

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO
Case No. 89 DR 477 Division M

MOTION TO VACATE ORDERS RE: RULE 69 PROCEEDING

In Re the Marriage of:

SANDRA WILFRED, Petitioner

and

HARMON WILFRED, Respondent.

COMES NOW the Defendant, Harmon Wilfred (Mr. Wilfred), by and through The Tegtmeier Law Firm, P.C., his attorneys, and respectfully Moves this Court for an Order Vacating and Setting Aside the Magistrate's Ex Parte Orders of May 30, 2000, on grounds that said Orders violate the Doctrine of Specialty, and this Court therefore lacks personal jurisdiction over Mr. Wilfred, a resident of Canada. In support hereof, Mr. Wilfred avers and argues as follows:

I. Statement of Facts

1. Mr. Wilfred is a resident of Canada. He was present in the State of Colorado, United States, on April 7, 2000 for a hearing in the District Court of El Paso County in Case No. 98 CR 215 (Information attached hereto as Exhibit A; hereinafter "the custody and extortion case").
2. The *Warrant of Committal* entered June 1, 1998 by Judge C. Stephen Glithero of the Ontario Court of Justice (hereinafter "Extradition Order," attached hereto as Exhibit B) – issued under the terms of the *Treaty on Extradition Between Canada and the United States of America* (hereinafter "Treaty," attached hereto as Exhibit C) – authorized extradition of Mr. Wilfred only for the charges specified in the custody and extortion case. Exhibit B, page 1.
3. The District Court of El Paso County entered an Order on April 7 that allowed Mr. Wilfred to return to Canada and Ordered him to return for further proceedings in the custody and extortion case on May 11, 2000. Copy of Minute Order attached hereto as Exhibit D.
4. On May 10, 2000, in anticipation of Mr. Wilfred's presence in the State of Colorado for proceedings in the custody and extortion case, the United States filed a complaint alleging failure to pay child support. Copy of federal Complaint attached hereto as Exhibit E.

The United States arrested Mr. Wilfred on May 15, 2000 on these charges. Mr. Wilfred filed a Motion to Dismiss the complaint on grounds that it violated the Rule of Specialty, as specified hereinafter. The United States concurred, filed an independent Motion to Dismiss on grounds that the action violated the Rule of Specialty (Exhibit F, attached), and the United States District Court for the District of Colorado, Judge Walker Miller, ordered dismissal of the federal complaint on those grounds on May 26, 2000 (Exhibit G, attached).

5. On May 26, 2000, Arapahoe County arrested Mr. Wilfred under an outstanding warrant that also sought to enforce alleged child support and maintenance obligations – and that also violates the Rule of Specialty, for reasons specified hereinafter. On May 30, 2000 – in an ex parte proceeding in which Mr. Wilfred was not represented by counsel – the Arapahoe County District Attorney discharged the warrant, and the District Court of Arapahoe County ordered Mr. Wilfred to appear on June 29, 2000 for a financial asset examination pursuant to a three-year-old subpoena issued under C.R.C.P. Rule 69. The Court also required Mr. Wilfred to sign a \$750,000 personal recognizance bond in order to be released from unlawful detention. These orders must be vacated under the Rule of Specialty.

6. The Extradition Order states that Mr. Wilfred had been apprehended under Canada's *Extradition Act* on the ground of his being accused in the State of Colorado of the crimes of "Criminal Extortion" and "Violation of Custody Order." As stated in the Information filed in the District Court of El Paso County in Case No. 98 CR 215 (attached hereto as Exhibit A), the charges covered by the Extradition Order are:

COUNT ONE: CRIMINAL EXTORTION (F-4)

Between November 22, 1997 and December 5, 1997, HARMON LYNN WILFRED did unlawfully, feloniously and without legal authority and with the intent to induce DEARNA WILFRED against her will to perform an act and to refrain from performing a lawful act, make a substantial threat to confine and restrain, DANIELLE MARIE WILFRED and ISAAC ARTHUR WILFRED, and HARMON LYNN WILFRED did threaten to cause the results by performing and causing an unlawful act to be performed; In violation of Colorado Revised Statutes 18-3-207(1), as amended, Criminal Extortion (F-4)

