

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
ALEXANDER HILTON)	
)	
)	
v.)	Docket No: 13-11710
)	
JOHN KERRY, UNITED STATES)	
SECRETARY OF STATE; ERIC)	
HOLDER, UNITED STATES ATTORNEY)	
GENERAL; JOHN GIBBONS, UNITED)	
STATES MARSHAL, DISTRICT OF)	
MASSACHUSETTS.)	
_____)	

**ALEXANDER HILTON’S PETITION FOR A WRIT OF
HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241**

I. INTRODUCTION

Petitioner Alexander Hilton (“Petitioner” or “Mr. Hilton”) is a United States citizen who was found extraditable to Scotland pursuant to the Certificate of Extraditability entered by Magistrate Judge Jennifer C. Boal on May 17, 2013. Mr. Hilton, a young man with a long and well-documented history of mental illness and high risk of suicide, seeks habeas relief from this Court because his extradition would violate the Constitution and laws and treaties of the United States. *See* 28 U.S.C. § 2241(c)(3). Mr. Hilton’s extradition to Scotland – where he would be tried by a 15-person jury and a mere majority could convict him for a crime subject to life in prison – would be in violation of his constitutional rights and the United States-United Kingdom Extradition Treaty because the Senate was never apprised of the idiosyncratic jury system in Scotland and, therefore, did not give its knowing advice and consent as required by the Constitution. Extradition is also incompatible with Mr. Hilton’s constitutional and human rights because removing him from the support of his mental health providers and family will severely

exacerbated his mental illness and create the real and substantial risk that he will commit suicide. This Court should grant Mr. Hilton's petition for habeas relief and order the immediate discharge of the conditions of release imposed on him.

II. JURISDICTION AND VENUE

Jurisdiction in this Court is proper pursuant to 28 U.S.C. §§ 1331 and 2241. Venue in this Court is proper pursuant to 28 U.S.C. § 1391.

III. PARTIES

Mr. Hilton is a United States citizen and resident of Massachusetts. Mr. Hilton resides with his parents, David Hilton and Suzanne Dolphin, at 25 Pheasant Hollow Run, Princeton, Massachusetts 01541.

John Kerry is the United States Secretary of State. His address is U.S. Department of State, 2201 C. Street, N.W., Washington, D.C. 20520.

Eric Holder is the United States Attorney General. His address is U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C.

John Gibbons is the United States Marshal for the District of Massachusetts. His address is John Joseph Moakley U.S. Courthouse, 1 Courthouse Way, Boston, Massachusetts 02210.

IV. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Mr. Hilton has a long history of mental illness and severe psychological impairments, dating from childhood. (Ex. A, Affidavit of Judith G. Edersheim, J.D., M.D., dated Feb. 18, 2013 (hereinafter, "Edersheim Aff."); Ex. B, Transcript of Extradition Hearing on Mar. 7, 2013, at 19 (hereinafter "Hr'g Tr.")). At the ages of seven and nine, Mr. Hilton underwent psychological testing and psychotherapy because he was having difficulties in school despite his high intelligence and was suffering from depression, loneliness, and anxiety. (Ex. A, Edersheim

Aff. ¶ 5.a-b; Ex. B, Hr'g Tr. 19.) While Mr. Hilton ultimately graduated from high school in 2009, he remained withdrawn, socially isolated, and grew increasingly apathetic during this time period. (*See* Ex. A, Edersheim Aff. ¶ 5.c.) His functioning was very poor and he required an elaborate set of supports from his parents to help him organize his affairs, plan his homework, and do his basic tasks. (*Id.*; Ex. B, Hr'g Tr. 21.)

Following his graduation from high school, Mr. Hilton attended the University of St. Andrews in Scotland from September 2009 through March 2011. (Ex. A, Edersheim Aff. ¶ 5.d.) At St. Andrews, without the support of his parents, Mr. Hilton's mental health further deteriorated. (*Id.*; Ex. B, Hr'g Tr. 21:19-24; 27:24-28:2.) During his three terms at St. Andrews, Mr. Hilton engaged in substance abuse and became disinhibited, erratic, disorganized, and unmotivated. (Ex. A, Edersheim Aff. ¶ 5.d.) He articulated paranoid and delusional ideas, and spoke frequently about plots to harm him and implausible international conspiracies. (*Id.*) He missed classes and assignments, and began failing his courses. (*Id.*) In the spring of 2010, after a break up with a girlfriend, Mr. Hilton became depressed and isolated, increased his substance abuse, and began engaging in self-injurious behavior. (*Id.* ¶ 5.e.)

In the summer of 2010, Mr. Hilton returned home to Massachusetts and resumed psychotherapy. (Ex. A, Edersheim Aff. ¶ 5.f.) His therapist was concerned about Mr. Hilton's depression, agitation, substance abuse, and insomnia, and further noted he was engaged in suicidal ideas and paranoid and distorted thinking. (*Id.*) His psychiatrist prescribed him anti-depressants and attention deficit drugs, and considered prescribing a mood stabilizer or antipsychotic medication for Mr. Hilton's suspiciousness. (*Id.* ¶ 5.g.) In August 2010, Mr. Hilton underwent a battery of psychological tests, which revealed the presence of a serious psychological disorder and characterized Hilton as being "in the throes of a 'florid psychotic

process,' with serious disturbances of thought structure, thought content and mood." (*Id.* ¶ 5.h (quoting Psychological/Neuropsychological Evaluation of Alexander Hilton by Richard Monahan, Ph.D., dated Aug. 15, 2010 (attached as Exhibit C).) The tester's preliminary diagnoses included Schizophrenia, paranoid type, Delusional Disorder, Bipolar Disorder, or Obsessive Compulsive Disorder. (*Id.*)

