
**In the United States Court of Appeals for the
First Circuit**

**CHRISTIAN AGUASVIVAS,
PETITIONER-APPELLEE**

v.

**MICHAEL POMPEO, U.S. SECRETARY OF STATE; WILLIAM BARR, U.S. ATTORNEY
GENERAL; JOHN GIBBONS, U.S. MARSHAL FOR THE DISTRICT OF
MASSACHUSETTS; DANIEL MARTIN, WARDEN, WYATT DETENTION FACILITY;
WING CHAU, U.S. MARSHAL FOR THE DISTRICT OF RHODE ISLAND,
RESPONDENTS-APPELLANTS**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND, D. Ct. No. 1:19-CV-00123**

BRIEF FOR THE UNITED STATES

**ANDREW E. LELLING
United States Attorney
District of Massachusetts**

**BRIAN A. BENCZKOWSKI
Assistant Attorney General
Criminal Division**

**CYNTHIA A. YOUNG
Chief, Appeals Unit
District of Massachusetts**

**BRUCE C. SWARTZ
Deputy Assistant Attorney General
Criminal Division**

**THEODORE B. HEINRICH
Assistant United States Attorney
District of Massachusetts**

**CHRISTOPHER J. SMITH
Associate Director
PHILIP A. MIRRER-SINGER
Trial Attorney
Office of International Affairs
Criminal Division
U.S. Department of Justice
1301 New York Avenue NW
Washington, D.C. 20530
(202) 532-4154
Christopher.J.Smith@usdoj.gov**

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
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BRIEF FOR THE UNITED STATES

JURISDICTIONAL STATEMENT

The United States of America, on behalf of the respondents, appeals from the judgment of the district court (McConnell, J.), granting the petition of Cristian Aguasvivas for a writ of habeas corpus. Through his petition, Aguasvivas challenged the decision by the magistrate judge (Hennessy, M.J.), presiding over his extradition hearing pursuant to 18 U.S.C. § 3184, to certify his extradition to the Dominican Republic so that the United States Secretary of State may decide whether to surrender him to Dominican authorities. The district court had jurisdiction pursuant to 28 U.S.C. § 2241. *But see infra* 27-43 (explaining that the district court was precluded from exercising habeas jurisdiction to review Aguasvivas's Convention Against Torture

claim). The district court granted Aguasvivas's petition on September 18, 2019, *see* Add. 43-69, and the government filed a timely notice of appeal the following day, *see* App. 407.¹ This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(a).

STATEMENT OF THE ISSUES

1. Whether the Dominican Republic satisfied the requirement in its extradition treaty with the United States that extradition requests be supported by “the document setting forth the charges against the person sought,” when it submitted the warrant for Aguasvivas's arrest that sets forth the charges against him.

2. Whether the Secretary of State may proceed to consider Aguasvivas's Convention Against Torture claim and render a decision on his extradition because:

- a) the district court was barred from reviewing Aguasvivas's claim as a defense to extradition in light of the well-established rule of non-inquiry, the Foreign Affairs Reform and Restructuring Act, and the REAL ID Act of 2005;
- b) Aguasvivas's claim is not ripe for judicial review because the Secretary of State has not yet fulfilled his obligations, mandated by statute and regulation, to evaluate that claim and decide whether to surrender Aguasvivas to the Dominican Republic; and

¹ Add. refers to the addendum filed with this brief; App. refers to the government's appendix.

- c) the decision by the Board of Immigration Appeals to withhold Aguasvivas's removal, rendered in 2016 in separate immigration proceedings, is not binding on the Secretary of State's extradition decision.

INTRODUCTION

The Dominican Republic has requested the extradition of Aguasvivas, who is alleged to have shot three Dominican police officers, murdering one and severely wounding the two others. Aguasvivas fled the scene and eventually entered the United States illegally. A magistrate judge in the District of Massachusetts (the "extradition court") found that the requirements of the countries' bilateral extradition treaty² (the "Treaty") were satisfied and certified Aguasvivas's extradition for the Secretary of State to decide whether to surrender him to Dominican authorities. Aguasvivas then filed a petition for a writ of habeas corpus in the instant case.

