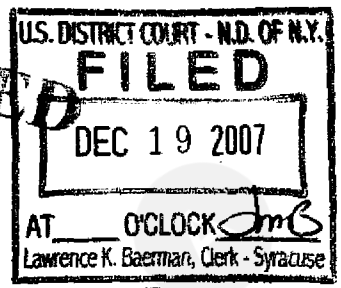

UNITED STATES DISTRICT COURT
FOR THE NORTHERN
DISTRICT OF NEW YORK

IN THE MATTER OF	)	
	)	
THE EXTRADITION OF	)	Misc. No. 5:07-MC-88 (GJD)
	)	
BRIAN LEE MONTGOMERY	)	

COMPLAINT (18 U.S.C. §3184)

I, the undersigned Assistant United States Attorney, being duly sworn, state on information and belief that the following is true and correct:

1. In this matter I act for and on behalf of the Government of Canada.

2. There is an extradition treaty in force between the United States and Canada, dated December 3, 1971 and entered into force on March 22, 1976.

3. Pursuant to the treaty, the Government of Canada has submitted a formal request through diplomatic channels for the extradition of **Brian Lee Montgomery.**

4. Arrest warrants were issued for **Brian Lee Montgomery** in Ontario, Canada on April 11, 2007, April 26, 2007, June 21, 2007 and July 12, 2007. **Montgomery** is charged with Uttering Threats, contrary to Section 264.1(1)(a) of the Criminal Code of Canada; Assault, contrary to Section 265(1)(a) of the Criminal Code of

Assault, contrary to Section 265(1)(a) of the Criminal Code of Canada; Sexual Assault, contrary to Section 271 of the Criminal Code of Canada; Administering a Noxious Thing Intending to cause Bodily Harm, contrary to Section 245 of the Criminal Code of Canada; Overcoming Resistance to Commit an Indictable Offense by Administering a Stupefying Drug, contrary to Section 264 of the Criminal Code of Canada; five counts of Failure to Comply with Recognizance, contrary to Section 145(3) of the Criminal Code of Canada; and Failure to Attend Court as Required, contrary to Section 145(2)(b) of the Criminal Code of Canada.

5. The warrants were issued on the basis of the following facts:

(A) On or about December 8, 2006, **Brian Lee Montgomery** at the District of Akwesasne verbally uttered a threat to the victim to cause death by taking the victim to a river and throwing her into the river, contrary to Section 264.1(1)(a) of the Criminal Code of Canada; committed an assault on the victim, contrary to section 266 of the Criminal Code of Canada; committed a sexual assault on the victim, contrary to section 271 of the Criminal Code of Canada; administered to the victim a noxious substance to wit: Gammahdroxybutyrate (GHB) with the intent to cause bodily harm contrary to section 245 of the Criminal Code of Canada; with intent to assist himself and Christopher Jocko to commit the indictable offense of sexual assault did cause the victim to take a stupefying drug to wit: Gammahdroxybutyrate (GHB), contrary to section 246 of the Criminal Code of Canada.

(B) On or about April 10, 2007 at the District of Akwesasne, **Brian Lee Montgomery** being at large on his recognizance

entered into before a justice and being bound to comply with a condition of that recognizance failed without lawful excuse to comply with the conditions as directed by said justice, contrary to section 145(3) of the Canadian Criminal Code.

(C) On or about April 26, 2007 at the City of Cornwall, **Brian Lee Montgomery** did unlawfully fail to attend court on that date as required by that court, contrary to section 145(2) of the Canadian Criminal Code.

6. **Brian Lee Montgomery** may be found within the jurisdiction of this court at 111 Michaels Avenue, Syracuse, New York.

7. Heather K. McShain, an attorney in the Office of the Legal Adviser of the United States Department of State, has provided the Department of Justice with a declaration authenticating a copy of the diplomatic note by which the request for extradition was made and a copy of the extradition treaty between the United States and Canada, stating that the offenses for which extradition is demanded are covered by the treaty, and confirming that the documents supporting the request for extradition are properly certified by the principal American diplomatic or consular officer in Canada, in accordance with Title 18, United States Code, Section 3190, so as to enable them to be received in evidence.