In August 2011, Mr. Hilton's mother contacted St. Andrews to ensure that Mr. Hilton had adequate psychological care when he returned for the fall semester. (*See In re Hilton*, Docket No. 1:13-mj-7043-JCB, Motion for Release on Bail Pending Extradition Proceedings (Doc. 23) (hereinafter, "Bail Mot."), at 5.) However, when Mr. Hilton arrived at St. Andrews, the university had failed to arrange for his treatment needs. (*Id.*) As a result, Mr. Hilton's mental state deteriorated as he struggled both academically and personally. (*Id.* at 6.) In late February 2011, university officials confronted Mr. Hilton concerning his behavior and told him to undergo another psychological evaluation. (*Id.*)

The Extradition Request alleges that on March 5, 2011, within days of being confronted by university authorities, Mr. Hilton attempted to murder Robert Forbes, a student at St. Andrews and an American citizen, by spiking a bottle of red wine with methanol. (*See In re Hilton*, Docket No. 1:13-mj-7043-JCB, Extradition Request ¶ 1.1 (Doc. 3-2) (hereinafter, "Extradition Request".) Following the alleged incident, Forbes was admitted to the hospital and allegedly lost his eyesight (*id.*) (albeit temporarily, as he regained his eyesight as early as June 6, 2011 when he was caught speeding at approximately 4:25 a.m. in his hometown in Virginia and was issued a summons and convicted of the violation (*see* Bail Mot. 7-8).

The local police in Scotland were notified of Forbes' injury on March 9, 2011 and exhaustively investigated the incident, including searching Mr. Hilton's room and interrogating

him for five hours, without the presence of an attorney. (*See* Extradition Request ¶¶ 4.1-4.3.) No charges were filed against Mr. Hilton at that time. (Bail Mot. 7.) On March 22, 2011, Mr. Hilton left Scotland and returned home to Massachusetts after taking a leave of absence from St. Andrews. (*Id.*)

In the fall of 2011, Mr. Hilton did not return to St. Andrews, and instead attended the New Mexico Institute of Mining and Technology in Socorro, New Mexico. (Bail Mot. 8.) While he received satisfactory grades at his new school, Mr. Hilton missed many classes, was isolated with little or no social interaction, and spent most of his days sleeping in his apartment. (*Id.*) In December 2011, he underwent a psychological evaluation at Amen Clinic in California because he was not functioning very well in New Mexico. (Ex. A, Edersheim Aff. ¶ 5.i; Ex. B, Hr'g Tr. 28:6-17.)

In May 2012, following completion of the academic year, Mr. Hilton returned to his parents' home in Massachusetts and learned for the first time that Scottish authorities had charged him with the attempted murder of Robert Forbes on December 2, 2011. (Bail Mot. 8.) Following the news of his possible extradition, Hilton underwent serious psychological turmoil. (Ex. B, Hr'g Tr. 22:11-23:1.) On July 31, 2012, he expressed suicidal thoughts and plans to his parents, who took him to UMass Memorial Medical Center for an emergency psychiatric evaluation. (Ex. A, Edersheim Aff. ¶ 5.j.) Following this evaluation, he was released to his parents' custody and admitted to a partial hospitalization program at Marlborough Hospital, which he attended from September 3, 2012 to September 19, 2012. (*Id.*) Upon his release, he was placed on psychiatric medications and referred to Dr. Leonard Sommer whom he began seeing twice a week. (*Id.*; *id.* ¶ 7.b.) On November 14, 2012, Mr. Hilton returned to the hospital for an emergency evaluation and again was admitted to the partial hospitalization program and

prescribed further medications for anxiety and depression. (*Id.* ¶ 7.c.)

In December 2012, Mr. Hilton underwent additional psychological testing, conducted by Frank DiCataldo, Ph.D., who concluded that Mr. Hilton consistently expresses primary thought disorder, with poor reality testing, persecutory ideas, beliefs that others can read his thoughts and misperceptions about the intentions of others. (Ex. A, Edersheim Aff. ¶¶ 5.k, 7.d (citing Psychological Testing Report of Alexander Hilton by Frank DiCataldo, Ph.D., dated Dec. 23, 2012) (attached as Exhibit D).) According to Dr. DiCataldo, Hilton suffers from an unusually high degree of psychological disturbance, including signs of depression, anxiety, and social withdrawal, and is a suicide risk. (*Id.*)

On February 12, 2013, the United States government, on behalf of the government of the United Kingdom, which includes the Government of Scotland, instituted the extradition of Mr. Hilton by filing a sealed complaint for extradition. (*In re Hilton*, Docket No. 1:13-mj-7043-JCB, Doc. 3.) The complaint alleged that Mr. Hilton had been charged in Scotland with the attempted murder of Robert Forbes, and a warrant for his arrest had issued on December 2, 2011 in the United Kingdom. (*Id.*)

On February 13, 2013, Mr. Hilton was arrested and subsequently transferred to Wyatt Detention Facility where he awaited a bail hearing and determination on bail. (*In re Hilton*, Docket No. 1:13-mj-7043-JCB, Doc. 24.) Shortly after arriving at Wyatt, Mr. Hilton engaged in suicidal behavior, including attempts to puncture his neck and wrist, and was placed on suicide watch. (Ex. E, Supplemental Affidavit of Judith G. Edersheim, J.D., M.D., dated Feb. 25, 2013 (hereinafter, “Edersheim First Supp. Aff.”), at ¶ 2.c.)

