Court of Queen's Bench of Alberta

Citation: United States of America v Caro-Hernandez, 2020 ABQB 801

Date: 20201218
Docket: 181333782X1
Registry: Calgary

Between:

The Attorney General of Canada on Behalf of the United States of America

Applicant

- and -

Julio Caro-Hernandez

Respondent

Oral Reasons for Judgment
of the
Honourable Mr. Justice D.A. Labrenz

Introduction

[1] The United States of America ["United States"] seeks Mr. Caro-Hernandez's extradition to stand trial on controlled-substance related offences that correspond to the Canadian criminal offence of possession for the purposes of trafficking in Schedule 1 controlled substances, contrary to section 5(2) of the *Controlled Drugs and Substances Act,* SC 1996, c 19, s.5(2).

[2] In October of 2018, the Attorney General of Canada issued an Authority to Proceed ["ATP"] pursuant to s.15 of the *Extradition Act,* SC 1999, c. E-18 ["*Act*"], as amended, which authorizes the Attorney General of Canada ["Attorney General"] to seek an order for committal for the extradition of Mr. Caro-Hernandez. Pursuant to this authority, the Attorney General of Canada seeks an order committing Mr. Caro-Hernandez for extradition under s.29(1)(a) of the *Act*.

[3] In support of its request to extradite Mr. Caro-Hernandez, the USA relies upon evidence contained in a Record of the Case ["ROC"], which was certified under s.33(3) of the *Act* on

April 30, 2018 by a Special Assistant United States Attorney with the United States Attorney's Office in the Eastern District of North Carolina.

[4] Under s.24(1) of the *Act*, the Court is required to hold an extradition hearing upon receipt of an ATP. As the Attorney General properly identifies, my task is to determine whether there is evidence of conduct, that had it occurred in Canada, would justify committal for trial on the offence set out in the ATP: ***United States of America v Batista-Cervantes***, 2014 ABCA 408 at para 3.

[5] I must also be satisfied on a balance of probabilities that Mr. Caro-Hernandez is the person sought by the extradition partner.

[6] At this stage, the extradition hearing before me can be described as being at the committal phase. Should I order that Mr. Caro-Hernandez be committed for extradition to the United States, during the next phase aptly referred to as the surrender phase, Mr. Caro-Hernandez will be afforded the right and the opportunity to make submissions to the Minister as to why the Minister should decline to surrender, or should surrender only upon conditions: s.43 of the *Act*.

[7] The ROC, as filed, contains the entirety of the available evidence for the purposes of this extradition hearing, and it briefly summarizes the anticipated evidence of an unidentified "cooperating witness"; the anticipated evidence of an officer with the United States Drug Enforcement Administration ["DEA"]; an investigator with the Wilson Police Department (North Carolina); and an expert forensic chemist who will testify that 113.9 grams of seized substance was identified by her to be methamphetamine.

[8] Mr. Caro-Hernandez opposes his committal for the purposes of his extradition on the basis that there is insufficient reliable evidence to link him to the conduct complained of by the United States, such that his identification is manifestly unreliable and does not meet the test for committal. Mr. Caro-Hernandez points to the use of a singular photograph that was presented to the cooperating witness for the purposes of identification, and the concomitant failure of the DEA to utilize a photographic line up. Mr. Caro-Hernandez also points to the failure of the ROC to disclose what discussions, if any, preceded the single photographic identification by the cooperating witness, and the lack of any information as to the circumstances of the identification – i.e., did the cooperating witness hesitate, or need further time, to make his identification from that single photograph.

[9] In support of his "identification" argument Mr. Caro-Hernandez asks me to consider that the ROC is vague in its details, such that, the paucity of proffered detail should undermine any suggestion that his identification is reliable. The ROC, as Mr. Caro-Hernandez points out, does not provide information as to the duration of any of the interactions the cooperating witness had in relation to purchasing or obtaining the controlled substances, the cooperating witness's ability or opportunity to make appropriate identification observations (lighting, lines of sight), and the lack of any information indicating that the cooperating witness provided any description or detailing of pertinent identifying features.