8. The declaration from the Department of State with its attachments, including a copy of the diplomatic note from the requesting state, a copy of the relevant extradition treaty, and the certified documents submitted in support of the request, [marked collectively as Government's Exhibit #1] are filed with this complaint and incorporated by reference herein.

arrest of the afore-named person be issued in accordance with the Extradition Treaty between the United States and Canada, and Title 18, United States Code, Section 3184, so that the fugitive may be arrested and brought before this court, "to the end that the evidence of criminality may be heard and considered."

Michael C. Olmsted
Assistant U.S. Attorney

Sworn to before me and subscribed in my presence this 11th day of December, 2007, at Syracuse, New York.

United States Magistrate Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

IN THE MATTER OF THE
EXTRADITION OF
BRIAN LEE MONTGOMERY

WARRANT FOR ARREST

5:07-mc-88(GTD)
Case Number: Misc. No.

To: The United States Marshal and any Authorized United States Officer

YOU ARE HEREBY COMMANDED to arrest Brian Lee Montgomery
Name

and bring him forthwith to the nearest magistrate to answer an

Indictment ☐ Information ☒ Complaint ☐ Order of Court ☐ Violation Notice ☐ Probation Violation Notice

charging him with (brief description of offense)

being a fugitive from Canada, which has sought an arrest with a view towards extradition, to answer charges in Canada, pursuant to the extradition treaty between the United States and Canada, and Title 18, United States Code, Section 3184, setting out violations under sections 264.1(1)(a); 265(1)(a); 271, 264, 145(3), and 145(2)(b) of the Criminal Code of Canada.

U.S. District Court ... NEW YORK
I, the undersigned Clerk of the Court, certify that this is a true, correct and full copy of the original document on file in my custody.
# of pages (text) 1 # of pages including (exhibits) 2
Dated 12/11/07 Lawrence K. Baerman, Clerk
by K Priddy, Deputy Clerk

Hon. Gustave J. DiBianco
Name of Issuing Officer

U.S. Magistrate Judge
Title of Issuing Officer

Signature of Issuing Officer

December 11 2007 - Syracuse, NY
Date and Location

RETURN		
This warrant was received and executed with the arrest of the above-named defendant at		
Date Received	Name and Title of Arresting Officer	Signature of Arresting Officer
Date of Arrest		

SEALED

2

U.S. DISTRICT COURT - N.D. OF N.Y.
FILED
DEC 19 2007
AT ____ O'CLOCK
Lawrence K. Baerman, Clerk - Syracuse

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

IN THE MATTER OF)
)
THE EXTRADITION OF)
)
BRIAN LEE MONTGOMERY)
)

Misc. No. 5:07-MC-88 (GJD)

GOVERNMENT'S MEMORANDUM IN SUPPORT OF EXTRADITION

NOW COMES the United States of America, by and through the United States Attorney for the Northern District of New York, and herewith submits this memorandum of law in support of the extradition of **Brian Lee Montgomery**. In this matter, the United States acts on behalf of the Government of Canada.

The Government of Canada has submitted a formal request for **Brian Lee Montgomery's** surrender, supported by appropriate documents, to the Department of State. See Documents Annexed to Request for Extradition (which are incorporated herein by reference). By statute, this Court must thereafter hold a hearing to consider the evidence of criminality presented by the Government of Canada and to determine whether it is "sufficient to sustain the charge under the provisions of the proper treaty or convention." 18 U.S.C. § 3184. If the Court finds the fugitive extraditable, it certifies that conclusion to the Secretary of State, who decides whether to surrender the fugitive.

I. Nature of the Hearing

A. Purpose of Hearing

The purpose of the hearing required by 18 U.S.C. § 3184 is to determine whether a person arrested in the United States pursuant to a complaint submitted on behalf of a foreign government is subject to surrender to the requesting country under the terms of the pertinent treaty and relevant law. If the Court decides that the elements necessary for extradition are present, it incorporates these determinations in factual findings and conclusions of law styled as a "Certification of Extraditability," which is forwarded to the Department of State for disposition by the Secretary of State. The final decision to surrender the fugitive rests with the Secretary of State, not the Court.