A bail hearing was held on February 21, 2013. (*In re Hilton*, Docket No. 1:13-mj-7043-JCB, Doc. 24.) On March 5, 2013, Magistrate Judge Boal issued a decision finding that Mr.

Hilton had established special circumstances overriding the presumption against bail in extradition proceedings and that Mr. Hilton did not pose a serious risk of flight or danger to the community. (*Id.*) Accordingly, Mr. Hilton was released on conditions, which required, among other things, that his parents put up a \$100,000 bond secured by \$25,000 cash and a \$75,000 lien on their home and that Mr. Hilton be subject to home detention with GPS monitoring and regular reporting to Pretrial Services. (*Id.* Docs. 27-28.)

On March 7, 2013, Magistrate Judge Boal held an extradition hearing where she heard extensive evidence regarding Mr. Hilton's psychiatric condition. (*In re Hilton*, Docket No. 1:13-mj-7043-JCB, Doc. 32.) On May 3, 2013, Magistrate Judge Boal issued a decision finding that Mr. Hilton is extraditable to the United Kingdom pursuant to 18 U.S.C. § 3184, but she ordered that the certification of extradition be stayed for 60-days from its issuance in order to permit Mr. Hilton to file a habeas petition. (*Id.* Doc. 36 at 12-13.) The Court issued the formal certificate of extraditability on May 17, 2013. (*Id.* Doc. 40.)

On May 10, 2013, the government filed a memorandum requesting that the 60-day stay be lifted and Mr. Hilton's bail be revoked. (*In re Hilton*, Docket No. 1:13-mj-7043-JCB, Doc. 38.) By decision and order dated June 26, 2013, Magistrate Judge Boal held that a stay was warranted because "Hilton does present serious and difficult questions of law," and "the potential harms to him [would be] substantial" were a stay not granted, "[e]specially in light of Hilton's significant mental health issues." (*Id.* Doc. 44 at 4-5.) Magistrate Judge Boal further held that Mr. Hilton would be entitled to continued release on conditions pending the outcome of habeas corpus proceedings because the government had made no argument that circumstances had changed and "Hilton has generally been compliant with his conditions of release." (*Id.* at 6.)

Since his release from detention to the custody and care of his parents, Mr. Hilton has

undergone intensive psychological treatment. (Ex. F, Supplemental Affidavit of Judith G. Edersheim, J.D., M.D., dated May 22, 2013 (hereinafter, “Edersheim Second Supp. Aff.”), at ¶¶ 5-6.) He is seeing his psychotherapist Dr. Sommer three times per week and Dr. Alexander Bodkin, a psychiatrist at McLean Hospital, every other week. (*Id.*) Dr. Bodkin has placed Mr. Hilton on a complex five-drug regimen, which includes multiple antipsychotic medications to ameliorate paranoid thoughts and severe anxiety, antidepressants, anti-anxiety medications, and medications to counter his insomnia. (*Id.* ¶ 6.b.)

Mr. Hilton’s mother, Suzanne Dolphin, was recently diagnosed with breast cancer, which will require surgery, chemotherapy, and radiation treatment and will preclude her from being able to travel to Scotland to care for her son should he be extradited. (Ex. G, Letter from Katherine Carter, M.D., dated June 26, 2013.)

V. CLAIMS FOR RELIEF

A. Standard of Review for Habeas Relief

Although this Circuit previously has characterized the scope of habeas review as being limited in nature to procedural and jurisdictional defects in the magistrate’s decision to certify extradition, it is well-settled that a federal court has the authority to review certain substantive constitutional violations that arise in the context of extradition.

In *Koskotas v. Roche*, 931 F.2d 169 (1991), the First Circuit noted that “limited appellate review may be obtained only on a petition for writ of habeas corpus,” explaining that “[h]abeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty, and . . . whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.” *Id.* at 171 (quoting *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925)). However, the First Circuit has also “recognize[d] that

serious due process concerns may merit review beyond the narrow scope of inquiry in extradition proceedings.” *In re Extradition of Manzi*, 88 F.2d 204 (1989) (citing *Romeo v. Roache*, 820 F.2d 542, 544 (1st Cir. 1987); *Plaster v. United States*, 720 F.2d 340, 348-49 (4th Cir. 1983); *Matter of Burt*, 737 F.2d 1477, 1482-87 (7th Cir. 1984)). Indeed, in *Matter of Burt*, which was favorably cited by the First Circuit, the Seventh Circuit explicitly held, “that federal courts undertaking habeas corpus review of extraditions have the authority to consider not only procedural defects in the extradition procedures that are of constitutional dimension, but also the substantive conduct of the United States in undertaking its decision to extradite if such conduct violates constitutional rights.” 737 F.2d at 1484.