[10] Mr. Caro-Hernandez further opposes his committal for extradition on the basis that the cooperating witness is manifestly unreliable. Mr. Caro-Hernandez objects to the failure of the United States to name the cooperating witness by arguing that the name of the witness ought to be released because of the "frail" evidence of identity in this case, and because of the failure of

the ROC to specify whether the cooperating witness received payment or other consideration for the witness's anticipated cooperation. Mr. Caro-Hernandez further argues that the latter issue is central to the cooperating witness's credibility and, in turn, whether the cooperating witness's evidence is manifestly unreliable. I should note that I am told that Mr. Caro-Hernandez abandoned a previously scheduled application for the purpose of seeking disclosure of the cooperating witness's name.

Background

[11] The ROC alleges that Mr. Caro-Hernandez possessed and trafficked controlled substances on multiple occasions between 2013 and 2016.

[12] The ROC describes that a cooperating witness in the investigation had dealings with Mr. Caro-Hernandez from 2013 to 2016. The witness is expected to testify to the following:

- Beginning in 2013, the cooperating witness began purchasing cocaine from Mr. Caro-Hernandez. In total, the cooperating witness bought approximately 500 grams of cocaine on several occasions;
- On February 9, 2016 the cooperating witness negotiated a purchase of four ounces of methamphetamine from Mr. Caro-Hernandez for the sum of $3,200;
- On the same day, the cooperating witness met with Mr. Caro-Hernandez. During the meeting, Mr. Caro-Hernandez provided approximately four ounces of methamphetamine to the witness. The cooperating witness paid Mr. Caro-Hernandez half of the negotiated price, $1,600 in cash. On February 16, 2016, the cooperating witness paid the remaining $1,600 cash to Mr. Caro-Hernandez, in person, to pay the balance of the prior methamphetamine purchase; and
- The cooperating witness viewed a photograph attached as Exhibit 1 to the ROC and could testify that it depicts the individual the cooperating witness knew as Mr. Caro-Hernandez, from whom the witness purchased methamphetamine on February 9, 2016.

[13] The evidence of the DEA Task Force Officer ["TFO"] is described in the ROC as an expectation that he will testify as follows:

- In October 2015, the cooperating witness began working with the TFO as a confidential source in the hope of receiving leniency in a federal narcotics case against the cooperating witness;
- On March 8, 2016, the cooperating witness was sentenced to 109 months for his federal drug conviction;
- On December 9, 2015, during an interview, the cooperating witness informed the TFO that Mr. Caro-Hernandez had supplied the cooperating witness with cocaine beginning in 2013 and had supplied the cooperating witness with an estimated half kilogram of cocaine over several transactions;
- On February 16, 2016, the TFO video and audio recorded the cooperating witness paying the balance of $1600 to Caro-Hernandez for the methamphetamine purchase. The TFO was present in another room of the residence when the transaction took place; and

- The Wilson Police Department maintains this recording. The TFO will authenticate the recording to use as evidence.

[14] The Wilson Police investigator is described as being expected to testify as follows:

- On February 9, 2016, law enforcement officers fitted the cooperating witness with a clandestine audio-video recording device. This device recorded the cooperating witness meeting with Mr. Caro-Hernandez and arranging to purchase four ounces of methamphetamine from Mr. Caro-Hernandez for a total sum of $3,200;
- Later that same day, the law enforcement officers fitted the cooperating witness with a clandestine audio-visual recording device. The device recorded the cooperating witness meeting with Mr. Caro-Hernandez in the cooperating witness's car. Mr. Caro-Hernandez provided the cooperating witness with 113.9 grams of methamphetamine in exchange for $1600;
- The Wilson Police investigator took the suspected methamphetamine from the cooperating witness and placed it into the custody of the property and evidence custodian of the Wilson Police Department; and
- The Wilson Police Department maintains both of these recordings. The Wilson Police investigator will authenticate the recordings to use as evidence.

[15] The forensic chemist is expected to testify to the following:

- The chemist holds a Master of Science in Chemistry and a Chemical Engineer Degree. From January through June 2013 she was trained as a forensic chemist at the Drug Enforcement Agency in Quantico, Virginia;
- The chemist has identified and quantified methamphetamine in hundreds of exhibits. She has testified in court approximately fifteen times and has been admitted as an expert in forensic drug chemistry in the United States; and
- On October 26, 2016, Ms. Diaz examined the suspected methamphetamine purchased by the cooperating witness from Mr. Caro-Hernandez on February 9, 2016, and determined the substance to be 113.9 grams of methamphetamine.

Legal Principles

The Extradition Hearing and the Role of the Extradition Judge

[16] Extradition is meant to be a simple and expeditious process by which Canada complies with its international obligations and affords protection for the rights of the person sought: ***MM v United States of America,*** 2015 SCC 62 at para 1.

