied with its treaty obligations. It advised that the US would either be making arrangements for Mr. Purdom to testify in person or compel his deposition in Canada for use at trial in the US in accordance with the agreement that exists between the US and Canada on mutual legal assistance in criminal matters. It advised that a failure of Mr. Purdom to cooperate would amount to a breach of his sentencing and plea bargain.
- [22] With respect to item (e), the Requesting State advised that on August 17, 2006, Mr. Purdom was sentenced to 54 months in custody and three years of supervised release. He had obtained a transfer to Canada on September 4, 2009.
- [23] In relation to (f), the Requesting State advised that Mr. Purdom had a prior conviction for conspiracy to distribute cocaine and ecstasy, for which he was convicted on August 17, 2006.
- [24] In connection with (f), inquiries made by counsel for the Attorney General of Canada acting for the Requesting State, Ms. Swift, resulted in the production of an affidavit of Mr. Purdom's bail supervisor Heather Krystie, sworn April 16, 2013, that was marked on this application. She submitted that Mr. Purdom is presently in the City of Kelowna and has been regularly meeting with her since October last year.
- [53] The first issue with respect to the disclosure is the committal judge's decision that she did not have the jurisdiction to compel the Requesting State to disclose material. The overwhelming consensus of the jurisprudence on this point, with one exception, is that a committal judge does not have the jurisdiction to order a Requesting State (in other words a foreign government), to produce documents.
- [54] See the British Columbian cases: *U.S.A. v. Akrami et al.*, 2000 BCSC 1438 at paras. 29-31; *U.S.A. v. Welch and Romero*, 2007 BCSC 1567 at paras. 50-51 (a committal judge may only direct the Department of Justice to ask the Requesting State for materials); *USA v. Ibrahim*, 2011 BCSC 357 at para. 21 (endorsing Welch). See also the appellate jurisprudence from other provinces: *Wacjman v. United States of America*, [2003] R.J.Q. 71 at paras. 38-39, 58 (Que. C.A.), leave to appeal to appeal ref'd [2003] 1 S.C.R. xix; *United States of America v. Daul*, 2005 SKCA 34 at paras. 24-31.
- [55] The only decision where such an order was made was *R. v. Tollman*, [2006] O.J. No. 5588 at paras. 59-63 (Ont. S.C.). This decision has not been followed in British Columbia: see *Welch*. Nor has it been followed in its own jurisdiction: see *A.G. Canada v. Gill*, 2015 ONSC 2577. In addition, Speyer J. in *United States v. Khadr*, [2007] O.J. No. 3140 (Ont. S.C.) considered *Tollman* and expressed doubt as to whether the Court had jurisdiction to order disclosure of documents not relied on from the Requesting State (paras. 37, 44-51).
- [56] In my view, the committal judge did not err in finding that she had no jurisdiction to order the Requesting State to comply with a disclosure order. The correctness of the disclosure order she made is not under consideration on this appeal.

Abuse of Process

- [57] This brings me to the related issue of whether the committal judge should have considered staying the proceedings as an abuse of process on the basis that the Requesting State did not comply with the terms of the disclosure order. The committal judge dealt with this in the "Vukelich" reasons. She reviewed the evidence and authorities and concluded that there was no "air of reality" to an abuse of process argument. As such, she refused to conduct a voir dire in accordance with this Court's decision in *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.).
- [58] Mr. Kerfoot argued that the situation was analogous to a Rowbotham application, in that the judge does not have jurisdiction to order the government to pay for a lawyer for an accused, but can stay the proceedings if no lawyer is appointed on the basis of a breach of the accused's s. 7 rights under the Charter: see *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.).
- [59] There is no issue that a committal judge has the jurisdiction to grant a Charter remedy. The leading case on this issue is *United States of America v. Cobb*, 2001 SCC 19, where the Court granted a stay of proceedings on the basis that an abuse of process had occurred. The case concerned comments made by both the American judge assigned to the case and the prosecuting attorney that the Court found what amounted to "threats and inducements" that interfered with the Canadian extradition proceedings (para. 33). The Court held, at para. 32:
- [32] The principles of fundamental justice guaranteed under s. 7 vary according to the context of the proceedings in which they are raised: *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *Dynar*, supra. Where the issues before the courts involve a liberty and security interest, s. 7 is engaged and requires that the proceedings be conducted fairly. Accordingly, although the committal hearing is not a trial, it must conform with the principles of procedural fairness that govern all judicial proceedings in this country, particularly those where a liberty or security interest is at stake.
- [60] In *Cobb*, the Court found that the comments amounted to an abuse of process that was "directly and inextricably related to the committal hearing" (para. 40).
- [61] The accused's allegation of an abuse of proceeding must have an "air of reality": *United States of America v. Kwok*, 2001 SCC 18 at para. 74. The issue of abuse of process arose in extradition proceedings indexed as *R. v. Larosa* (2002), 166 C.C.C. (3d) 449 (Ont. C.A.). *Doherty J.A.*, at para. 78 defined the "air of reality" requirement. He said:
- [78] The "air of reality" requirement comes from *R. v. Kwok*, supra, at 267-69. An "air of reality" means some realistic possibility that the allegations can be substantiated if the orders requested are made
- [62] At para. 52, discussing the application of the abuse of process principle to extradition, he held:

- [52] If I understand Cobb correctly, an extradition judge has the authority to stay proceedings under s. 25 of the Extradition Act or under the common law abuse of process doctrine in two related but somewhat different situations. He or she may stay the proceedings if the actual conduct of the committal proceedings produces unfairness which reaches the level of a breach of s. 7 or an abuse of process. Unfairness is considered in the context of the purpose of the committal hearing, which is to determine whether a questioned state has established a *prima facie* case. The extradition judge may also stay committal proceedings if, in the circumstances, proceeding with committal proceedings would amount to an abuse of process or a breach of the principles of fundamental justice. Cobb and Shulman are examples of situations in which proceeding with a committal hearing amounted to an abuse of process and a breach of s. 7 no matter how fairly that proceeding might be conducted.
- [63] This Court has held that there is not an absolute right to a *voir dire* when a person sought alleges a Charter breach. Additionally, the decision not to proceed with a *voir dire* is discretionary, and absent an error in principle, will be given deference: *United States of America v. Bennett*, 2014 BCCA 145 at para. 29.
- [64] Mr. Kerfoot did not argue bad faith or deceit on the part of the Requesting State. He also did not argue that the committal judge should go behind the assertions that the material was privileged.
- [65] The committal judge carefully and thoroughly reviewed the law, and concluded that there was no air of reality to the contention that there had been an abuse of process as a result of the conduct of Mr. Lombardi. The evidence does not, in my view, come close to circumstances that could amount to an abuse of process. In my view, the committal judge has committed no error in principle, and therefore, I would not give effect to this argument.

Sufficiency of the Evidence to Commit for Extradition

- [66] The Supreme Court of Canada recently reviewed the extradition process in *M.M.*, cited above. In that decision, Cromwell J., for the majority, clarified the law post-*United States of America v. Ferras*, 2006 SCC 33. In doing so, he rejected this Court's analysis in *United States of America v. Graham*, 2007 BCCA 345 at para. 32, on the issue of the discretion available to a committal judge to assess evidence on the standard of an unreasonable verdict (para. 67).
- [67] At para. 22, the Court summarized the committal proceedings as follows:
- [22] If, as here, the Minister issues an ATP, the extradition moves to the committal phase. This phase plays an important, although carefully circumscribed, role in protecting the rights of the person sought. That role is defined by s. 29(1)(a) and (3) of the Extradition Act. The extradition judge is to determine two things: (1) whether "there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed"; and (2) "that the person [before the court] is the person sought by the extradition partner" (s. 29(1)(a)). Committal is ordered if the judge finds that these conditions exist; if not, the person must be discharged: s. 29(1)

(a) and (3). This means that the requesting state must show that it has evidence available for trial that would justify committal for trial in Canada for the Canadian offences specified in the ATP.

[Emphasis added.]