As set forth below, extradition of Mr. Hilton to Scotland pursuant to the United States-United Kingdom extradition treaty would be in violation of Mr. Hilton’s constitutional rights and, therefore, is clearly reviewable by this Court.¹

B. Mr. Hilton’s Extradition to Scotland Pursuant to the United States-United Kingdom Extradition Treaty as Advised and Consented to by the United States Senate and Ratified by the United States Would Violate His Constitutional Rights

Mr. Hilton’s extradition to Scotland – where he would be tried by a jury of fifteen and could be convicted of a crime punishable by life in prison by a mere majority of eight – would violate his constitutional rights because the Senate was never apprised of the idiosyncratic jury

¹ In the context of determining that federal courts have the inherent authority to review subpoenas issued pursuant to the treaty between the United States and the United Kingdom on Mutual Legal Assistance on Criminal Matters (“MLAT”), the First Circuit recently noted that “[t]reaties, like statutes, are subject to constitutional limits” and rejected the “the government’s position . . . that by ratifying an MLAT, the legislative branch could compel the judicial branch to reach a particular result—issuing orders compelling production and denying motions for protective orders—in particular cases, notwithstanding any concerns, such as violations of individual rights, that a federal court may have.” *In re Request from the United Kingdom*, No. 12-1236, 2013 WL 2364165 at *6 (1st Cir. May 31, 2013) (quoting *In re 840 140th Ave. NE*, 634 F.3d 557, 571-72 (9th Cir. 2011)). Similarly, here, simply because the government is acting pursuant to an extradition treaty does not divest this Court of its inherent authority to review Mr. Hilton’s claims of constitutional violations.

system in Scotland and, therefore, did not give its knowing advice and consent to the United States-United Kingdom extradition treaty as required by the Constitution.

In giving its advice and consent to the ratification of the extradition treaty with the United Kingdom, the Senate did so subject to specific understandings, declarations and provisos. (Ex. H, S. Exec. Rep. No. 109-19, *Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland*, 109th Cong., 2d Sess. 8 (2006)). One of those declarations provides:

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO UNDERSTANDING, DECLARATIONS, AND PROVISOS

The Senate advises and consents to the ratification of the Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, and related exchanges of letters, signed at Washington on March 31, 2003 (hereinafter in this resolution referred to as the ``Treaty") (Treaty Doc. 108-23), **subject to** the understanding in section 2, the declarations in section 3, and the provisos in section 4. [emphasis added]

SECTION 3. DECLARATIONS

The advice and consent of the Senate under section 1 is subject to the following declarations:

(1) Nothing in the Treaty requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the United States.

(2) The Treaty shall be implemented by the United States in accordance with the Constitution of the United States and relevant federal law, including the requirement of a judicial determination of extraditability that is set forth in Title 18 of the United States Code.

This Declaration is binding on the government, and specifically requires it to implement the

treaty “in accordance with the Constitution” and to not take any “other action . . . that is prohibited by the Constitution”.²

In this case, if Mr. Hilton were extradited to Scotland, he would be tried by a jury of 15 jurors. However, the Scottish law of criminal procedure requires only a simple majority of the jurors to convict him. Thus, even if seven of the jurors believe he is not guilty, he can be convicted by the votes of the other eight jurors. (See Ex. I, The Modern Scottish Jury in Criminal Trials, Chapter 7, <http://www.scotland.gov.uk/Publications/2008/09/17121921/9> (last accessed July 14, 2013).)

² Even in the absence of the above declaration,

[i]t is well-settled, however, that the United States government must, in carrying out its treaty obligations, conform its conduct to the requirements of the Constitution, and that treaty obligations cannot justify otherwise unconstitutional governmental conduct. See *Reid v. Covert*, 354 U.S. 1, 16-19 (1957) (plurality opinion); *In re Aircrash*, 684 F.2d 1301, 1308-09 (9th Cir. 1982); *Chas. T. Main Int’l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 813 n.20 (1st Cir. 1981); *Rosado v. Civiletti*, 621 F.2d 1179, 1195-96 (2d Cir.), *cert. denied*, 449 U.S. 856 (1980); *Edwards v. Carter*, 580 F.2d 1055, 1058 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978); *Holmes v. Laird*, 459 F.2d 1211, 1217 (D.C. Cir.) (specifically holding that the United States Constitution overrides the SOFA Treaty and the USA-FRG Supplementary Agreement), *cert. denied*, 409 U.S. 869 (1972); *Bell v. Clark*, 437 F.2d 200, 203 (4th Cir. 1971) (testing treaty against Constitution).

* * *

Although the power and the discretion of the Executive is undoubtedly great in matters of foreign relations, the cases to which we have referred demonstrate that the exercise of this power is limited by the provisions of the federal constitution. And, unquestionably, it is the province of the judiciary to adjudicate claims that governmental conduct is in violation of the Constitution. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Thus, although the Secretary of State and the President have the discretion *not* to extradite an individual for any reason whatsoever, including, for instance, a concern as to deficiencies in the judicial process in the requesting country, see *Eain v. Wilkes*, 641 F.2d 504, 508 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981); *Collier v. Vaccaro*, 51 F.2d 17, 20 (4th Cir.1931), they may not choose to extradite an individual where such extradition would, in the opinion of the judiciary, violate the individual’s constitutional rights.

Plaster, 720 F.2d at 348-49. *Accord Matter of Burt*, 737 F.2d at 1483-85. *Cf. In re Request from the United Kingdom*, 2013 WL 2364165 at *6.

In 1972, a sharply divided Supreme Court upheld, against Due Process challenges, convictions in Louisiana and Oregon by 9-3 and 10-2 jury verdicts respectively. *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). Subsequently, a unanimous Supreme Court struck down a conviction by a 5-1 majority of a six person jury stating that “it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved”, such a conviction “presents a . . . threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous.” *Burch v. Louisiana*, 441 U.S. 130 (1979). Plainly, conviction by a simple majority of a larger jury presents an even greater threat to Mr. Hilton’s due process rights and the fairness of the trial he would face in Scotland.