[17] The objectives of extradition include "protecting the public against crime through its investigations; bringing fugitives to justice for the proper determination of their criminal liability; and ensuring, through international cooperation, that international boundaries do not serve as a means of escape from the rule of law" ... "To achieve these pressing and substantial objectives, our extradition process is founded on the principles of reciprocity, comity and respect for differences in other jurisdictions": ***MM*** at para 15.

[18] The broad principle of double criminality as expressed in s.3(1)(b) of the *Act* means that a person may be extradited from Canada if the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada: ***MM*** at para 16.

[19] The jurisdiction of the extradition judge as found in s.29(1) of the *Act* is limited in scope, with the purpose of ensuring that the evidence establishes a *prima facie* case that the extradition crime has been committed: ***United States of America v Abdullahi,*** 2019 ABCA 238 at para 17; ***Argentina v Mellino,*** [1987] 1 SCR 536 at para 29.

[20] Section 29(1)(a) of the *Act* requires an extradition judge to determine what evidence is admissible under the *Act* and whether the admissible evidence is sufficient to justify committal: ***MM*** at para 22; ***United States of America v Ferras,*** 2006 SCC 33 at para 54.

[21] Certification of the ROC as set out in s.33(3)(a) of the *Act* raises a presumption that a record of the case is reliable. The person sought for extradition may challenge the sufficiency of the evidence by making application to call evidence, or by simply making argument as to whether the evidence as contained in the ROC could be believed by a reasonable jury.

[22] Where an argument is raised, the extradition judge may engage in a limited weighing of the evidence to determine whether there is a plausible case on a threshold basis. The question of ultimate reliability is best left for the trial. The question posed for the extradition judge asks whether the evidence presented discloses a case on which a jury could convict. If the evidence is "so defective or appears so unreliable that a judge concludes it would be dangerous or unsafe to convict, then the case should not go to a jury and is therefore not sufficient to meet the test for committal": ***Ferras*** at para 54.

[23] The Alberta Court of Appeal, referring to ***Ferras,*** has described the limited weighing engaged in by the extradition judge as not involving a consideration of "whether the evidence is weak or a conviction is unlikely" as this is not "the extradition judge's concern and do not provide a basis for refusing committal. The question of the ultimate guilt or innocence is one for the trial court in the foreign jurisdiction. The issue for the extradition judge is whether the evidence discloses a case on which the trier of fact could convict": ***Abdullahi*** at para 20.

[24] The approach taken by the Supreme Court of Canada in ***Ferras*** was further considered by the Supreme Court in ***MM.*** Cromwell J writing for the majority in ***MM,*** reiterated that there is no power to deny extradition simply because the case appears to be weak or unlikely to succeed at trial. It is only where the concerns with the reliability of the evidence, whatever the source or sources, are powerful enough to justify the complete rejection of the evidence, that the concerns become important to the s.29(1)(a) inquiry: ***MM,*** at paras 71-72.

[25] Because Mr. Caro-Hernandez did not seek to call evidence to rebut the presumptions of threshold reliability and availability of the evidence for trial under s.32 of the *Act*, he may instead make argument suggesting that the evidence contained within the certified ROC fails to disclose a case upon which a reasonable jury, properly instructed, could convict. To do so, Mr. Caro-Hernandez must successfully argue that the evidence is so defective that it would be dangerous or unsafe to convict or, expressed differently, that it is manifestly unreliable.

The Application of the Principles

Double Criminality

[26] As I have already mentioned, at the crux of extradition legal interpretation, is the principle of double criminality – that is, a person should not be extradited to face punishment in another country for conduct that would not be criminal in Canada.

[27] The first phase of the extradition process relates to receipt of an extradition request from a foreign state and the resulting decision of the Minister of Justice to proceed with an ATP. The Minister's role at this stage is to satisfy him or herself that the conditions set out in s.3(1)(a) and 3(3) are met in respect of the offences mentioned in the request. Once the Minister makes this determination, the foreign component of double criminality is met, and the Minister may then issue an ATP.