- [68] Mr. Kerfoot argues two points in relation to the sufficiency of the evidence, both in relation to the evidence of Mr. Purdom. First, he submits that Mr. Purdom has recanted his evidence (Affidavit May 18, 2010) and thus, his evidence is now so "defective" or "unreliable" it should be excised from the RROC.
- [69] The second point is in relation to Mr. Purdom's affidavit of December 15, 2013, where he says he will not testify or comply with any court order compelling him to testify, and therefore, his evidence is "unavailable".
- [70] After reviewing the case authorities, and the circumstances, including the fact that Mr. Purdom gave a sworn statement of his involvement (and Mr. Kerfoot's) in the crime before a federal judge at his plea, as well as statements in the presence of his lawyer to American prosecutors, the committal judge concluded that Mr. Kerfoot failed to rebut the presumption that the SSROC and RROC are reliable. The conflicting evidence is for the trier of fact to resolve.
- [71] With respect to the second point, the committal judge reviewed the law in this province, and concluded that Mr. Purdom's assertion that he will not testify does not mean his evidence is unreliable. She refused to omit his evidence from consideration on the committal.
- [72] Cromwell J., in *M.M.* discussed the change brought about in *Ferras*, and the discretion of a committal judge to refuse to extradite on the basis of insufficient evidence, giving examples of "where the reliability of the evidence certified was successfully impeached or where there was no evidence that the evidence was available" (para. 60).
- [73] He affirmed, at para. 63:
- [63] This means that there continues to be a high threshold for refusing committal on the basis that the supporting evidence is unreliable. It is only where the evidence supporting committal is "so defective or appears so unreliable" or "manifestly unreliable" that it would be "dangerous or unsafe" to act on it that the extradition judge is justified in refusing committal on this basis: *Ferras*, at paras. 54 and 40.
- [74] Finally, at paras. 71-72, he outlined the correct approach to the question of committal when the evidence is said to be "unreliable":
- [71] In particular, I largely agree with the interpretation of *Ferras* given by Doherty J.A. writing for the court in *United States of America v. Anderson*, 2007 ONCA 84, 85 O.R. (3d) 380, at paras. 28-31. *Ferras* "does not envision weighing competing inferences that may arise from the evidence", other than in the limited sense noted in *Arcuri* of considering that the inferences sought to be drawn from circumstantial evidence are reasonable: *Anderson*, at

para. 28. Ferras does not contemplate that the extradition judge will decide whether a witness is credible or his or her evidence is reliable beyond determining that the evidence is not "so defective" or "so unreliable" that it should not be given any weight: Anderson, at para. 30. Ferras does not call upon the extradition judge to evaluate the relative strength of the case put forward by the requesting state. There is no power to deny extradition simply because the case appears to the extradition judge to be weak or unlikely to succeed at trial. Ferras requires the extradition judge, however, to remove evidence from consideration that appears to the judge to be "so defective" or "so unreliable" that it should be disregarded. This may be the result of problems inherent in the evidence itself, problems that undermine the credibility or reliability of the source of the evidence, or a combination of those two factors.

[72] I also agree with Doherty J.A. that "it is only where the concerns with respect to the reliability of the evidence, whatever the source or sources, are sufficiently powerful to justify the complete rejection of the evidence, that these concerns become germane to the s. 29(1) (a) inquiry": Anderson, at para. 30. The extradition judge's starting point is that the certified evidence is presumptively reliable: see Ferras, at paras. 52-56. This presumption may only be rebutted by evidence showing "fundamental inadequacies or frailties in the material relied on by the requesting state": Anderson, at para. 31.

[75] It is not uncommon for witnesses, particularly accomplices, to recant their statements. The question is whether the recantation in the circumstances of this case made the evidence "so defective or appear so unreliable" that it should not be given weight. The law has been clarified that Ferras does not stand for an expanded role of the extradition judge. It does not invite committal judges to embark on a credibility analysis of competing evidence. Only where it is "dangerous" or "unsafe" to rely on the evidence, should it be disregarded. Here, there are two competing versions under oath. There is other evidence supporting the version Mr. Purdom gave to the authorities and in relation to his plea agreement. In my view, the committal judge did not err in concluding that the evidence was not manifestly unreliable and not worthy of consideration. The determination of which version is correct is properly for a trial judge.

[76] The next question is whether the evidence was "available". Mr. Purdom may be subject to the provisions of the MLACMA which permit evidence to be taken by video link and individuals to be held in contempt of court if they fail to cooperate:

22.1 (1) If the Minister approves a request of a state or entity to compel a person to provide evidence or a statement regarding an offence by means of technology that permits the virtual presence of the person in the territory over which the state or entity has jurisdiction, or that permits the parties and the court to hear and examine the witness, the Minister shall provide a competent authority with any documents or information necessary to apply for the order.(2) The competent authority who is provided with the documents or information shall apply ex parte to a judge of the province in which the person may be found for an order for the taking of the evidence or statement from the person under subsection (1).