The general rule in United States extradition law, the so-called Rule of Non-Inquiry, is that the courts “are bound by the existence of an extradition treaty to assume that the trial [in the requesting country] will be fair.” *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911). This rule effectively places responsibility on the Executive Branch – the very branch of the government that is representing Scotland’s extradition request before this court³ – to determine whether the surrender of the requested person in a specific case might lead to a significant deprivation of the rights of the requested person in the requesting country.

Courts have expressed some uneasiness with this rule. The Court of Appeals for the Second Circuit “confessed” to some “disquiet” with this rule stating, “We can imagine situations where the relator [requested person], upon extradition would be subject to procedures or punishment so antipathetic to a federal court’s sense of decency as to require reexamination of the principle.” *Galina v. Fraser*, 278 F.2d 77, 79 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960);

³ It is submitted that such representation of a requesting country’s extradition request before the judiciary constitutes a clear conflict of interest within the government.

accord Matter of Burt 737 F.2d at 1487. Extradition to Scotland pursuant to the United States-United Kingdom treaty would subject Mr. Hilton to a procedure not only plainly antipathetic to a federal court's sense of decency, but also a violation of his constitutional Due Process and Sixth Amendment rights via possible conviction by a simple majority of eight of 15 jurors.

There is no indication in *Glucksman* that the requested person attempted to draw into question whether the Senate considered the fairness of the requesting country's criminal procedure before giving its advice and consent to the ratification of the treaty in question. In this case, however, it is crystal clear that the Senate, in giving its advice and consent to the ratification of the Treaty on Extradition between the United States and the United Kingdom, "Subject to Understanding, Declarations and Provisos," did so totally unaware that someone extradited from the United States to Scotland could be convicted by a simple majority of jurors – a concept completely alien to American and Anglo-American constitutional concepts of trial by jury, due process and fairness.

In this regard, the treaty document by which the President transmitted the treaty to the Senate seeking its advice and consent to ratification makes no mention of the Scottish laws relating to criminal verdicts. (Ex. J, S. Treaty Doc. No. 108-23, *Extradition Treaty with Great Britain and Northern Ireland*, 108th Cong., 2d Sess. (2004)). Moreover, despite two lengthy hearings before the Senate Committee on Foreign Relations, there was no mention of the Scottish laws relating to criminal verdicts. (Ex. K, S. Hrg. No. 109-342, *Treaties*, 109th Cong., 1st Sess. (2005); Ex. L, S. Hrg. No. 109-570, *Treaty*, 109th Cong., 2d Sess. (2006).)⁴ Likewise, the Foreign Relations Committee's report, recommending that the full Senate give its advice and consent to the treaty's ratification, does not mention the unique Scottish laws relating to criminal

⁴ The only discussion of the fairness of the criminal procedures in the United Kingdom in the hearings relates to infamous Diplock Courts in Northern Ireland for the trial of alleged IRA terrorists. (See Ex. L at 56-57, 74-75.)

verdicts. (*See* Ex. H.) Thus, despite the constitutionally antipathetic Scottish jury verdict laws, neither the Department of State nor the Department of Justice apparently ever brought them to the attention of the Senate Committee on Foreign Relations, and there is no indication that the Committee was cognizant of them when it recommended that the Senate give its advice and consent to ratification.

It is quite possible that the State Department and Justice Department negotiators themselves were not aware of the differences between the jury verdict laws of Scotland and Great Britain, Wales and Northern Ireland. With respect to those other constituent parts of the United Kingdom, the United Kingdom's Juries Act 1974, Ch. 23, Sec. 17, which is not applicable to Scotland, provides:

17 Majority verdicts.

(1) Subject to subsections (3) and (4) below, the verdict of a jury in proceedings in the Crown Court or the High Court need not be unanimous if—

(a) in a case where there are not less than eleven jurors, ten of them agree on the verdict; and

(b) in a case where there are ten jurors, nine of them agree on the verdict.

(3) The Crown Court shall not accept a verdict of guilty by virtue of subsection (1) above unless the foreman of the jury has stated in open court the number of jurors who respectively agreed to and dissented from the verdict.

(Ex. M, United Kingdom's Juries Act 1974, Ch. 23, Sec. 17.) Consequently, the United Kingdom's majority jury verdict statute is consistent with the constitutional norms expressed in the Supreme Court's opinions in *Johnson*, *Apodaca* and *Burch*. However, if the Department of State and Department of Justice negotiators were aware of the differences between the jury verdict laws of Scotland and the rest of the United Kingdom, they were derelict in not bringing them to the attention of the Senate.

The bottom line is that the Senate was not made aware that Scotland's jury verdict laws plainly failed to meet United States constitutional and common law standards when it gave its advice and consent to the ratification of the treaty pursuant to which Mr. Hilton's extradition has been requested. Moreover, in view of the grave concerns expressed in the Senate hearings with the fairness of prosecutions in Northern Ireland's Diplock Courts,⁵ it is submitted that had the Senate been so informed, it would have included a specific reservation, declaration or understanding in its advice and consent to the ratification barring extradition to Scotland for trial by a simple majority jury.⁶

⁵ See *supra* n.4.

