ANTICIPATORY WAIVERS OF EXTRADITION IN U.S. PROSECUTIONS AS A FACTOR UNDER THE BAIL REFORM ACT

QUESTION: In domestic prosecutions, is an anticipatory waiver of extradition executed before the U.S. court an effective condition under the Bail Reform Act of 1984 ("BRA"), 18 U.S.C. §§ 3141, et seq., alone or in combination with other measures, to "reasonably assure" a defendant's later appearance at trial?

SHORT ANSWER: An anticipatory waiver of extradition provides no assurances that the defendant will return to court when ordered. The Office of International Affairs (OIA) is unaware of any country that would consider such a waiver binding in its extradition proceeding. The extradition of a defendant from a foreign country is a long and costly process with uncertain results, possibly including the imposition of limitations on the United States prosecution or potential sentence. Additionally, a written waiver of extradition from a particular country, even if it were enforceable, provides no guarantee that the defendant will not flee to a third country from which, even if he or she can be located, extradition may be impossible or, at best, even more difficult.

Prosecutors should oppose the use of so-called extradition waivers (country specific or "universal waivers") as a basis for releasing a defendant on conditions in his or her U.S. criminal case. In response to a defense proffer concerning a waiver of extradition, please contact OIA as early as possible to determine if the country involved is willing to provide a formal statement making clear that such a waiver is not enforceable under that country's laws. With such a statement in hand, even if the defense challenges it with a contrary legal opinion, at the minimum, the government will be able to argue that a substantial question is presented relating to the enforceability of the proffered waiver, and thus, the court should assign it little or no weight when determining whether there are conditions that will reasonably assure the presence of the defendant at trial.

DISCUSSION AND CASE LAW:

Under § 3142(f)(2)(A) of the BRA, a court may order the pretrial detention of a defendant "in a case that involves . . . a serious risk that such person will flee." In assessing that risk, a court must consider: (I) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug; (ii) the weight of the evidence against the person; (iii) the history and characteristics of the person; and (iv) the nature and seriousness of the danger to any person or the community should the defendant be released. 18 U.S.C. § 3142(g). The government bears the burden of establishing, by a preponderance of the evidence, that there are no conditions or combination of conditions that will reasonably assure the presence of the defendant at trial.

The case law discussing the weight that should be given to a waiver of extradition in assessing a defendant's risk of flight when determining bail is broad in scope. Several courts, with no analysis whatsoever on the question of whether a waiver of extradition is enforceable,

have approved the release of a defendant prior to trial, in part, because he or she has executed, or will execute a waiver of extradition to a particular country or to any country where he/she may be found.[1] Some courts have acknowledged that the foreign country to which the waiver is directed would likely not recognize it, but nonetheless, appear to have imposed its execution as a condition, along with others, and released the defendants.[2] Some courts have rejected defendants' arguments that their proffered waivers of extradition militate against their risk of flight, finding either that such waivers are not enforceable[3], or that substantial legal questions are

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[1] See United States v. Salvango, 314 F. Supp. 115, 119 (N.D.N.Y. 2004) (directing defendants to "execute and file with the Clerk of the Court a waiver of extradition applicable to any nation in which [t]he[y] may be found as a condition of [their] continued release"); United States v. Karni, 298 F. Supp. 2d 129, 133 (D.D.C. 2004) ("Mr. Karni must sign a waiver of any rights not to be extradited to the United States that he has under Israeli and South African extradition treaties with the United States."); United States v. Chen 820 F. Supp. 1205, 1212 (N.D. Cal. 1992) ("[Defendants] . . . are to execute waivers of challenges to extradition from any nation where they may be found."). Cf. United States v. Londono-Villa, 898 F.2d 328, 329 (2d Cir. 1990) (reversing district court's order of release pending sentencing – one of the conditions imposed had been "the execution of a waiver of extradition applicable to any country in which he may be found"); United States v. Townsend, 897 F.2d 989, 994 (9th Cir. 1990) ("But the waivers relate only to their countries of residence. . . . In all three cases, there is no waiver of extradition from the country that might provide refuge if in fact they are guilty of the offenses charged and chose to leave the jurisdiction of the United States.").

[2] See United States v. Bodmer, No. 03 CR 947 (SAS), 2004 WL 169790, at *1 (S.D.N.Y. June 28, 2004) ("[The Government argues that] the Swiss government will not recognize [defendant's] written waiver of his right to avoid extradition. Even if this is so, this argument alone cannot be a basis for denying bail because if taken to its logical conclusion, no Swiss national would ever be eligible for bail."); United States v. Myiow, No. 95-CR-446 FJS, 1996 WL 238545 (S.D.N.Y. April 26, 1996) ("[T]he United States has offered evidence that such a waiver in unenforceable in Canadian courts unless executed under the jurisdiction of those courts. Such evidence is persuasive. . . . The waiver is retained as a condition of release, however, based on the defendant's offer to do so and the possibility that it might have some effect in the extradition proceeding.").