22.2 (1) The judge may make the order if satisfied that there are reasonable grounds to believe that

- (a) an offence has been committed; and
 - (b) the state or entity believes that the person's evidence or statement would be relevant to the investigation or prosecution of the offence.
- (2) An order made under subsection (1) shall order the person
- (a) to attend at the place fixed by the judge for the taking of the evidence or statement by means of the technology and to remain in attendance until the person is excused by the authorities of the state or entity;
 - (b) to answer any questions put to the person by the authorities of the state or entity or by any person authorized by those authorities, in accordance with the law that applies to the state or entity;
 - (c) to make a copy of a record or to make a record from data and to bring the copy or record, when appropriate; and
 - (d) to bring any record or thing in his or her possession or control, when appropriate, in order to show it to the authorities by means of the technology.

Contempt of court in Canada

22.4 When a witness gives evidence under section 22.2, the Canadian law relating to contempt of court applies with respect to a refusal by the person to answer a question or to produce a record or thing as ordered by the judge under that section.

[Emphasis added.]

- [77] If Mr. Purdom refuses to cooperate, he may be subject to his plea agreement being withdrawn and facing additional proceedings in the United States. He will potentially face contempt of court allegations, which could result in a jail term.
- [78] This Court in *United States of America v. Lillemo*, 2005 BCCA 198 at paras. 5-6 examined ways in which evidence might be "available":
- [5] As I noted in the case of *Fordham*, the mere fact that a witness may not presently have been contacted in Canada or may not have agreed to testify in the United States does not necessarily mean that his or her evidence will not be available for the purposes of prosecution in the United States: see also [Yang].
- [6] It may be that the evidence of a witness could be taken by video link or, in the case of those witnesses who testified at the extradition proceeding before Gill J., it may be that such evidence could be adduced under the laws of the domestic forum through a provision similar to s. 715 of our Criminal Code. Those are issues to be resolved under the provisions of the law of the extradition partner, in this case the United States. For the reasons I

expressed in *Fordham*, it does not seem to me that this argument about the "availability" of the Canadian witnesses affords any basis to set aside the decision of the Minister of Justice to order the applicant, Mr. Lillemo, to be surrendered for extradition to the United States.

[Emphasis added.]

[79] In *United States of America v. Fordham*, 2005 BCCA 197 at para. 31, the British Columbia Court of Appeal stated:

[31] I would not assume that because these witnesses may be reluctant or difficult to locate, their evidence is not therefore "available" in a prosecution in the United States. For instance, it may be possible to have evidence given by such witness from Canada by video link. It may also be feasible for evidence to be adduced at any such prosecution as it could be in Canada in a situation where a witness has previously testified and is not available at trial to give the evidence: see s. 715 of the Criminal Code. [Emphasis added.]

[80] In the instant case, the committal judge held, at paras. 85-86:

[85] Voluntary attendance is not to be equated with availability of evidence. If an individual can be subpoenaed to come to court or if their testimony can be ordered pursuant to the Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 (4th Supp.) (the "MLACMA"), then the evidence is still considered available. It may be that that evidence is given by way of videoconferencing, but the manner in which the evidence is adduced does not take away from the fact that it is available.

[86] Mr. Kerfoot argues that it is a facile assertion to say that the requesting state will rely upon the provisions of the MLACMA; nonetheless, the ability of the Requesting State to rely upon the MLACMA has not been disputed .

[81] In summary, there are ways that Mr. Purdom can be required by law to cooperate, and I do not think it appropriate to assume he will, in fact, disobey the law. In the event he does, however, there are sworn statements in existence in the United States that would be admissible in a Canadian court for the truth of their contents in similar circumstances.

[82] In my view, the committal judge did not err in concluding that the evidence was available. Therefore, taking into consideration the anticipated evidence of Mr. Purdom, it cannot be said that there was insufficient evidence to commit Mr. Kerfoot for extradition.

[83] I would dismiss the appeal from committal.

B. JUDICIAL REVIEW

Standard of Review

[84] I next turn to the decision of the Minister to surrender Mr. Kerfoot to the United States. In *M.M., Cromwell J.* affirmed the standard of review, at para. 106:

[106] There is no dispute that the standard of review that the Court of Appeal had to apply to the Minister's decision was reasonableness. This standard was authoritatively described in *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at para. 41:

To apply this standard in the extradition context, a court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. . . . If . . . the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld by a reviewing court unless it is unreasonable. . . . Given the Minister's expertise and his obligation to ensure that Canada complies with its international commitments, he is in the best position to determine whether the factors weigh in favour of or against extradition.