⁶ Scotland's simple majority verdict – a concurrence of a mere 53 1/3 percent of the jurors – raises significant due process concerns, particularly because Scotland also permits hearsay statements of dead or unavailable witnesses to be presented before the jury that would not be admissible in American courts. Section 259 of the Criminal Justice Act of Scotland provides that a statement taken from a witness who subsequently dies or is outside the United Kingdom, where it is not reasonably practicable to secure his or her attendance or otherwise obtain his testimony in a competent matter, may be admissible as an exception to the hearsay rule even where the defendant had no prior opportunity to cross-examine the witness. (See Ex. N, Criminal Justice Act of Scotland § 259.) In this regard, Scottish law is in direct contradiction with the Sixth Amendment of the United States Constitution, which guarantees the accused in all criminal prosecutions the right to confront the witnesses against him. The Supreme Court has held that the accused's right to confrontation requires that testimonial evidence, including a prior statement, is inadmissible unless the witness appears at trial or, if the witness is deceased or otherwise unavailable, if the defendant had a prior opportunity to cross-examine the witness. See *Crawford v. Washington*, 541 U.S. 36, 61-62 (2003) (explaining that “[the confrontation clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination”).

In the instant case, the lack of confrontation rights in Scotland is particularly troubling because at least one witness from whom Scottish authorities took a statement, John Shipley, died in June 2012 due to unrelated circumstances. As indicated in the Extradition Request, Shipley was a percipient witness who was present in the room with Hilton and Forbes when Forbes allegedly consumed tainted wine. (See Doc. No. 3-2, Extradition Request ¶ 2.9.) Moreover, many of the witnesses involved in this case are international students who will likely graduate from St. Andrews, leave Scotland, and return to their native countries by the time a trial would take place in this case should Hilton be extradited. As a result, Scottish authorities may have difficulty securing these witnesses' attendance and, thus, pursuant to Scottish law, may use their prior statements instead. Thus, should he be extradited to Scotland, Hilton would have no right to confrontation with respect to multiple witnesses against him. The use of these untested witness statements, coupled with the simple majority verdict, lay bare that a trial in Scotland

For the above reasons, it is submitted that Mr. Hilton's extradition to Scotland would violate his constitutional rights and is prohibited by the terms of the treaty as ratified and the Constitution.

C. Mr. Hilton Should Not Be Extradited Because He Has Severe Psychological Impairments Which Lead to the Real Risk that He Will Commit Suicide If Extradited

The United States will deprive Mr. Hilton of his fundamental constitutional and human rights by extraditing him to Scotland. Uncontested evidence presented at the extradition hearing establishes that Mr. Hilton's longstanding and severe psychiatric condition and his history of self-injurious behavior would create a substantial and real risk that he would end his life should he be extradited to Scotland. Simply put, there is a substantial likelihood that Mr. Hilton's extradition to Scotland effectively would be a death sentence in violation of his right to due process under the Fifth Amendment. As set forth below, the United Kingdom, based on its own laws, international obligations, and precedent, has denied extradition of its own citizens to the United States under similar circumstances. In light of the fact that reciprocity is the guiding principle in extradition law, this Court should have equivalent authority to deny Mr. Hilton's extradition due to his serious psychological condition and the substantial risk that he will commit suicide should he be extradited.

i. The Uncontested Evidence of Mr. Hilton's Mental Illness and Suicide Risk Establish that Extradition Would Violate His Fundamental Rights

Dr. Judith Edersheim, a highly reputed forensic psychiatrist, conducted a comprehensive evaluation of Mr. Hilton, which included seven hours of interviews with him, interviews of his

raises serious due process issues that are so antipathetic to an American court's sense of decency that a federal court's review of these practices is necessary before allowing extradition of an American citizen. *See Crawford*, 541 U.S. at 62 ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.").

parents, and an exhaustive review of his school and mental health records. (*See* Ex. A, Edersheim Aff. ¶¶ 1, 5.1; Ex. B, Hr’g Tr. 17:3-19.) Based on Mr. Hilton’s longstanding history of serious mental illness and suicidal behavior, it is Dr. Edersheim’s opinion that extraditing Mr. Hilton to Scotland “would disrupt current measures taken to monitor Mr. Hilton’s suicidality and would disrupt treatment for his acute mental illness. Disruption of his treatment in the context of increasing stress is likely to increase the risk of self-harm.” (Ex. A, Edersheim Aff. ¶ 7.)

Based on her evaluation, Dr. Edersheim concluded that Mr. Hilton “has a primary psychotic disorder, a primary disorder of thought,” which is “usually characterized by hallucinations, delusions, loss of reality testing ... [and] at baseline there is disordered thinking and thought content and thought structure.” (Ex. B, Hr’g tr. 18:10-21.) In her opinion, he suffers from a serious mental illness with diagnostic considerations pointing to Schizophrenia, Delusional Disorder, or generalized Psychotic Disorder. (Ex. A, Edersheim Aff. ¶¶ 4-5.)

According to Dr. Edersheim, Mr. Hilton has chronic difficulty coping with the mild to moderate stressors that accompany the transitions of everyday adult life” and when faced with emotional stressors, Mr. Hilton “decompensates acutely,” which results in the “acceleration of psychiatric symptoms requiring mental health treatment.” (Ex. A, Edersheim Aff. ¶¶ 6.a & 7.a.) While Mr. Hilton is at home, “his mother and father provide all of his daily structure and care and they are his primary emotional resources.” (*Id.* ¶ 6.a.) Even with this level of support, “Mr. Hilton has difficulty with everyday functioning, including daily tasks and self-care.” (*Id.*) As reflected in the evidence of his behavior at St. Andrews and in New Mexico (*see supra* pp. 4-5), “[w]hen [Mr. Hilton] leaves home, the deficits in his thinking processes and his coping mechanisms come to the forefront, and he deteriorates markedly.” (Ex. B, Hr’g Tr. 21:16-17.)