[28] Once the ATP is issued, the extradition moves to the committal phase. At this stage the United States must demonstrate that it has evidence available for trial that would justify committal for trial in Canada for the Canadian offences specified in the ATP. The statutory requirements can be found in s.29(1) of the *Act.*

[29] For the purposes of this hearing, Mr. Caro-Hernandez does not argue that the conduct described in the ROC corresponds to the Canadian criminal offence identified in the ATP:

i. For possession for the purpose of trafficking in Schedule 1 controlled substances, contrary to s.5(2) of the *Controlled Drugs and Substances Act* ["*CDSA"*].

ii. Section 5(2) of the *Controlled Drugs and Substances Act* states as follows:

> No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III, IV, V.

[30] As the Attorney General argues, the elements of this offence include possession of a substance (knowledge and control); that the substance is a controlled substance under the *CDSA*; that the accused knew of the nature of the substance; that possession was not authorized; and, that the accused intended to traffic in the substance.

[31] In my view, leaving aside for the moment the question of Mr. Caro-Hernandez's identification and the related concerns raised with respect to the reliability of the cooperating witness, I am satisfied that there is a *prima facie* case to be tried in the foreign jurisdiction. As I have said, Mr. Caro-Hernandez does not argue otherwise.

[32] As I have reviewed, the ROC indicates that the cooperating witness bought cocaine on several occasions beginning in 2013. In February of 2016, the cooperating witness negotiated the purchase of four ounces of methamphetamine and purchased 113.9 grams of methamphetamine for $1600. On a later date in February of 2016, the cooperating witness paid the remaining $1600 owing.

[33] In my view, the evidence contained within the ROC clearly meets the requirements of s.29(1)(a) of the *Act.* The evidence demonstrates to the standard required for committal that the person identified as Mr. Caro-Hernandez possessed a quantity of substance that was later confirmed to be methamphetamine - a Schedule 1 substance. He had knowledge and control, and possessed the substance for the purpose of trafficking (a two-part transaction where the cooperating witness exchanged money for the methamphetamine). This conduct clearly meets

the legal requirements for the Canadian equivalent offence under s.5(2) of the *CDSA* as set out in the ATP.

Identity of the Person Sought

[34] I am satisfied on a balance of probabilities under s.37 of the *Act* that Mr. Julio Caro-Hernandez is the person referred to in the order of arrest because the physical characteristics of the person before the Court is similar to the photograph marked as Exhibit 1 in the ROC. If it were necessary, I would have been prepared to find that the photograph depicts the individual that appeared before the Court beyond a reasonable doubt. I would also note that the person before the Court is of the same name as the name used in the documents submitted by the United States requesting extradition. In this regard, it is well accepted that an extradition judge can compare a photograph in evidence with the appearance of the person in the courtroom for the purpose of this identification: ***United States v Batista-Cervantes,*** 2014 ABCA 408 at para 12.

The Argued Unreliability of the Cooperating Witness

[35] Mr. Caro-Hernandez submits that the "cooperating witness" is not a true confidential informant, acknowledging that the ROC states that the name of the cooperating witness will be provided to near to or at trial; however, he suggests that the failure to provide the name of the cooperating witness undercuts his ability to respond to the allegations made against him: including, material issues such as his identification. In addition, Mr. Caro-Hernandez complains that the pithy nature of the information received in the ROC renders it impossible to assess the evidence contained in the ROC generally, and more particularly, the motives and credibility of the cooperating witness.

[36] As a starting point, I have no jurisdiction to order that the name of the cooperating witness be disclosed by the United States: ***United States v Kerfoot,*** 2016 BCCA 306.

[37] While I acknowledge that the information contained in the ROC could be described as a scant summary of the evidence in the nature of a "will-say", I cannot accede to an argument, which suggests that that I should discount the ROC as manifestly unreliable because there may be triable issues in the requesting state.

[38] As Justice Cromwell made clear in ***MM*** at paras 67-69, in apparent disagreement with the British Columbia Court of Appeal in ***United States of America v Graham,*** 2007 BCCA 345 at paras 31-32, the role of an extradition judge is not like the role of an appellate court in determining whether a verdict is unreasonable. An appellate court conducting a retrospective review of a full trial record is not limited to evidence of a bare *prima facie* case as you would typically find in the ROC. As Justice Cromwell points out, appellate courts in review of a trial decision, may look to see if credibility findings are reasonably supported by the evidence, or may also intervene because of the bizarre nature of the evidence or the possibility of collusion. Finally, in a judge alone case, an appellate court may assess the reasonableness of the trial judge's reasons for conviction.