B. Elements Necessary for Extradition

Much of the jurisprudence surrounding extradition has been established for more than a century. An early Supreme Court opinion held that a determination of extraditability was proper if:

(1) the judicial officer was authorized to conduct extradition proceedings;

(2) the court had jurisdiction over the fugitive;

(3) the applicable treaty was in full force and effect;

(4) the crimes for which surrender was requested were covered by the treaties; and

(5) there was competent legal evidence for the decision.

Ornelas v. Ruiz, 161 U.S. 502 (1896). *Accord, Bingham v. Bradley*, 241 U.S. 511 (1916); *McNamara v. Henkel*, 226 U.S. 520 (1913); *Zanazanian v. United States*, 729 F.2d 624 (9th Cir. 1980).

1. Authority of the Judicial Officer

United States District Court Judges are clearly authorized by 18 U.S.C. § 3184 to hear and decide extradition cases, while United States Magistrate Judges have jurisdiction where specifically authorized by the district court.[1] *See Ward v. Rutherford*, No. 89-5413, (D.C. Cir. 1990) (rejecting constitutional challenge to magistrate's authority).

2. Jurisdiction over the Fugitive

Although the Supreme Court included personal jurisdiction as an essential element for reasons of analytic completeness, the question of jurisdiction has not been a decisive issue in an extradition case in modern times. If the fugitive is before the Court, the Court has jurisdiction over that person. *See In re Pazienza*, 619 F.Supp. 611 (S.D.N.Y. 1985).

3. Treaty in Full Force and Effect

The extradition statute, 18 U.S.C. § 3184, limits extradition to instances in which a treaty is in force between the requesting state and the requested state, and several cases have so held. *See, e.g., Argento v. Horn*, 241 F.2d 258 (6th Cir. 1957). As part of its proof, the government has provided the Declaration of Heather K. McShane, Attorney-Advisor, Office of the Legal Adviser for the Department of State, attesting that the treaty with the Government of Canada is in full force and effect. See Government Exhibit 1. The Department of State's opinion in this sphere is entitled to deference from the Court. *Galanis v. Pallanck*, 568 F.2d 234 (2nd Cir. 1977); *Sayne v. Shipley*, 418 F.2d 679 (5th Cir. 1969) *cert. denied*, 398 U.S. 903 (1970).

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[1] Local Rule 58.1(2) authorizes Magistrates Judges to conduct extradition hearings, consistent with 18 U.S.C. § 3184.

4. Charges or Conviction in the Requesting State

The treaty provides for the return of fugitives charged with or convicted of a crime in the requesting state. The documents submitted by the requesting state establish that the respondent has been charged with a series of felonies, including sexual assault, assault and involuntary drugging. Montgomery fled from Canada while on recognizance from a Canadian Court.

5. Crime Covered by the Treaty

Extradition treaties create an obligation to surrender fugitives under the circumstances defined in the treaty. The Court must determine whether the crime for which extradition is requested is among the offenses specified in the treaty as giving rise to an obligation to extradite. A requesting country is not obliged to produce evidence on all elements of a criminal offense nor to establish that its crimes are identical to ours. *Kelly v. Griffin*, 241 U.S. 6, 15 (1916). Where, as in the present case, a dual criminality analysis is required, the Court should examine the facts and decide whether the fugitive's conduct would have been criminal under our law. The Supreme Court noted in *Collins v. Loisel*, 259 U.S. 309 (1922) that:

> The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the *particular act* charged is criminal in both jurisdictions.

259 U.S. at 312 (emphasis added). *Accord, Messina v. United States*, 728 F.2d 77 (2nd Cir. 1984); *Cucuzzella v. Keliikoa*, 638 F.2d 105, 108 (9th Cir. 1981); *United States v. Stockinger*, 269 F.2d 681, 687 (2nd Cir. 1959); *Di Stefano v. Moore*, 46 F.2d 308 (E.D.N.Y.), *aff'd*, 46 F. 2d 310 (2nd Cir. 1930), *cert. denied*, 283 U.S. 830 (1931).