Despite the fact that the Secretary has not yet rendered a decision on Aguasvivas's surrender, the district court found that the Board of Immigration Appeals' ("BIA") three-year-old decision to grant Aguasvivas withholding of removal in a separate immigration proceeding precludes the Secretary from considering whether to extradite him. It also found that the Dominican Republic's extradition request is insufficient because it does not contain a separate, formal charging document, but

² See Extradition Treaty between the Government of the United States of America and the Government of the Dominican Republic, Jan. 12, 2015, T.I.A.S. 16-1215.

rather includes an arrest warrant which details the charges against Aguasvivas. The court therefore granted Aguasvivas's habeas petition and ordered his immediate release from custody.

The district court's decision misinterprets the Treaty, which does not preclude an arrest warrant from serving as the requisite "document setting forth the charges against the person sought." The decision also disregards the fact that immigration and extradition proceedings are "separate and distinct," in the sense that "the resolution of even a common issue in one proceeding is not binding in the other." *Castaneda-Castillo v. Holder*, 638 F.3d 354, 360-61 (1st Cir. 2011). While an immigration case decides a domestic issue—whether an alien may remain in the country—based on the record before the immigration court, the Secretary of State's decision whether to extradite a fugitive is ultimately an exercise of foreign policy. In making that decision, the Secretary may use the myriad diplomatic tools at his disposal to ensure that the United States is able to fulfill its treaty obligations in a manner consistent with law and policy.

The district court ignored these significant differences between immigration and extradition, and it was the first court *ever* to exercise habeas jurisdiction to deny extradition based upon the Convention Against Torture (the "CAT").³ In doing so, it usurped the Secretary of State's statutorily prescribed role in the extradition process.

³ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85.

The law is clear that it is the Secretary’s responsibility—and not that of the district court or the BIA—to consider the CAT claim of a fugitive wanted for extradition. If allowed to exercise its lawful role, the Department of State will thoroughly consider Aguasvivas’s claims before the Secretary renders a decision on his surrender. But at least one fact is not in dispute: The United States should not, and will not, surrender Aguasvivas to foreign authorities if the government determines that he is more likely than not to face torture there.

STATEMENT OF THE CASE

A. Procedural History

On December 6, 2018, the extradition court certified Aguasvivas’s extradition for the Secretary of State to decide whether to surrender him to the Dominican Republic. Add. 1-39. Aguasvivas challenged that certification in a petition for a writ of habeas corpus, which the district court granted in a Memorandum and Order entered on September 18, 2019. Add. 68-69. The government appeals from that Order.

Aguasvivas has been in custody throughout the pendency of these extradition proceedings. While the district court ordered Aguasvivas’s immediate release, *see* Add. 69, on September 19, 2019, this Court granted a temporary stay of Aguasvivas’s release, and subsequently extended that stay through the resolution of this case when it granted the parties’ joint motion to modify the briefing schedule.

B. Legal Background

“In the United States, the procedures for extradition are governed by statute.” *United States v. Kin-Hong*, 110 F.3d 103, 109 (1st Cir. 1997). These statutes, 18 U.S.C. §§ 3181 *et seq.*, establish “a two-step procedure which divides responsibility for extradition between a judicial officer and the Secretary of State.” *Kin-Hong*, 110 F.3d at 109 (footnote omitted). The duties of the judicial officer, serving as the extradition court, are set out in 18 U.S.C. § 3184. *Id.* The extradition court, “upon complaint, issues an arrest warrant for an individual sought for extradition.” *Id.* It then conducts a hearing to determine if “the evidence [is] sufficient to sustain the charge under the provisions of the proper treaty.” 18 U.S.C. § 3184. Specifically, the extradition court determines whether (1) it is authorized to conduct the extradition; (2) it has jurisdiction over the fugitive; (3) the applicable treaty is in full force and effect; (4) the treaty covers the offenses for which extradition is sought; and (5) there is probable cause to believe the fugitive committed the alleged offenses. *See, e.g., Zanażanian v. United States*, 729 F.2d 624, 625-26 (9th Cir. 1984).