[39] In contrast, as the judge hearing an extradition matter, I am limited to the high threshold of refusing to commit only in those circumstances where the evidence is manifestly unreliable to the extent that it would be dangerous or unsafe to act upon the ROC. The legal authorities to which I have referred do not require me to decide whether a witness is credible beyond determining whether the evidence is so defective or unreliable that it should not be given any weight.

[40] Although the Supreme Court of Canada in ***Ferras*** and ***MM*** has clearly stated that it is no longer proper to equate the task of an extradition judge with that of a judge considering committal following a preliminary inquiry; the limited weighing of the evidence that I engage in must not be permitted to expand beyond ignoring manifestly unreliable evidence such that it would be dangerous or unsafe to convict.

[41] A review of the legal authorities clearly demonstrates the high threshold required to demonstrate manifest unreliability. For example, in ***United States v Kerfoot,*** 2016 BCCA 306, an extradition was permitted in circumstances where the witness was a co-conspirator who recanted prior statements that implicated the appellant in a trafficking conspiracy. The British Columbia Court of Appeal agreed with the extradition judge that the difficulties involved in having a recanting witness testify did not mean the evidence was unavailable. As to the recantation itself, the Court noted that while there were two competing versions of the evidence under oath, the committal judge did not err by concluding that the evidence was not manifestly unreliable: ***Kerfoot,*** at para 75.

[42] Other legal authorities equally support the conclusion that manifest unreliability is not generally found simply because there are problematic witnesses, *Vetrovec* witnesses, tainted witnesses, or witnesses who simply become cooperating witnesses. Generally, in the extradition context, the approach is not to discount the evidence of problematic witnesses such that it would permit the extradition judge to conclude that the requesting state has not met the test for extradition: ***Thailand v Obi,*** 2020 BCSC 1071 at para 33, citing, ***Attorney General of Canada and Jay Aneja,*** 2012 ONSC 4062 at paras 19-24, aff'd ***United States v Aneja,*** 2014 ONCA 423 at paras 26-28, 41-46; ***USA v Ranga,*** 2012 BCCA 81 at para 35-37.

[43] In my view, considering the high threshold of determining manifest unreliability, neither the acknowledged relative paucity of the information contained in the ROC, nor the possibility that further disclosure might have some impact upon the assessment of the cooperating witness's reliability or credibility at trial, reasonably supports Mr. Caro-Hernandez's argument that the evidence contained within the ROC is manifestly unreliable.

[44] In particular, the cooperating witness's hopes for some leniency for cooperating in the case is a consideration for trial. As the Supreme Court of Canada has previously held, even the evidence given by a cooperating witness awaiting sentencing raises an issue of weight, not admissibility: ***United States v Shulman,*** 2001 SCC 21 at para 59.

[45] Nor, is it unusual for a witness to be identified in an extradition hearing simply as a cooperating witness. In my view, nothing turns on this consideration for the purposes of an extradition hearing. It is not difficult to posit many different reasons for a witness being identified in this manner including, *inter alia*, the safety of the witness. See, for example, ***United States v Charuk,*** 2013 ONCA 330 at paras 7-8.

Identification of Mr. Caro-Hernandez as the Person who Committed the Offence

[46] Before Mr. Caro-Hernandez may be committed for extradition, s.29 of the *Act* also requires that there must be *prima facie* evidence that the person sought is the person who committed the offence alleged.

[47] With respect to this issue, Mr. Caro-Hernandez argues strenuously that I must not overlook the well-known dangers attributable generally to improper identification evidence and the absence of any suggestion in the ROC that the cooperating witness was presented with a

proper photographic line-up as opposed to the single photograph that he identified as being Mr. Caro-Hernandez.

[48] In support of his argument, Mr. Caro-Hernandez brought to my attention a large number of legal authorities that collectively consider the many well-known dangers involved with the use of improper identification evidence in a variety of contexts. Some of the legal authorities, properly point out, for example, that prior exposure to a single photograph may in some circumstances taint any subsequent identification. Mr. Caro-Hernandez also referred me to the report and recommendations made by The Honourable Peter Cory: *The Inquiry Regarding Thomas Sophonow*: *The Investigation, Prosecution and Consideration of Entitlement to Compensation.*

[49] Mr. Caro-Hernandez urges me to view the evidence contained in the ROC as nothing more than a bald conclusory statement of identification, unsupported by the necessary underlying facts, information, or context, such that I cannot judicially assess the probative value of the evidence of identification. For these reasons, Mr. Caro-Hernandez urges me not to commit him for extradition on the basis that the identification evidence against him is dangerous, unsafe, and manifestly unreliable.