[Emphasis added.]

Legal Parameters

[85] The Minister must refuse to surrender a person if the surrender would be "unjust or oppressive having regard to all the relevant circumstances". Section 44(1)(a) of the Extradition Act reads:

44. (1) The Minister shall refuse to make a surrender order if the Minister is satisfied that
- (a) the surrender would be unjust or oppressive having regard to all the relevant circumstances;

[86] Pursuant to s. 57(7) of the Extradition Act, this Court may grant relief from the decision of the Minister based on the grounds of s. 18.1(4) of the Federal Courts Act, R.S.C. 1985, c. F-7:

Extradition Act

57 (7) The court of appeal may grant relief under this section on any of the grounds on which the Federal Court may grant relief under subsection 18.1(4) of the Federal Courts Act.

Federal Courts Act

18.1 (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

- (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
- (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

- (e) acted, or failed to act, by reason of fraud or perjured evidence; or
- (f) acted in any other way that was contrary to law.

[87] Mr. Kerfoot raises five grounds to challenge the reasonableness of the Minister's decision and that the Minister abused his discretion and acted contrary to law by: i) surrendering Mr. Kerfoot because of the conditions in the U.S. prisons that would shock the conscience of Canadians; ii) by surrendering Mr. Kerfoot in the face of the prosecutor's abusive tactics; iii) surrendering Mr. Kerfoot on the basis of coerced or false testimony from co-conspirators, that combined to render the surrender unsafe and/or oppressive; iv) surrendering Mr. Kerfoot without assurances that he would not face an enhanced penalty if convicted; and v) by misapplying the test in *Cotroni*.

The Conditions in the Prisons

[88] Mr. Kerfoot submitted to the Minister that the prison conditions in the United States would shock the conscience of Canadians, and therefore his surrender would be unjust or oppressive. The Minister considered the submissions and concluded:

Your client will have access to the protective measures that currently exist in the U.S. penal system. In addition, as he is a Canadian citizen, he will also have access to Canadian consular services in the U.S[.], and may raise any concerns he has regarding the treatment he is receiving in U.S. custody with a Canadian consular- officer.

Further, it is an important interest of society that Canada does not become a safe haven for persons alleged to have committed crimes abroad and ensuring that a fugitive is brought to justice for a proper determination of his or her guilt or innocence.

You have not provided me with any new information regarding your client's likely treatment should he be imprisoned in a U.S. prison. Consequently, I agree with my predecessor's reasoning and conclude that having considered all of your submissions, you have not demonstrated that your- client will be subjected to human rights violations in the U.S. prison system and, therefore, have not established that your client will personally face a situation that is "simply unacceptable" or "shocking and fundamentally unacceptable to our society".

[89] This Court and other appellate courts have considered the question of general allegations of mistreatment in U.S. prisons, including conditions that were dangerous and degrading. In each case, the courts have concluded that without specific allegations of personal abuse, the general state of the prisons would not "shock the conscience" of the community: see *États-Unis du Mexique v. Bolly* (2007), 220 C.C.C. (3d) 384 (Que. C.A.) at paras. 59-61; *Thailand v. Saxena*, 2006 BCCA 98 at paras. 52-56; *Saxena v. Canada (Minister of Justice)*, 2009 BCCA 223; *Gwynne v. Canada (Minister of Justice)* (1998), 103 B.C.A.C. 1; *United States of America v. U.A.S.*, 2013 BCCA 483; *United States of America v. Johnstone*, 2013 BCCA 2; and *United States of America v. Reumayr*, 2003 BCCA 375. The Supreme Court of Canada refused leave to appeal in all the cases where leave was sought.

- [90] Recently, in *India v. Badesha*, 2016 BCCA 88, this Court set aside a surrender on the basis that the assurances sought by the Minister that the persons sought would not be subject to torture, violence and neglect in an Indian prison were not adequate.
- [91] In my view, this decision is distinguishable from the case at bar. For example, India has failed to ratify the United Nations Convention Against Torture. There was evidence before the Court that torture was endemic, and that women (one of the persons sought was female), were subject to custodial torture by rape by the law enforcement personnel (at paras. 22-26). The Court concluded that the situation in Indian prisons would shock the conscience of Canadians. That has never been the conclusion with respect to United States prisons, despite evidence of dangerousness and degradation.
- [92] In my view, the decision of the Minister was reasonable in the face of the evidence and authorities. I would not give effect to this ground of review.