If the extradition court finds that the requirements for extradition are met, it “shall certify the same” to the Secretary of State. 18 U.S.C. § 3184. The Secretary then “determine[s] whether or not the [fugitive] should actually be extradited.” *Kin-Hong*, 110 F.3d at 109 (citing 18 U.S.C. § 3186). “The Secretary has the authority to review the judicial officer’s findings of fact and conclusions of law *de novo*, and to reverse the judicial officer’s certification of extraditability if she believes that it was made

erroneously.” *Id.* (footnote omitted). The Secretary may decline to surrender the fugitive on humanitarian or other grounds. *Id.* The Secretary may also attach conditions to the fugitive’s surrender and may “elect to use diplomatic methods to obtain fair treatment for the relator.” *Id.* at 110 (citing *Jimenez v. U.S. Dist. Court for S. Dist. of Fla., Miami Div.*, 84 S. Ct. 14, 19 (1963) (Goldberg, J., in chambers)).

A fugitive cannot directly appeal a certification order but may seek “limited appellate review” by filing a petition for a writ of habeas corpus. *See, e.g., Koskotas v. Roche*, 931 F.2d 169, 171 (1st Cir. 1991).

C. Statement of the Facts

1. Aguasvivas Murders a Dominican Law-Enforcement Officer

According to the extradition request transmitted by the Dominican Republic, on December 6, 2013, three agents of the Dominican Republic’s National Directorate for Drug Control—Captain Felipe de Jesus Jimenez Garcia (“Captain Jimenez”), Agent Jose Marino Hernandez Rodriguez (“Agent Hernandez”), and Agent Lorenzo Ubri Monter (“Agent Ubri”)—were conducting an anti-drug operation in the city of Baní. Add. 2-3; App. 22. As part of that operation, the agents handcuffed and attempted to arrest Aguasvivas, who was with his brother Francis Aguasvivas (“Frank”). *Id.* However, Frank distracted the agents by protesting, and Aguasvivas took advantage of this distraction to disarm Agent Ubri and shoot him three times at close range, including

two bullets to the chest area, killing him. Add. 19-20; App. 16-17, 29-30.⁴ Aguasvivas also shot Captain Jimenez and Agent Hernandez, who both sustained serious but non-fatal injuries. Add. 19; App. 16-17. The Aguasvivas brothers then disarmed the other agents participating in the anti-drug operation and fled the scene. Add. 19; App. 17, 23.

The two surviving officers—Captain Jimenez and Agent Hernandez—identified a photograph of Aguasvivas as the shooter. Add. 19-20; App. 36. A video of events immediately before and during the shooting shows Aguasvivas resisting efforts by Agent Ubri and other officers to place him into a parked car. Add. 20-21. It indicates that Aguasvivas's hands were cuffed in front of him, rather than behind his back, making it possible for him to steal Agent Ubri's gun and shoot Agent Ubri. Add. 21. The recording depicts a male—presumably Frank—standing near the open passenger door, screaming and protesting. *Id.* It then shows Agent Ubri's hands on Aguasvivas when the first shot occurred, at approximately seventeen seconds into the video. *Id.* Two more shots followed in quick succession. *Id.* Most significantly, the video reflects that the spatial relationship between Aguasvivas and Agent Ubri at the time of the shooting was such that only Aguasvivas could have committed the murder because

⁴ Autopsy reports show that Agent Ubri was shot twice in the chest area and once in the upper left arm. Add. 19; App. 29-30.

Aguasvivas himself occupied the space through which the bullets would have had to travel if someone else had shot Agent Ubri. Add. 22.

2. Proceedings in the Dominican Republic

On December 6, 2013, Leonardo Antonio Garcia Cruz (“Judge Garcia”), Acting Judge of the Judicial Office of Services of Permanent Assistance, in the Judicial District of Peravia, issued a warrant for Aguasvivas’s arrest. Add. 2; App. 22-26. Specifically, the warrant states that “at the moment when the agents of the National Directorate for Drug Control . . . were making an anti-drug operation and were preparing to arrest . . . Aguasvivas . . . this person disarmed and fired three shots to the agent Lorenzo Ubri Montero causing his dea[th].” App. 22-23 (capitalization altered). It further states that Aguasvivas seriously injured Agent Hernandez and Captain Jimenez with the firearm, and that together with his brother Frank, they disarmed those agents. App. 23. The warrant also lists the provisions of Dominican law under which Aguasvivas has been charged, including “articles 265 [conspiracy], 266 [punishment for conspiracy], 295 [murder], 304 [punishment for murder] and 3[7]⁹⁵ [robbery] of the Dominican Criminal Code and article 39 of Law 36 on Trade and Possession of Firearms [illegal firearms possession].” *Id.*

⁵ The arrest warrant contains a typographical error, identifying this provision as article 309 rather than 379. *See* Add. 17 n.10.