The Court's analysis of the question of dual criminality is subject to the general requirement that it "approach challenges to extradition with a view toward finding the offense within the treaty." *McElvy v. Civiletti*, 523 F. Supp. 42, 48 (S.D. Fla. 1981). In this case, theft and assault both have analogous felonies under United States law. Assault, sexual assault and drugging the victim of a sexual assault are all felonies in the United States, and so meet the need for dual criminality.

6. Competent Legal Evidence

The standard of proof in extradition proceedings is that of probable cause as defined in federal law. *Sindona v. Grant*, 619 F.2d 167 (2nd Cir. 1980). This means evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief in the guilt of the accused. *Coleman v. Burnett*, 477 F.2d 1187, 1202 (D.C. Cir. 1973). The Supreme Court stated in *Collins v. Loisel, supra*, that "[t]he function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether evidence is sufficient to justify a conviction." 259 U.S. 309, 316. The Fourth Circuit explained the Court's function in an extradition proceeding in the following terms:

> The extradition hearing is not designed as a final trial. The purpose is to inquire into the presence of probable cause to believe that there has been a violation of one or more of the criminal laws of the extraditing country, that the alleged conduct, if committed in the United States, would have been a violation of our criminal law, and that the extradited individual is the one sought by the foreign nation for trial on the charge of violation of its criminal laws.

Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062, 97 S.Ct. 787, 50 L.Ed.2d 778 (1977).

II. Distinctive Features of the Law of Extradition

A. Extradition Hearing Not a Criminal Trial

An extradition hearing is not a criminal trial; its purpose is merely to decide probable cause, not guilt or innocence. *Neely v. Henkel*, 180 U.S. 109 (1901); *Benson v. McMahon*, 127 U.S. 457, 463 (1888); *Simmons v. Braun*, 627 F.2d 635 (2nd Cir. 1980); *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062, 97 S.Ct. 787, 50 L.Ed.2d 778 (1977). Thus, the person whose extradition is sought is not entitled to the rights available in a criminal trial at common law. *Charlton v. Kelly*, 229 U.S. 447, 461 (1931); *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911); *United States v. Stockinger*, 269 F.2d 681, 687 (2nd Cir. 1959), *cert. denied*, 361 U.S. 913 (1959). For example: the fugitive has no right to discovery or even to cross-examination if any witnesses testify at the hearing (*Messina v. United States*, 728 F.2d 77 (2d Cir. 1984)); his or her right to present evidence is severely limited (*Messina, supra*); and the Sixth Amendment's guarantee to a speedy trial, being limited by its terms to criminal prosecutions, does not pertain to extradition proceedings (*Jhirad v. Ferrandina*, 536 F.2d 478, 485 n.9 (2d Cir. 1976)).

B. Inapplicability of Federal Rules of Criminal Procedure and Evidence

The Federal Rules of Criminal Procedure do not apply to extradition proceedings. Rule 54(b)(5), Fed R.. Crim. P., states: "[t]hese rules are not applicable to extradition and rendition of fugitives." The Federal Rules of Evidence are also inapplicable. Rule 1101(d)(3), Fed. R. Evid., provides that "[t]he rules (other than with respect to privileges) do not apply . . . [to p]roceedings for extradition or rendition."

C. Admissibility of Evidence

"Unique rules of wide latitude govern reception of evidence in Section 3184 hearings." *Sayne v. Shipley*, 418 F.2d 679, 685 (5th Cir. 1969)(citation omitted).

Hearsay evidence is admissible at extradition hearings and may support a finding of extraditability. *Collins v. Loisel*, 259 U.S. 309, 317 (1922); *O'Brien v. Rozman*, 554 F.2d 780, 783 (6th Cir. 1977); *In re David*, 395 F.Supp. 803, 806 (E.D. Ill. 1975); *United States ex rel. Eatessami v. Marasco*, 275 F. Supp. 492, 494 (S.D.N.Y. 1967). Extradition treaties do not contemplate the introduction of testimony of live witnesses at extradition proceedings because to do so "would defeat the whole object of the treaty." *Bingham v. Bradley*, 241 U.S. 511, 517 (1916). Thus, a finding of extraditability may be and typically is based entirely on documentary evidence. *Shapiro v. Ferrandina, supra*, 478 F.2d at 902-03; *O'Brien v. Rozman, supra*, 554 F.2d at 783; *In re Edmonson*, 352 F. Supp. 22, 24 (D. Minn. 1972).