Dr. Edersheim further opined that “Mr. Hilton has had a significant history, a long history

relative to his age of having suicidal thoughts and suicidal actions.” (Ex. B, Hr’g Tr. 21:21-23.) “He has had frequent suicidal thoughts, and they’re exacerbated by stress. He ruminates and is obsessional about worthlessness and feelings of guilt and they overwhelm his impaired coping and he becomes acutely suicidal.” (*Id.* 21:25-22:4.) As set forth above, Mr. Hilton engaged in self-injurious behavior while he was at St. Andrews and was treated and monitored for suicidal behavior when he returned home in the summer of 2010. (*See supra* pp. 3-4.) He also sought emergency evaluations at psychiatric hospitals due to suicidal thoughts in July and November 2012, and was subsequently admitted to partial-hospitalization programs and met with his therapist on a more frequent basis. (*See supra* pp. 5-6; Ex. B, Hr’g Tr. 22:5-10.) According to Dr. Edersheim, “Mr. Hilton was mentally stable while residing at home with his parents. While he did experience transient suicidal ideas, he was able to communicate these to his parents and psychotherapist, and voluntarily sought a high level of mental health treatment under these circumstances.” (Ex. E, Edersheim First Supp. Aff. ¶ 2.a.)

However, Mr. Hilton’s “precarious mental state became evident during his detention at Wyatt Detention Facility” following his arrest in connection with the extradition case. (Ex. F, Edersheim Second Supp. Aff. ¶ 3.) When he was removed from the support of his parents and psychotherapist, his mental status deteriorated substantially and he became actively suicidal. (*Id.*) He made attempts to puncture his neck and wrist and was put on suicide watch for approximately 11 days. (*See id.*) According to Dr. Edersheim, removing Mr. Hilton from his environment triggered his suicidal behavior because “at baseline [he is] suspicious and fearful and ha[s] paranoid thoughts – [and] without external grounding of the familiarity of [his] parents, particularly in his case, [his] therapist, [his] psychosis can be exacerbated.” (Ex. B, Hr’g Tr. 23:18-25.) He was only stabilized and taken off suicide watch after he was able to meet with his

therapist Dr. Sommer, which required a court order. (*See id.* ¶ 3.) According to Dr. Sommer, Mr. Hilton’s mental condition worsened when he was detained: Mr. Hilton for the first time began suffering from overt psychotic thoughts, including auditory, visual, and tactile hallucinations, and suffered from feelings of hopelessness and suicidal thoughts. (*Id.*)

Since his release from custody on March 4, 2013, Mr. Hilton mental state has stabilized with intensive psychiatric treatment, including meeting with his therapist Dr. Sommer three times per week and complying with a complex psychiatric medication regimen, which involves a combination of antipsychotic medications, anti-anxiety medications, and anti-depressants and requires frequent monitoring and dosing adjustments by his psychiatrist Dr. Bodkin. (Ex. F, Edersheim Second Supp. Aff. ¶¶ 4-6.)

According to Dr. Edersheim, “extraditing [Mr. Hilton] to a foreign correctional setting would cause an immediate deterioration in his mental status and acutely increase his risk of suicide.” (*Id.* ¶ 6.) She bases her opinion on the fact that Mr. Hilton will not be able to readily replicate his treatment alliance with his therapist or the complex medication regimen that is currently keeping him stable, which “risk[s] a resurgence of Mr. Hilton’s core psychotic and mood symptoms.” (*Id.* ¶ 6.a.) Further, extraditing Mr. Hilton to Scotland “will separate [him] from his parents, who remain the primary sources of his mental stability” by “continu[ing] to manage or perform all of his activities of daily living, including providing meals, prompting personal hygiene and structuring time.” (*Id.* ¶ 6.b.)⁷ Finally, “removing Mr. Hilton from his current residential and treatment settings will exacerbate his mental illness and cause a reemergence of his suicidality” because “[he] will likely experience a correctional facility as

⁷ This conclusion is reinforced by the fact that his mother’s recent diagnosis of breast cancer and the surgery and lengthy treatment she will be required to undergo will make it impossible for her to travel to Scotland to care for her son should he be extradited. (*See supra* p. 8.)

treacherous and threatening, and in that context his psychotic thought processes are likely to become prominent.” (*Id.* ¶ 6.c; *see also* Ex. B, Hr’g Tr. 25:9-21.)

In light of his precarious psychological condition, including the significant risk that his mental state will deteriorate to the extent that he will commit suicide, extradition of Mr. Hilton would violate Mr. Hilton’s Fifth Amendment right to due process and warrants habeas relief in this case.

ii. The Rule of Non-Inquiry Is Inapplicable Here

The Magistrate Judge erred in concluding that the rule of non-inquiry forecloses judicial review of Mr. Hilton’s claim concerning his psychiatric condition. (*See In re Hilton*, Docket No. 1:13-mj-7043-JCB, Doc. 36 at 10-11.) The Rule of Non-Inquiry is inapplicable here because Mr. Hilton’s case does not involve a challenge to the procedures or treatment awaiting him in Scotland. *See Manzi*, 888 F.2d 204 at 206 (denying review of relator’s due process claim concerning procedures or treatment awaiting him in requesting country based on rule of non-inquiry and lack of evidence suggesting that his safety would be threatened if he were extradited). Mr. Hilton’s claim instead involves the conduct of the United States government in detaining and transferring to a foreign country a highly vulnerable individual who is at risk of suicide in violation of his constitutional rights. This is the very type of constitutional claim that is reviewable by federal courts. *See Plaster*, 720 F.2d at 348-49; *Matter of Burt*, 737 F.2d at 1482-87.

iii. Principles of Reciprocity Support the Denial of Extradition

Moreover, given the importance of reciprocity in extradition cases, it is worthwhile to examine the law and practices of the United Kingdom on this issue. Both statutory law and case law in the United Kingdom clearly demonstrate that its courts have the authority to deny

extradition on grounds related to the physical or mental health of the person being sought for extradition. The United Kingdom Extradition Act of 2003 specifically provides that the judge must deny extradition or adjourn the extradition hearing if “the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him.” (Ex. O, United Kingdom Extradition Act of 2003 (hereinafter, “the Act”) § 91).