3. U.S. Immigration Proceedings

Eight months after the alleged murder, Aguasvivas illegally entered the United States. Add. 4. Once in removal proceedings, Aguasvivas sought asylum, withholding of removal, and relief under the CAT, citing fear of the Dominican police. *Id.* Following hearings held in 2015 and early 2016, an immigration judge denied all requested relief, but on August 17, 2016, the BIA reversed and granted Aguasvivas withholding of removal under the CAT. *Id.*; *see also* App. 37-39 (BIA decision). Specifically, the BIA found that “[i]n view of the country conditions evidence in the record and the credible and detailed testimony of [Aguasvivas’s] witnesses, . . . [Aguasvivas] has met his burden of demonstrating on this record that it is more likely than not that he will be tortured at the instigation of or with the consent or acquiescence of public official[s] in the Dominican Republic.” App. 38.

4. Extradition Proceedings

Separately, in February 2017, the Dominican Republic submitted to the United States a request for Aguasvivas’s extradition pursuant to the Treaty. *See* App. 12a-12b. On September 13, 2017, the United States acted on this request, filed an extradition complaint in the District of Massachusetts, and obtained a warrant for Aguasvivas’s arrest. *See* App. 9-12. On September 15, 2017, law enforcement apprehended Aguasvivas in Lawrence, Massachusetts.⁶

⁶ During Aguasvivas’s arrest, officers uncovered fentanyl in the taxi in which Aguasvivas had been located. *See United States v. Cristian Aguasvivas*, No. 19-mj-7358 (D. Mass.), DE

Following Aguasvivas's arrest, extradition proceedings commenced in the District of Massachusetts, with the parties engaging in extensive briefing and the extradition court holding extradition hearings on April 24, 2018, June 8, 2018, and June 29, 2018. *See* Add. 5. On December 6, 2018, the extradition court issued a 39-page decision certifying Aguasvivas as extraditable to the Dominican Republic on the charges of murder, aggravated robbery, and illegal firearms possession, and committed him to the custody of the U.S. Marshals Service. Add. 38.

The extradition court found that all the requirements for certification had been met, and it explained in detail why it found probable cause to believe that Aguasvivas had committed the offenses relevant here, including the murder of Agent Ubri.⁷ Add. 17-28. The court then rejected all of Aguasvivas's defenses to extradition, including the argument that the Dominican Republic's arrest warrant could not satisfy the Treaty requirement that it submit "the document setting forth the charges against the person sought." Add. 33-35; *see also* Add. 90 (Treaty Art. 7.3(b)). The court found that "Judge Garcia's arrest warrant demonstrates that Aguasvivas is currently charged with extraditable offenses." Add. 34. The extradition court also noted that the prosecutor's

1-1 at 4. On September 19, 2019, the government filed a separate criminal complaint charging Aguasvivas with possession of fentanyl with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1). *See id.*, DE 1.

⁷ The extradition court declined to certify Aguasvivas's extradition on the charge of "association of malefactors." Add. 28-31. No issue pertaining to this charge is currently before the Court.

affidavit submitted by the Dominican Republic avers “that the procedures followed in this case are a proper way to initiate criminal proceedings in the Dominican Republic against a defendant who has fled the country,” and it cited a number of cases that “reject the argument that extradition based upon a warrant for investigation is improper.” *Id.*

5. Habeas Proceedings

Following certification, Aguasvivas filed a habeas petition, raising many of the same issues that were rejected by the extradition court, including whether probable cause exists and whether the Dominican Republic had met the Treaty’s documentary requirements, as well as a claim under the CAT. *See* App. 215-32. On September 18, 2019, the district court issued a Memorandum and Order in which it granted Aguasvivas’s habeas petition, dismissed the extradition complaint, enjoined the State Department from extraditing Aguasvivas to the Dominican Republic, and ordered Aguasvivas’s immediate release. *See* Add. 69.