[50] I agree with Mr. Caro-Hernandez that although the ultimate reliability of this identification evidence must be left for trial in the requesting state, I must consider whether the linkage provided by the cooperating witness's identification is sufficient. Identification evidence that is manifestly unreliable is not sufficient to meet the test for committal: ***United States v Angelov,*** 2015 ONCA 659.

[51] In most cases, at trial, the credibility and weight that should be give to eyewitness testimony is a matter for the jury, with a corresponding duty placed upon the trial judge to appropriately caution the jury regarding the well-known frailties of identification evidence: ***R v Mezzo,*** [1986] 1 SCR 802, ***R v Hibbert,*** 2002 SCC 39; ***R v Hay,*** 2013 SCC 61. However, at the same time a properly instructed jury may, notwithstanding the frailties of eyewitness identification, conclude that the eyewitness evidence is reliable.

[52] This statement of the law, however, has a limit. As Rothstein J wrote in ***Hay,*** at para 41, there may be circumstances where the eyewitness testimony, even if believed, cannot properly support a finding of guilt beyond a reasonable doubt. In such cases, a trial judge must direct an acquittal upon a motion for a directed verdict.

[53] An example of a case where the identification evidence was found to be manifestly unreliable can be found in ***United States of America v Walker,*** 2008 BCCA 55. In that case, the identification of the appellant depended primarily on a stranger who was unknown to the appellant, and who made his identification either on the basis of six-person photographic montage or a single photograph. The appellant argued, like here, that the ROC did not provide sufficient information for the extradition judge to perform a proper assessment of the sufficiency of the evidence for the purpose of committal. The ROC was said not to reveal in what sequence the witness was shown the single photo and the montage. The extradition judge committed Mr. Walker for extradition.

[54] The British Columbia Court of Appeal, citing ***Ferras,*** held that an extradition judge must screen for identification evidence that is dangerous or unsafe, and that when the ROC is not complete, it cannot be said that the requesting state has met its burden. In other words, the

unanswered questions were such that it could not be determined if the eyewitness identification was dangerous or unsafe. In particular, the photo montage was not attached to the ROC; the order of the presentation of photographs was not revealed; and there was no information as to whether the single photograph was also used in the montage. The Court of Appeal also observed that the time of day, lighting conditions, and the duration of the encounter were not disclosed.

[55] The Court of Appeal overturned the extradition order made in the first instance. It should be noted that this case involved a stranger identification in a back alley. A subsequent ROC and supplemental ROC in the same matter resulted in an extradition order being upheld by the British Columbia Court of Appeal: ***United States of America v Walker,*** 2011 BCCA 110. The new information included, *inter alia*, the identification evidence of a friend who had known the appellant for two years and also observed the shooting.

[56] The case law, however, contains many examples where extradition was ordered despite significant challenge to the identification evidence.

[57] In ***United States v Singh,*** 2012 ONSC 686**,** the extradition judge considered the identification of the respondent based upon a single photograph which happened to have the respondent's name at the bottom. The extradition judge was not convinced that the name would have had any impact on the identification, and found that the ROC was not on its face manifestly unreliable and consequently that any reliability issues should be dealt with at trial. It is also noteworthy that the ROC apparently disclosed that the witness had a conversation with the respondent that was not brief in duration and that the witness's view of the respondent was "clear and unobstructed.": ***Singh,*** at para 32.

[58] In ***USA v Mendoza,*** 2016 BCSC 1297 at paras 64-72, the extradition judge considered a situation where the identification in the ROC consisted of voice identification made by a cooperating witness and the interpretation of a coded language by a police officer. The extradition judge, while acknowledging the inherent frailties in voice identification, found that the ultimate reliability of the identification should be dealt with at trial and not at the extradition hearing.

[59] In ***USA v Hall,*** 2016 BCSC 1004, the person sought to be extradited was identified on the basis of an identification made by three border patrol officers from a single photograph following a "brief and dynamic encounter in the woods, as the person they attempted to arrest fled to Canada". The photograph shown to the officers was taken from a driver's licence seized from a backpack, which had apparently been abandoned during flight. The name on the driver's licence was different from the name sought. Citing, ***United States of America v Khuc,*** 2008 BCCA 425 at paras 31, 32, the extradition judge found at paragraph 29 that "identification based on a single photograph rather than a photo line-up is a factor to be weighed, but on its own, does not make the evidence inadmissible or render it unsafe". The extradition judge ordered committal for the purposes of extradition, and held that any concerns with respect to the reliability of the identification should be dealt with in the requesting state.