COUNT TWO: VIOLATION OF CUSTODY (F-5)

On or about October 15, 1997, HARMON LYNN WILFRED did unlawfully, knowingly and feloniously violate an order of a District Court and Juvenile Court of the State of Colorado, to-wit: Case No. 97DR3393, dated October 15, 1997 and October 20, 1997, granting the custody of DANIELLE MARIE WILFRED and ISAAC ARTHUR WILFRED, a child under the age of eighteen years to DEARNA WILFRED, with the intent to deprive the said lawful custodian of the custody of the child: In violation of Colorado Revised Statutes 18-3-304(2), as amended, Violation of Custody (F-5)

7. The facts and law on which the *Extradition Order* is based are specified in detail in the *Requesting State's Factum*, attached hereto as Exhibit II, at pages 1 through 5.

8. Based on a review of the law and facts presented, Judge C. Stephen Glithero of the Ontario Court of Justice ordered the committal of Mr. Wilfred for extradition to the United States because the alleged offenses, if committed in Canada, would have consisted of "Abduction in contravention of a custody order," "Abduction," and "Extortion." See Exhibit B, page 2; Exhibit H, page 27.

9. The facts alleged in the Information in Case No. 98 CR 215, District Court of El Paso County (Exhibit A) are not the allegations before this Court under C.R.C.P. Rule 69 and the child support and maintenance claims.

10. The statutes under which Case No. 98 CR 215, District Court of El Paso County (Exhibit A) is filed do not address or relate to the C.R.C.P. Rule 69 proceeding before this Court or to the child support and maintenance allegations.

11. The facts presented to the Ontario Court of Justice in support of the request for extradition (Exhibit H, pages 1 through 5) do not support the C.R.C.P. Rule 69 Order entered by this Court to enforce alleged child support or maintenance obligations.

12. The law on which the Ontario Court of Justice relied in ordering the extradition of Mr. Wilfred (Exhibit H, page 27) does not address or relate in any way to the C.R.C.P. Rule 69 proceeding presently before this Court or child support and maintenance obligations.

13. The C.R.C.P. Rule 69 proceedings in the instant case are not based on alleged abduction, abduction in contravention of a custody order, or extortion – the charges within the purview of the Extradition Order.

14. Article 12 of the Treaty (Exhibit C) provides:

(1) A person extradited under the present *Treaty* shall not be detained, tried or punished in the territory of the requesting State for an offense other than that for which extradition has been granted nor be extradited by the State to a third State unless:

(i) He has left the territory of the requesting State after his extradition and has voluntarily returned to it;

(ii) He has not left the territory of the requesting State within thirty days after being free to do so; or

(iii) The requested State has consented to his detention, trial, punishment, for an offense other than that for which extradition was granted, or to his extradition to a third State, provided such other offense is covered by Article 2.

(2) The foregoing shall not apply to offenses committed after the extradition.

15. Mr. Wilfred did not waive extradition to appear before the District Court of El Paso County in Case No. 98 CR 215, or to appear before the United States District Court pursuant to an unlawful arrest, or to appear before this Court on May 30 pursuant to an unlawful detention. See letter of April 3, 2000 from Alan D. Gold, Counsel for Mr. Wilfred before the Ontario Court of Justice, to Robert Harward, Deputy District Attorney, El Paso County, Colorado (attached hereto as Exhibit I).

16. Canada has not consented to the detention, trial, or punishment of Mr. Wilfred for alleged failure to pay child support, or for a Rule 69 financial examination – matters other than those for which extradition was granted. See Exhibit I.