The court first rejected Aguasvivas’s claim that evidence in the record did not support the extradition court’s probable cause determination. *See* Add. 51-53. In so finding, the court relied on the affidavit of Dominican Prosecutor Feliz Sanchez Arias, which recounts that Captain Jimenez and Agent Hernandez—who were present and themselves wounded during the crime—saw Aguasvivas shoot Agent Ubri. Add. 51-52. The court also cited to the video of the crime and the autopsy’s physical findings. Add. 52-53.

Nevertheless, the district court disagreed with the extradition court's finding that the Dominican Republic had fulfilled the Treaty's documentary requirements, and it found that the CAT barred Aguasvivas's extradition. Add. 53-68. Regarding the documentary requirements, the district court interpreted Article 7.3(b) of the Treaty, which states that the requesting country must provide "the document setting forth the charges against the person sought," to mean that the Dominican Republic must have submitted "a formal charging document lodged in the court system." Add. 53. As the extradition request did not contain a separate, formal charging document, but rather contained an arrest warrant setting forth the charges, the district court concluded that this treaty requirement had not been met. Add. 54.

The district court also found that Aguasvivas cannot be extradited to the Dominican Republic because the BIA had granted him withholding of removal under the CAT. Add. 56-68. It determined that the longstanding rule of non-inquiry, pursuant to which humanitarian claims are exclusively reserved for the Secretary of State's consideration, did not apply in this case. Add. 61. The court found that it had habeas jurisdiction to review the CAT claim, relying principally on the Suspension Clause of the Constitution, and that Aguasvivas's CAT claim was ripe for review prior to the Secretary's extradition decision. Add. 58-60. The district court then concluded that the Secretary of State was precluded under *res judicata* from considering Aguasvivas's CAT claim because the BIA had previously considered the claim in the immigration context. Add. 65-68.

SUMMARY OF ARGUMENT

The district court erred in granting Aguasvivas's habeas petition. It misinterpreted the Treaty's documentary requirements, and it usurped the role of the Secretary of State when it found that Aguasvivas's CAT claim precludes his extradition. On both these grounds, this Court should reverse the district court.

First, the Dominican Republic's arrest warrant sets forth the charges against Aguasvivas and thus satisfies both the Treaty requirement that the country requesting extradition submit "the document setting forth the charges against the person sought," and the requirement that it submit "a copy of the warrant or order of arrest or detention." The district court's finding to the contrary—that the Dominican Republic was also required to submit a "formal charging document lodged in the court system"—contravenes the plain language of the Treaty, the interpretation of both parties to the Treaty, Dominican criminal procedure, and the Supreme Court's guidance that extradition treaties must be liberally construed in favor of extradition.

Second, the district court also erred in making the unprecedented finding that it could exercise habeas jurisdiction to deny Aguasvivas's CAT claim. In so finding, the court erred in several respects.

The district court disregarded the longstanding rule of non-inquiry, pursuant to which humanitarian arguments against extradition are reserved exclusively for the Secretary of State's consideration. For well over a century, the Supreme Court, this Court, and myriad others have faithfully adhered to the rule of non-inquiry, which

respects the Secretary's competence to consider conditions in a foreign country in rendering an extradition decision. Moreover, the CAT is not self-executing and its implementing legislation, the Foreign Affairs Reform and Restructuring Act (the "FARR Act"),⁸ as well as the REAL ID Act of 2005,⁹ reinforce this rule and make unambiguously clear that habeas courts are precluded from considering CAT claims except in the immigration context. Contrary to the district court's conclusion, it was not compelled by the Suspension Clause to review Aguasvivas's CAT claim in violation of these statutes and principles. As a matter of history and practice, the role of a habeas court presiding over an extradition case has never extended to issues concerning the treatment a fugitive will receive in a foreign state.

Moreover, even if the district court otherwise had jurisdiction, Aguasvivas's challenge to extradition under the CAT is not ripe for judicial review because the Secretary of State has not yet fulfilled his obligations, mandated by statute, regulation, and case law, to evaluate the CAT claim and decide whether to surrender Aguasvivas to the Dominican Republic. A decision by the Secretary not to surrender Aguasvivas would moot Aguasvivas's judicial challenge. The court thus, in effect, eliminated the Secretary's statutorily defined role in the extradition process.

⁸ See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, subdiv. B, title XXII, § 2242, 112 Stat. 2681-822 (8 U.S.C. § 1231 note).

⁹ See Pub. L. No. 109-13, Div. B, Tit. I, § 106(a), 119 Stat. 231, 310.