The Tactics of the Prosecution

- [93] Mr. Kerfoot argues that the decision of the committal judge not to stay the proceedings based on an abuse of process was not the end of the matter, and the Minister should have considered the conduct of the prosecutor on the basis that the surrender would be unjust or oppressive.
- [94] The Minister considered the issue and concluded that the United States authorities were within their rights not to disclose documents that are the subject of privilege. In addition, the committal judge correctly found that there was no air of reality to the allegation of abuse of process. In my view, it was not unreasonable of the Minister to surrender Mr. Kerfoot in light of these unsubstantiated allegations.

Unreliability of the Evidence

- [95] Mr. Kerfoot submitted to the Minister that the evidence of his co-conspirators was unreliable and unavailable. The arguments he made to the Minister and on appeal are similar to those made to the extradition judge on the committal. In these circumstances, the extradition judge concluded, and I have upheld, that the evidence was available and not manifestly unreliable.
- [96] The Minister reviewed the issue, and ultimately agreed with the extradition judge. He concluded:

In any event, I agree with the extradition judge's finding that the evidence contained in the RROC and SSROC is available and there is no reason not to rely on the certification of the U.S. that there is sufficient evidence to prosecute your client in the U.S.

It is my view that your client's surrender to the U.S. would not be unjust or oppressive, and would not violate section 7 of the Charter, notwithstanding your concerns regarding the availability and reliability of evidence for the prosecution.

[97] It cannot be said that this conclusion was unreasonable.

Assurances that Mr. Kerfoot Would Not Receive an Enhanced Penalty

[98] Mr. Kerfoot, if convicted, asserts he will likely face a minimum ten-year prison term. The prosecution could seek an enhanced penalty of a minimum twenty-year sentence. The decision to seek an enhanced penalty is generally made after the person has been surrendered, and is in the discretion of the prosecution. Mr. Kerfoot argues that there will be undue pressure upon him to waive his right to a trial and plead guilty in the face of such a long sentence. He asked the Minister to seek an assurance that the prosecution would not seek an enhanced penalty on the basis that it would be cruel and unusual punishment.

[99] The Minister concluded that the maximum sentences for the American and Canadian offences are similar, and demonstrate that the imposition of such a sentence would not shock the conscience of the community: see *United States v. Whitley* (1994), 20 O.R. (3d) 794, aff'd [1996] 1 S.C.R. 467 SCC.

[100] In my view, this conclusion was not unreasonable in the circumstances.

Cotroni Factors

[101] Mr. Kerfoot submits that if he is going to be prosecuted, he should be prosecuted in Canada. Otherwise, his mobility rights found in s. 6(1) of the Charter will be violated.

[102] In *Sriskandarajah v. United States of America*, 2012 SCC 70, the Court reaffirmed the factors in *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, with respect to s. 6(1) of the Charter in relation to mobility rights at paras. 9-14:

[9] First, *Cotroni*, *Kwok* and *Lake* hold that extradition constitutes a marginal limitation of the s. 6(1) right to remain in Canada. Although the surrender of a Canadian citizen to a foreign country impairs the individual's right to remain on Canadian soil, s. 6(1) is primarily aimed against exile and banishment, i.e. exclusion from membership in the national community. As a consequence, this limitation "lies at the outer edges of the core values" of s. 6(1): *Cotroni*, at p. 1481.

[10] Second, and flowing from the previous point, extradition will be generally warranted under s. 1 of the Charter as a reasonable limitation of the right to remain in Canada: *Cotroni*, at p. 1483; *Lake*, at para. 37. This is supported by the pressing and substantial objectives of extradition: (1) protecting the public against crime through its investigation; (2) bringing fugitives to justice for the proper determination of their criminal liability; (3) ensuring, through international cooperation, that national boundaries do not serve as a means of escape from the rule of law.