[60] In ***Thailand v Obi,*** 2020 BCSC 1071, Thailand requested the extradition of the respondent for a murder that occurred in Bangkok, Thailand. The deceased died of asphyxiation from neck compression, and the largely circumstantial evidence involved a number of witnesses who confirmed that the respondent was acquainted with the deceased; several of the witnesses saw the respondent in the vicinity of the Hotel; and CCTV footage showed that the only people who went in and out of the deceased's hotel room at the relevant time were the deceased and the

respondent. The extradition judge agreed that the identification evidence was in the nature of recognition evidence, and ruled that it would be up to the trier of fact in the Thai trial proceedings to determine the level of familiarity and the weight to be given to the evidence. The extradition judge held that the passport photo as found in the ROC was of sufficient quality to be identified by a witness's familiar with the respondent, and for the photo to be compared to the Hotel's CCTV footage.

[61] In ***United States v Barbra-Ruiz,*** 2020 BCSC 214, a decision involving a cooperating witness in the context of a joint investigation that resulted in two maritime seizures of large shipments of cocaine, it was argued that the photograph used by the witness to identify the respondent was insufficient to establish a *prima facie* case.

[62] The extradition judge disagreed with this argument, finding at paragraphs 54-56, that the photograph was sufficient to show the individual's face shape and facial features (although a bit blurry), and relied upon the British Columbia Court of Appeal decision in ***Danielson v United States of America,*** 2008 BCCA 519 as authority for the proposition that the same photograph could be used to demonstrate on a balance of probabilities that the person in the courtroom is the one named in the ROC, and also as proof there is a *prima facie* case that the person before the court was the person engaged in the alleged offence. I would add that it would appear that the extradition judge was significantly influenced when deciding to order committal that identification was in the nature of recognition evidence as opposed to identification having been made by a stranger.

[63] The British Columbia Court of Appeal decision in ***Khuc*** clearly held that the difficulties associated with identification based on a single photograph does not operate in every case to make the evidence inadmissible *per se* or to render it unsafe. The panel in ***Khuc,*** noted that in ***Walker,*** the appeal was not allowed because of the single photograph identification; rather, the appeal was granted because the Court of Appeal was unable to determine on what basis the identification had been made. The Court of Appeal at paragraph 32, adopted the reasoning of the Ontario Court of Appeal in ***R v Liebhardt,*** [2006] OJ No 1239 (ONCA) to the effect that identification based on "a single photograph rather than a line-up is a factor to be weighed by the trial judge. It does not...render the evidence incapable of supporting a conviction".

[64] The Court went on to stress that when an extradition judge considers context, a relevant consideration is whether the person was previously known to the witness. The Court stated at paragraph 37: "I would not consider the evidence of identification unreliable, particularly taking into account the presumption of reliability that follows from the certification of a ROC".

Conclusion on the Second Identification Issue

[65] Taking a holistic approach to the evidence contained in the ROC, and operating from the presumption that follows the certification of the ROC, I find that the identification evidence contained within the ROC is sufficient in the circumstances to make out a *prima facie* case.

[66] I say this, in part, because it is my view that I would not be entitled to direct a jury to acquit as the identification evidence here – no matter how pithily described - is capable of being weighed by the trier of fact. In other words, I do not view this as being the type of case where the identification evidence of such a weak nature that it should be withdrawn from consideration. Instead, consistent with the legal authorities I have reviewed, the evidence of identification is of sufficient strength that it is properly a matter for the trial court in the requesting state.

[67] In coming to this conclusion, I agree that eyewitness identification *may* be supported by past recognition or association between the witness and the identified party, on the theory that identification may take less time and may be more reliable. The Alberta Court of Appeal, like the other appellate courts that I have referred to, has long recognized the correctness of this legal proposition: ***R v Mackinaw,*** 2010 ABCA 359, citing ***R v DeCoste,*** 1983 AJ 140.