[3] For example, in United States v. Stanton, No. 91 CR 889 (CHS) 1992 WL 27139 (S.D.N.Y. Feb. 4, 2002), the court observed:

> The government has been advised by the Crown Prosecution Service in Great Britain that citizens of countries other than European Community or British Commonwealth countries (for whom a streamlined procedure exists) can waive extradition only by appearing before a British magistrate following the filing of an extradition request. No doubt Stanton would promise to appear before a British magistrate and waive extradition if requested; but the fact remains that he would leave the United States without having given an enforceable undertaking.

presented relating to whether they are enforceable, thereby rendering their consideration meaningless.[4]

Id. at *3 n.1; cf. United States v. Vreeken, 603 F. Supp. 715, 716 (D. Utah 1984), aff'd on other grounds, 803 F.2d 1085 (10th Cir. 1986) ("After consulting with Canadian counsel . . . the defendant signed a waiver of extradition proceedings and consented to return voluntarily to the United States. The Canadian Court then signed an Order to Convey, which directed the Royal Canadian Mounted police to deliver [defendant] to a United States Marshal in Toronto."). See also United States v. Bohn, 330 F. Supp. 2d 960, 961 (W.D. Tenn. 2004) ("Assuming that a Vanuatu official would sign . . . a certification [that the Vanuatu Government would honor an extradition request for defendant without any hearing or evidence], the Court finds that this alternative is inadequate assurance that Defendant will return for his trial. Such a certification has no legal significance, and the Government has no way of enforcing it, making it inconsequential in the analysis."). See generally United States v. Cook, 442 F.2d 723, 724 n.1 (D.C. Cir. 1970) (rejecting, without discussion, execution of a waiver from any country as a condition in bail determination); United States v. Lee, 79 F. Supp. 2d 1280, 1282 (D. New Mexico 1999) (same).

In the context of a foreign extradition proceeding, where the issue of bail is governed by the "special circumstances" test, the court in In Re Extradition of Pelletier, No. 09-22416-MC, 2009 WL 3837660 (S.D. Fla. 2009), rejected the argument that a fugitive's proffer of a waiver of extradition from Canada, among other considerations, met the test. As to the waiver, the court noted that "it appear[ed] that such a waiver would have no effect in a Canadian court, and that if the United States attempted to extradite [defendant] from Canada, [defendant] would have to waive extradition anew in the Canadian proceeding." Id. at *3.

[4] See United States v. Georgiou, No. 08-1220-M, 2008 WL 5191352, at *1 (E.D. Pa. Dec. 10, 2008) ("This statement confirms the representation of defendant's prior counsel that irrevocable waivers of extradition may, in some circumstances, be withdrawn and/or may not be enforceable in Canada."); United States v. Georgiou, No. 08-1220-M, 2008 WL 4306750, at *2 (E.D. Pa. Sept. 22, 2008) ("Should he not return, the Government would have to commence extradition proceedings in Canada which may take several years to resolve, and both parties agree that a waiver of extradition may not be enforceable in Canada."); United States v. Stroh, No. 396 CR 139-AHN, 2000 WL 1832956, at *5 (D. Conn. Nov. 3, 2000) ("[I]t appears that there is a substantial legal question as to whether any country to which [defendant] fled would enforce any waiver of extradition signed under the circumstances presented in this case. At any event, extradition from Israel (or any other country) would be, at best, a difficult and lengthy process and, at worst, impossible."); United States v. Botero, 604 F. Supp. 1028, 1035 (S.D. Fla. 1985) ("[T]his Court doubts that a waiver of extradition executed by Mr. Botero under these circumstances could ever be considered voluntary and enforceable. . . . Any waiver he executes here in an effort to secure his release would have to be considered suspect."). See also United States v. Castillo-Bourcy, 712 F. Supp. 927, 931 (M.D. Ga. 1989) ("Extradition of defendant . . . from the Republic of Panama [by way of his consent,] as shown by the inability of this country

Consequently, prosecutors should oppose using these waivers as a basis for releasing a defendant on conditions in his or her U.S. criminal case. OIA can assist prosecutors in determining whether it is possible to secure a formal statement from the country to which the waiver is directed clarifying that such a waiver is not enforceable under that country's laws. If such a statement can be obtained, it should help to convince the U.S. judge to reject a waiver as a factor favoring release on conditions. Even when challenged by a contrary legal opinion, the government will be able to argue that a substantial question is presented relating to whether or not the waiver is enforceable; therefore, the court should assign it little or no weight when assessing whether there are conditions or combination of conditions that will reasonably assure the presence of the defendant at trial.

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to secure the presence of defendant Noriega, does not appear to this court to be a realistic possibility. Such provision[], then [is] as a practical matter, useless.").

In United States v. Cirillo, 51 F. Supp. 2d 605 (E.D. Pa. 1999), the district court revoked the release order entered by the magistrate judge in a case involving a Canadian national charged with conspiracy to acquire ecstasy in the United States for distribution in Canada, finding that the defendant presented a risk of flight. Id. at 606. In support of his release, the defendant had agreed to execute an "irrevocable waiver of extradition" for Canada and anywhere else in the world he may be found, and also proffered a letter from Canadian counsel that such a waiver was enforceable. Id. at 610. In response, the Government proffered a letter from the Canadian Ministry of Justice which in part stated that "a waiver of extraditability signed by a defendant in the United States [wa]s not enforceable in Canada." Id. In light of the letter from the Canadian Ministry, the district accorded little weight to the waiver, finding "that there [wa]s substantial doubt and uncertainty as to whether the irrevocable waiver of extradition would be given full force and effect by Canadian court." Id.

On appeal, the Third Circuit reversed the ruling of the district court. Reviewing the matter de novo, the court reasoned that defendant's "strong family ties, lack of a prior criminal record, employment in a well-established family business, alleged commission of a nonviolent crime, and signing of an 'irrevocable waiver of extradition' all support[ed] the Magistrate Judge's conclusion that his appearance at trial c[ould] be reasonably assured." United States v. Cirillo, No. 99-1514, 1999 WL 1456536, at *2 (July 13, 1999). The court made no reference in its unreported opinion that the waiver which defendant executed may not be enforceable.