II. Argument

17. Under the Doctrine of Specialty, Mr. Wilfred can be prosecuted only on those charges or offenses for which he was extradited. *United States v. Abello-Silva*, 948 F.2d 1168, 1173, 1175 (10th Cir., 1991); *United States v. Levy*, 905 F.2d 326, 328 (10th Cir., 1990), cert. denied, 498 U.S. 1049, 111 S. Ct. 759, 112 L. Ed. 2d 778 (1991). In determining whether the charges in the instant prosecution are within the scope of the Extradition Order, the relevant inquiry is whether the charges (see *Levy*, supra at 328) or offenses (see *Abello-Silva*, supra, at 1174) alleged in the complaint are different from those stated in the Extradition Order, or correspond with the facts on which the Extradition Order is based. *Abello-Silva*, supra. The Court may consider the totality of circumstances in making this determination (*Levy*, supra at 329), but must “. . . place[s] itself in the position of the asylum country and inquire[s] whether the asylum state would consent to the extradition. . . .” for prosecution of the charges in the complaint. *Abello-Silva*, supra at 1174. See, generally, David B. Sweet, *Application of Doctrine of Specialty to Federal Criminal Prosecution of Accused Extradited From Foreign Country*, 112 A.L.R. FED. 473 (1993).

18. The Rule 69 proceeding simply and clearly does not included in the charges for which Mr. Wilfred was extradited. This proceeding is different from the charges of abduction, extortion, and violation of a custody order for which he was extradited, and, under the totality of circumstances, cannot reasonably be inferred to have been consented to by the government of Canada in entering the extradition order. Accordingly, the instant proceeding violates the Doctrine of Specialty and must be dismissed.

19. Additionally, the orders for the Rule 69 proceeding while the custody and extortion charges remain pending – and before Mr. Wilfred had an opportunity to return to Canada upon conclusion of the pending charges – is an independent violation of the *Treaty* and the Doctrine of Specialty. There is no evidence that the State of Colorado reserved a right before the Ontario Court of Justice to hold a Rule 69 proceeding while seeking extradition for the custody and extortion charges, and there is no evidence that Canada consented to extradition for

this proceeding. See *Cosgrove v. Winney*, 174 U. S. 64, 43 L. Ed. 897, 19 S. Ct. 598 (1899). See also 112 A.L.R. FED. 473, supra, §8(a).

20. Mr. Wilfred did not leave the State of Colorado or the United States after his extradition for the case in El Paso County and voluntarily return. Nor has he left the State of Colorado or the United States within thirty days after being free to do so. Orders entered by the District Court of El Paso County allowed Mr. Wilfred to return to Canada after an appearance on April 7, 2000, and ordered him to return for a subsequent hearing on May 11, 2000 (See Exhibit D). Mr. Wilfred's compliance with this Order does not constitute a voluntary departure from and return to the United States within the meaning of the *Treaty*, and does not deprive him of the immunity which he possessed by reason of his extradition, because (1) the jurisdiction of the District Court of El Paso County had not been exhausted; (2) Mr. Wilfred returned to Colorado under Court Order, and (3) Mr. Wilfred has had no opportunity to return to Canada after final discharge from the El Paso County prosecution. *Cosgrove*, supra. See also 112 A.L.R. FED. 473, supra, §5(b).

21. Because the Doctrine of Specialty has been violated in the particulars stated above, this Court lacks personal jurisdiction over Mr. Wilfred, and all Orders related to the instant Rule 69 proceeding must be vacated. *United States v. Vreeken*, 803 F.2d 1085, 1088-1089 (10th Cir. 1986).

WHEREFORE, Mr. Wilfred respectfully requests that this Court enter an Order Vacating all orders related to the Rule 69 proceeding, and grant such other and further relief as the Court deems just.

Respectfully submitted this 24TH day of June, 2000.

TEGTMEIER LAW FIRM, P.C.

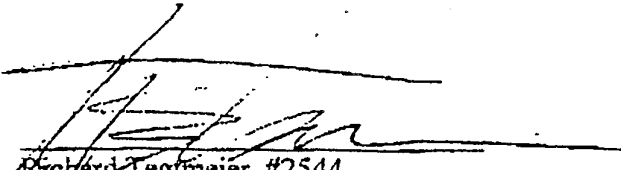
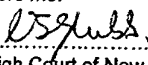

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EXHIBIT NOTE

This is the annexure marked "W" referred to in the within affidavit of HARMON LYNN WILFRED and sworn at Christchurch this 24th day of February 2006 before me:


A Solicitor of the High Court of New Zealand
(Solicitor to sign in part on Exhibit)

Christina Jane Glubb
Solicitor
Christchurch