[68] In ***R v Roasting,*** 2016 ABCA 138 at para 24, the Alberta Court of Appeal noted that "recognition evidence is a sub-species of identification evidence that can overcome concerns about identification". The Court also noted, quoting from ***R v Bigsky,*** 2006 SKCA 145 at para 43 the following:

> Where courts of appeal have found error, the reasons have been insufficient, the eyewitness identification rests on a "fleeting glance" or some improper procedure took place after the incident which may have inappropriately strengthened the witness's testimony.

[69] Mindful of the high threshold to remove the question of identification from a jury, and equally mindful of the high threshold before the identification evidence can be described as manifestly unreliable as being not supportive of a *prima facie* case, I do not find a basis here to say that the identification evidence as contained in the ROC is so weak such that it would be considered as manifestly unreliable.

[70] Here, as in many extradition cases, the use of the single photograph has two purposes such that it effectively bridges the two types of identification required.

[71] The cooperating witness, although I agree that scant details are provided in the ROC, is said to have had a long relationship with Mr. Caro-Hernandez. The ROC notes that the cooperating witness purchased cocaine from Mr. Caro-Hernandez on several occasions dating back to 2013. These previous encounters of a commercial nature are not irrelevant to the question of identification when considered from the perspective of recognition evidence as generally deserving greater weight for reliability: ***R v Bob,*** 2008 BCCA 485.

[72] Nor is it irrelevant to the question of his identification, that the cooperating witness was able to apparently keep in touch with Mr. Caro-Hernandez over that same period of time, such that he successfully met with him twice in February of 2016 for the purpose of purchasing methamphetamine.

[73] Although the ROC speaks of three separate audio/video recordings of transactions between the cooperating witness and Mr. Caro-Hernandez in February of 2016, the ROC does not disclose in any manner whatsoever what was actually captured. For this reason, I discount the references to audio/video recording as having any evidentiary value for the purposes of Mr. Caro-Hernandez's identification or committal for extradition. That said, it is not necessary for me to consider this evidence for the purpose of concluding that the identification evidence contained in the ROC is not so defective so as to be dangerous or unsafe as a basis upon which a committal rests.

[74] As a final comment, my reasons for ordering committal should not be seen as an endorsement of the pithiness of the ROC, as filed in this case, when considered from the perspective of the desirability of providing a more fulsome record of the evidence available against Mr. Caro-Hernandez.

[75] In my view, Mr. Caro-Hernandez's submissions as to the scantiness of the record are meritorious when considered from the perspective that an extradition judge may well be obligated to decline extradition on the basis that the materials are bereft of sufficient detail. The extradition process, as Justice Cromwell emphasized in ***MM*** at paragraph 211, is not to act simply as a "rubber stamp", but to carefully consider the facts and law before ordering extradition. It follows from this statement that the requesting state should provide sufficient details for the evidence to be properly evaluated by the extradition judge.

[76] As should be clear by now, I have found that the ROC does provide sufficient evidence as to Mr. Caro Hernandez's identification to support committal.

Conclusion

[77] I conclude that the entirety of the evidence establishes a *prima facie* case that Mr. Caro-Hernandez, as the person sought, engaged in the conduct underlying the United States' extradition request for trafficking in a controlled substance.

[78] Given my conclusion that the admissible evidence would justify committal for trial in Canada on this offence as set out in the ATP, and having determined that both questions relating to identity have been proven to the relevant standards, I commit Mr. Caro-Hernandez for the purpose of extradition.

[79] Under s.29(1)(a), Mr. Caro-Hernandez is committed into custody to await a determination by the Minister of Justice of whether to surrender him to the United States of America.

[80] Pursuant to s.38(2) of the *Act*, I am required to inform you, Mr. Caro-Hernandez that you will not be surrendered until after the expiration of 30 days and that you have a right to appeal this committal order and to apply for judicial interim release.

[81] In accordance with s.38(1) of the *Act*, I direct that the following documents be transmitted to the Minister of Justice:

i. a copy of the committal order;

ii. copies of all exhibits introduced at this hearing;

iii. copies of my oral reasons which will be reported and circulated to the parties; and

iv. no evidence having been adduced at this hearing, there is no further evidence to transmit to the Minister.

Heard on the 18th day of December, 2020.
Dated at the City of Calgary, Alberta this 18th day of December, 2020.

D.A. Labrenz
J.C.Q.B.A.

Appearances:

Olivia Furlong
Department of Justice Canada
for the Applicant

Jeinis S. Patel
Barrister
for the Respondent