In *Cucuzzella v. Keliikoa*, 638 F.2d 105 (9th Cir. 1981), the court held that 18 U.S.C. § 3190 governs the admissibility of statements submitted by the requesting state and is satisfied by a certification that accords with the terms of the statute. *See also Collins v. Loisel, supra.* Alternatively, documents may be received in evidence if they are certified in accordance with the terms of the treaty. *Emami v. United States District Court*, 834 F.2d 1444 (9th Cir. 1987).

D. Limitations on Fugitive's Evidence

A fugitive's right to controvert the evidence introduced against him is "limited to testimony which explains rather than contradicts the demanding country's proof." *Hooker v. Klein, supra*, 573 F.2d at 1368. The district court in *Matter of Sindona*, 450 F. Supp. 672 (S.D.N.Y. 1978), *aff'd*, 619 F.2d 167 (2d Cir. 1980), discussed the distinction between contradictory and explanatory evidence

and cited the established authority for the proposition that an extradition hearing should not be transformed into a full trial on the merits:

> The distinction between "contradictory evidence" and "explanatory evidence" is difficult to articulate. However, the purpose behind the rule is reasonably clear. In admitting "explanatory evidence," the intention is to afford an accused person the opportunity to present reasonably clear-cut proof which would be of limited scope and having some reasonable chance of negating a showing of probable cause. The scope of this evidence is restricted to what is appropriate to an extradition hearing. The decisions are emphatic that the extraditee cannot be allowed to turn the extradition hearing into a full trial on the merits.

450 F.Supp at 685.

E. Impermissible Defenses

1. Conflicting Evidence

The fugitive's grounds for opposition to the extradition request are severely circumscribed. *Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978); *First National City Bank of New York v. Aristeguieta*, 387 F.2d 219, 222 (2nd Cir. 1960); *In Re Shapiro*, 352 F.Supp. 641, 645 (S.D.N.Y. 1973). He may not introduce evidence which conflicts with the evidence submitted on behalf of the demanding state (*Collins v. Loisel*, 259 U.S. 309, 315-17 (1922)); establishes an alibi (*Abu Eain v. Adams*, 529 F.Supp 685 (N.D.Ill.); sets up an insanity defense (*Hooker v. Klein, supra*); or impeaches the credibility of the demanding country's witnesses (*In re Locatelli*, 468 F.Supp. 568 (S.D.N.Y. 1979)). He is limited to introducing explanatory evidence.

The law is clear, a defendant's right to produce evidence at an extradition hearing is extremely limited. A defendant has no right to introduce evidence which merely contradicts the demanding country's proof or questions credibility. *See Shapiro v. Ferrandina*, 478 F.2d 894, 904

(2d Cir. 1973); *Sandhu v. Burke*, No. 97 CIV. 4608 (JGK), 2000 WL 191707, at *5 (S.D.N.Y. Feb. 10, 2000). While the defendant may introduce evidence which is "explanatory" of the demanding country's proof, it is not meant to be a dress rehearsal for trial. *See Matter of Requested Extradition of McMullen*, No. 86 CR. MISC. 1, 1988 WL 70296, at *5 (S.D.N.Y. June 24, 1988).

2. Trial in Demanding Country on Other Charges

A fugitive's contention that he or she will be tried in the extraditing country for crimes other than those for which extradition will be granted, or that surrender is being requested for political offenses, must be rejected, because the United States Government does not presume that the demanding government will seek a trial in violation of a treaty. *Bingham v. Bradley*, 241 U.S. 511, 514 (1916). As the district court noted in *Gallina v. Fraser*, 177 F.Supp. 857, 867 (D.Conn. 1959): "the Secretary of State of the United States would not authorize the surrender of a fugitive . . . to be punished for non-extraditable crimes, and . . . any extradition would be so conditioned as to negate this possibility."