Courts in the United Kingdom have applied this section of the Act to deny extradition of individuals to the United States. In *United States v. Tollman*, the United States sought extradition of Stanley and Beatrice Tollman, a married couple in the their 70s. (Ex. P, *United States v. Tollman*, 3 All ER 150 (2008).) Mr. Tollman was sought on fraud and tax evasion charges, and Mrs. Tollman was only sought on tax charges. The High Court affirmed the Senior District Judge’s decision to order Mrs. Tollman’s discharge, thereby denying extradition, in part, on the basis of medical and psychological evidence submitted in the extradition proceedings establishing that she suffered from moderate to severe clinical depression and severe anxiety. (*See id.* §§ 120-172.) In reaching this conclusion, the Court firmly stated, “section 91 lays a duty upon the UK Court to reach its own view on whether it would be unjust or oppressive to extradite a person because of her physical or mental health condition.” (*Id.* § 164.)⁸

In addition to its own extradition statute, the United Kingdom is bound by decisions of the European Court of Human Rights (“ECHR”), which recently barred the extradition of mentally ill individual in the United Kingdom to the United States. In that case, *Aswat v. The United Kingdom* (Application No. 17299/12) (attached hereto as Exhibit Q), Haroom Aswat,

⁸ The High Court further ordered the Senior District Judge to consider whether Mrs. Tollman’s condition, on its own, provided a sufficient basis for Mr. Tollman’s extradition to be denied on the grounds that it would be oppressive to her, and therefore to Mr. Tollman, for him to be extradited and his presence removed from Mrs. Tollman while she was in ill health. (Ex. P ¶¶ 106-12.) The High Court therefore suggested the interpretation of § 91 is far reaching, applying to both the health and mental condition of the person being extradited and third parties who are cared for by that person.

who suffers from paranoid schizophrenia, sought relief from an order of extradition from the United Kingdom to the United States on the grounds that it would violate Article 3 of the European Convention on Human Rights (“the Convention”), which prohibits member states from deporting or extraditing individuals who may be subjected to torture, inhuman or degrading treatment or punishment in the recipient state. Noting that Aswat faces “extradition to a country where he has no ties, where he will be detained and where he will not have the support of family and friends,” the ECHR concluded that “there is a real risk that the applicant’s extradition to a different country and to a different, and potentially more hostile, prison environment would result in significant deterioration of his mental and physical health and that such a deterioration would be capable of reaching the Article 3 threshold.” (Ex. Q at 15.) The *Aswat* decision makes clear that the United Kingdom, which is a party to the Convention and therefore bound by the ECHR’s rulings, must consider the mental and physical health of an individual in determining whether to extradite him to a requesting state.

Based on its international treaty obligations and domestic laws, United Kingdom law is in direct contradiction to the United States’ Rule of Non-Inquiry in extradition proceedings. As the First Circuit has recognized, reciprocity between countries is a guiding principle in extradition law. *See United States v. Kin Hong*, 110 F.3d 103, 111 (1st Cir. 1997) (recognizing that treaties should be construed “so as to effect the apparent intention of the parties to secure equality and reciprocity between them” (citations and quotation marks omitted)). This Court should have the same authority to deny extradition of a United States citizen to the United Kingdom where, as here, the relator has put forth substantial credible evidence that he is suffering from a long-standing and severe mental illness and has a real risk of committing suicide should he be

removed from his treatment regimen and the support of his mental health providers and family.⁹

VI. PRAYER FOR RELIEF

For the foregoing reasons, Mr. Hilton respectfully requests that the Court issue an order granting his Petition and directing the immediate and permanent discharge of the conditions of release imposed on him in connection with the extradition case and such other and further relief as the Court deems just and equitable.

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⁹ Importantly, it should be noted that the United Kingdom's Home Secretary recently denied the United States' extradition request of Gary McKinnon, a British citizen sought for charges of infiltrating United States military computers. (*See Ex. R, Statement of Home Secretary on Extradition of McKinnon.*) Mr. McKinnon, who was diagnosed with Asperger's and depression, has a mental health condition is similar to Mr. Hilton's or arguably even less severe than his, but the charges against Mr. McKinnon were serious and directly impacted U.S. national security. The United Kingdom Home Secretary ultimately denied the United States' extradition request in its entirety based on her conclusion that "Mr. McKinnon's extradition would give rise to such a high risk of him ending his life that a decision to extradite would be incompatible with Mr. McKinnon's human rights." (*See id.*) Mr. Hilton's circumstances are no different and, in fact, his personal history and current psychological state demonstrate a high risk of suicide should he be extradited. Just as with McKinnon, extradition of Mr. Hilton should be denied because it would give rise to such a high risk that he will end his life that a decision to extradite him would be incompatible with his fundamental due process rights.