- [11] Third, the Minister's discretion to extradite or to prosecute in Canada is a necessary condition for the effective enforcement of the criminal law, and it attracts a high degree of deference: Cotroni, at p. 1497; Kwok, at paras. 93-96; Lake, at para. 34. The Minister's assessment of whether the infringement of a fugitive's s. 6(1) right is justified under s. 1 involves a determination of whether, based on his superior expertise of Canada's international obligations and interests, Canada should defer to the interests of the requesting state. This is mostly a political decision. Courts should interfere with the Minister's discretion only in the "clearest of cases" (Lake, at para. 30).
- [12] Fourth, ministerial discretion to extradite is not unfettered. Public authorities must give due regard and weight to the citizen's Charter right to remain in Canada in considering whether to prosecute domestically or order surrender. The Minister must order surrender only if satisfied that extradition is more appropriate than domestic prosecution, having balanced all factors which he finds relevant under the circumstances, such as:
- Where was the impact of the offence felt or likely to have been felt?
 - Which jurisdiction has the greater interest in prosecuting the offence?
 - Which police force played the major role in the development of the case?
 - Which jurisdiction has laid charges?
 - Which jurisdiction has the most comprehensive case?
 - Which jurisdiction is ready to proceed to trial?
 - Where is the evidence located?
 - Is the evidence mobile?
 - How many accused are involved and can they be gathered together in one place for trial?
 - In what jurisdiction were most of the acts in furtherance of the crime committed?
 - What is the nationality and residence of the accused?
 - What is the severity of the sentence that the accused is likely to receive in each jurisdiction?
- [13] Fifth, no single factor is dispositive. Nor need all relevant factors be given equal weight. The Minister may decide to grant an extradition request because of one factor which he finds determinative in a given case. The pertinence and significance of the "Cotroni factors" vary from case to case: Lake, at para. 30. Nothing precludes the Minister from paying more heed to one factor than another in a given case. The inquiry is essentially a fact-based, balancing assessment within the expertise of the Minister.
- [14] Sixth, the question of whether a Canadian prosecution is a realistic option is simply one factor that must be considered. It is not the determinative factor in the Minister's assessment: Cotroni, at p. 1494; Kwok, at para. 92; Lake, at para. 37. In Kwok, Arbour J. noted

that "[t]he efficacy of a prosecution goes beyond simply determining whether it has any chance of resulting in a conviction. It requires an assessment, in the public interest, of all the costs and risks involved, including delay, inconvenience to witnesses and applicable rules" (para. 90). In addition, the interest of the foreign nation in prosecuting the fugitive on its territory must not be neglected. Indeed, it would not be wrong for a Minister, after having pondered all the relevant factors, to "yield to the superior interest of the Requesting State, even in a case where some form of prosecution in Canada [was] not materially impossible or totally unlikely to succeed" (Kwok, at para. 91).

- [103] The Minister considered the submissions made by Mr. Kerfoot on the Cotroni factors. He referred to his obligation to consider whether prosecuting Mr. Kerfoot in the United States would not unjustifiably violate his right to remain in Canada under s. 1 of the Charter. He concluded that the impact of the offence would weigh more heavily in the United States, given that is where the drugs were seized. The investigation was initiated and developed exclusively by the American authorities. All of the physical evidence is in the United States, and all witnesses except Mr. Purdom are in the United States. The United States has the most comprehensive case, laid charges, and is ready to proceed to trial. The co-accused were prosecuted in the United States. In the Minister's view, the sentences that may be imposed are comparable.
- [104] Mr. Kerfoot submits that the Minister was incorrect in that the Canadian authorities must have obtained the telephone records that sought to tie him to a cell phone, and turned them over to the United States. He submits that the Minister's conclusion was wrong, and his decision unjustifiably violates Mr. Kerfoot's Charter rights.
- [105] The Respondent says that it was not an error to identify the Canadian authorities as providing no role. He says that they played no active role as their assistance occurred after the investigation and the arrests in the United States. The American authorities had clear conduct over the investigation.
- [106] If there was an error in stating that the Canadian authorities had no role, in my view, it was not an error of importance. The American authorities clearly had the "major role" in the development of the case.
- [107] The Minister's letter demonstrates consideration of all the Cotroni factors. In my view, it cannot be said that his conclusion that s. 6 would not be violated unjustifiably by having Mr. Kerfoot prosecuted in the United States was unreasonable.

In my view, there is no basis upon which to overturn the findings of the Minister of Justice. His conclusions are all within a reasonable range of outcomes.

- [108] I would dismiss the appeal from the order of committal and I would dismiss the judicial review from the surrender order.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Mr. Justice Savage"

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