3. Motivation of Demanding Country: Rule of Non-Inquiry

Should a fugitive suggest that a court look behind the extradition request to the motives of the government of the demanding country, the answer may be found in *In re Lincoln*, 228 Fed. 70, 74, (E.D.N.Y. 1915):

> It is not a part of the court proceedings nor of the hearing upon the charge of the crime to exercise discretion as to whether the criminal charge is a cloak for political action, nor whether the request is made in good faith. Such matters should be left to the Department of State . . . .

In *In re Gonzalez*, the court further noted that 18 U.S.C. § 3184 gives it no authority to inquire into such matters. *In re Gonzalez*, 217 F.Supp. 717, 722, n.15 (S.D.N.Y. 1963). *Accord, In*

re Extradition of Singh, 123 F.R.D. 127, 129-37 (D.N.J. 1987)(citing cases on doctrine of non-inquiry). In *Ramos v. Diaz*, 179 F. Supp. 459, 463 (S.D. Fla. 1959), the court clearly stated that the motive of the demanding government in an extradition proceeding is not controlling; the circumstances surrounding the offense when it occurred are dispositive. *See also In Re Locatelli*, 468 F.Supp. 568, 575 (S.D.N.Y. 1979).

4. Lack of U.S. Constitutional Protections Abroad

Questions concerning the judicial procedure in the requesting state and the treatment that might be accorded the fugitive after extradition are not proper matters for consideration by the certifying judicial officer, a proposition supported by "substantial authority" according to the Second Circuit Court of Appeals. *Ahmad v. Wigen*, 910 F.2d 1063, 1072-73 (2d Cir. 1990)(citing *Sindona v. Grant*, 619 F.2d 167, 174 (2d Cir. 1980); *Jhirad v. Ferrandina*, 536 F.2d 478 (2nd Cir.) *cert. denied* 429 U.S. 833 (1976); *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); *Matter of Extradition of Tang Yee-Chun*, 674 F.Supp. 1058, 1068-69 (S.D.N.Y. 1987). Considering the same issue in a slightly different context, the Court of Appeals for the District of Columbia Circuit said:

> What we learn from *Neely* [*Neely v. Henkel*, 180 U.S. 109 (1901)] is that a surrender of an American citizen by treaty for purposes of a foreign criminal proceeding is unimpaired by an absence in the foreign judicial system of safeguard in all respects equivalent to those constitutionally enjoined upon American trials.

Holmes v. Laird, 459 F.2d 1211, 1219 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 869 (1972). *Accord, Pfeifer v. United States Bureau of Prisons*, 468 F. Supp. 920 (S.D. Cal. 1979), *aff'd* 615 F.2d 873 (9th Cir. 1980). Another court disposed of the issue, as follows:

> Regardless of what constitutional protections are given to persons held for trial in the courts of the United States or of the constituent states thereof, those protections cannot be claimed by an accused whose trial and conviction have been held or are to be held under the laws of another nation, acting according to its traditional processes and within the scope of its authority and jurisdiction.

Gallina v. Fraser, 177 F. Supp. 856, 866 (D. Conn. 1959), *aff'd,* 278 F.2d 77 (2d Cir. 1960).

F. Extradition Treaties to Be Liberally Interpreted

Extradition treaties must be liberally construed to effect their purpose, namely, the surrender of fugitives for trial for their alleged offenses. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 14 (1936); *Factor v. Laubenheimer*, 290 U.S. 276-293, 301 (1933). In discussing the application of this rule, the District Court for the Southern District of Florida in *McElvy v. Civiletti,* held, as follows:

> a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intentions of the parties to secure equality and reciprocity between them.

523 F. Supp. 42, 47 (S.D. Fla. 1981)(citations omitted).

In order to carry out a treaty obligation the treaty "should be construed more liberally than a criminal statute or the technical requirements of criminal procedure," *Factor v. Laubenheimer*, *supra*, 290 U.S. at 298; *In re Chan Kam-Shu*, 477. This country does not expect foreign governments to be versed in our criminal laws and procedures. *Grin v. Shine*, 187 U.S. 181, 184 (1902). Thus, "[f]orm is not to be insisted upon beyond the requirements of safety and justice." *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925). This approach is mandated by the liberal rules of construction that are to be used in interpreting extradition agreements.

G. Fugitive for Extradition Purposes

The nature of the fugitive's absence from the country seeking his surrender is immaterial; it is sufficient for purposes of extradition that he be found in the United States. *Vardy v. United States*, 529 F.2d 404, 407, *reh. denied*, 533 F.2d 310 (5th Cir. 1976); *In Re Chan Kam-Shu, supra*, 477 F.2d at 338-339; *United States ex rel. Eatessami v. Marasco, supra*, 275 F. Supp. at 496.

III. The Case Before This Court

A. The Canadian Warrants for Arrest Against BRIAN LEE MONTGOMERY

Arrest warrants were issued for **Brian Lee Montgomery** in Ontario, Canada on April 11, 2007, April 26, 2007, June 21, 2007 and July 12, 2007. **Montgomery** is charged with Uttering Threats, contrary to Section 264.1(1)(a) of the Criminal Code of Canada; Assault, contrary to Section 265(1)(a) of the Criminal Code of Canada; Sexual Assault, contrary to Section 271 of the Criminal Code of Canada; Administering a Noxious Thing Intending to cause Bodily Harm, contrary to Section 245 of the Criminal Code of Canada; Overcoming Resistance to Commit an Indictable Offense by Administering a Stupefying Drug, contrary to Section 264 of the Criminal Code of Canada; five counts of Failure to Comply with Recognizance, contrary to Section 145(3) of the Criminal Code of Canada; and Failure to Attend Court as Required, contrary to Section 145(2)(b) of the Criminal Code of Canada.

These offenses are covered by the extradition treaty, as they are felony offenses in both countries. Specifically, the threat to throw the victim into the St. Lawrence River, when accompanied by an attempt to do so, which is described in the Affidavit of Rachel Thomas on Page 4, could constitute reckless endangerment under New York Penal Law 120.20. The sexual assault

charges have their counterparts as Rape, in violation of Penal Law 130.25 and Sex Abuse in the First Degree, under 130.65. The use of the "stupefying" drug is analogous to "Facilitating a Sex Offense with Controlled Substances, a felony in violation of Penal Law 130.90. Accordingly, each of the charges set out in the Complaint is a charge for which extradition should be granted.

IV. Conclusion

The paramount issue of every extradition proceeding is whether there exists probable cause to believe that the fugitive has committed the crimes charged in the requesting country. The latter determination is the kind that courts make in a preliminary hearing under Rule 5.1, Fed.R.Crim.P. *Ward v. Rutherford, supra.* The extradition hearing is not a trial on the merits, and the rules ordinarily applicable in such trials are not used. The United States has provided substantial evidence to support a finding that there is probable cause to believe that **Brian Lee Montgomery** has committed the offenses charged by the Government of Canada and for which his extradition has been sought.

On the basis of the foregoing, the petitioner asserts that it has satisfied its burden under the treaty and that an order should issue certifying the extradition of **Brian Lee Montgomery** to the Government of Canada pursuant to 18 U.S.C.§ 3184.

Respectfully submitted, this 11th day of December, 2007.

GLENN T. SUDDABY
UNITED STATES ATTORNEY

By: 
Michael C. Olmsted
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT
FOR THE NORTHERN
DISTRICT OF NEW YORK

IN THE MATTER OF)
)
THE EXTRADITION OF) Misc. No. 5:07-MC-88(GTD)
)
BRIAN LEE MONTGOMERY)

3

ORDER

BEFORE ME, a United States Magistrate Judge for the Northern District of New York, personally appeared Michael C. Olmsted, Assistant U.S. Attorney, the complainant herein, whose complaint made under oath in accordance with 18 U.S.C. § 3184 sets forth facts on the basis of which I find probable cause to believe that BRIAN LEE MONTGOMERY should be apprehended and brought before this Court of the end that the evidence of criminality may be heard and considered as provided in Title 18, United States Code, Section 3184, and the Extradition Treaty between the United States and Canada.

IT IS THEREFORE ORDERED that a warrant for the arrest of BRIAN LEE MONTGOMERY be issued.

G. J. Francis
United States Magistrate Judge

Date: Dec. 11, 2007