Regardless, the district court erred in applying *res judicata* and finding that a CAT determination made by the BIA three years ago now binds the Secretary. As this Court has recognized, immigration proceedings are separate and independent from extradition proceedings. Further, the Secretary has a unique ability to seek assurances and conditions to mitigate potential CAT concerns; he will be examining Aguasvivas's CAT claim in the context of him returning in custody to the Dominican Republic to face trial with Treaty protections; and the circumstances affecting the CAT claim may have changed since the BIA issued its decision.

ARGUMENT

I. THE DOMINICAN REPUBLIC'S EXTRADITION REQUEST FULFILLS THE TREATY'S DOCUMENTARY REQUIREMENTS

The Dominican Republic's extradition request fulfills the Treaty's documentary requirements, including its requirement that a requesting country provide "a copy of the document setting forth the charges against the person sought." The request here contains the Dominican arrest warrant, which itself is the document setting forth the charges against Aguasvivas. The district court's finding to the contrary—that the Dominican request is insufficient because it does not contain a "formal charging document lodged in the court system"—ignores the plain language of the Treaty, the interpretation of both parties to the Treaty, the canons of construction applicable to extradition treaties, and ample case law rejecting similar arguments.

A. Standard of Review

“In examining habeas corpus petitions challenging extradition proceedings, the scope of inquiry is limited.” *Matter of Extradition of Manzi*, 888 F.2d 204, 205 (1st Cir. 1989) (per curiam). “[H]abeas corpus review ‘is not a means for rehearing what the magistrate already decided.’” *Id.* (quoting *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925)). Accordingly, the Court only examines “whether the magistrate had jurisdiction to consider the matter, whether the offense charged is within the treaty and by a somewhat liberal construction, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.” *Id.* (internal quotations omitted). In undertaking such review, this Court has recognized that “[t]reaty interpretation is a purely legal exercise” subject to de novo review. *In re Extradition of Howard*, 996 F.2d 1320, 1329 (1st Cir. 1993).

B. The Dominican Republic Met the Treaty Requirement that It Submit the Document Setting Forth the Charges

1. The Treaty’s Flexible Language Should Be Given Effect

“The interpretation of a treaty, like the interpretation of a statute, begins with its text.” *Medellin v. Texas*, 552 U.S. 491, 506 (2008); *see also, e.g., Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (“It is well established that, when the statutory language is plain, we must enforce it according to its terms.”). Pursuant to Article 7.3 of the Treaty, the Dominican Republic was required to submit, *inter alia*, “a copy of the warrant or order of arrest or detention issued by a judge or other competent authority,” and “a

copy of the document setting forth the charges against the person sought.” *See* Add. 90 (Treaty, Art. 7.3(a), (b)). The plain text of Article 7.3(b) of the Treaty does not specify that any particular type of document is required, only that the document “setting forth the charges” against the subject of the extradition request must be provided.

By including an adaptable and non-specific requirement—that the requesting country provide the document setting forth the charges against the person sought for extradition—the Treaty recognizes that different types of documents may be provided to fulfill this requirement. Prosecuting authorities who are seeking the return of fugitives may employ varying procedures to initiate criminal proceedings, and if the parties to the Treaty had intended to require the submission of a specific type of document, such as an “indictment” or “charge sheet,” they could have so required. *See, e.g., Matter of Assarsson*, 635 F.2d 1237, 1243 (7th Cir. 1980) (“If the parties had wished to include the additional requirement that a formal document called a charge be produced, they could have so provided.”); *Emami v. U.S. Dist. Ct. for N. Dist. Of Cal.*, 834 F.2d 1444, 1448 (9th Cir. 1987) (“grafting such a [formal charge] requirement as Emami proposes on to the treaty in the instant case is inadvisable”).

Moreover, the flexible language of Article 7.3(b) comports with the Treaty as a whole. *See, e.g., U.S. Nat’l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (“Over and over we have stressed that in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”) (cleaned up). For example, in describing

the parties' extradition obligations, Article 1 of the Treaty refers to persons "sought by the Requesting Party from the Requested Party for prosecution," rather than only persons who have been formally charged. *See* Add. 87 (Treaty, Art. 1).

Conversely, the Treaty reflects that the parties knew how to require a specific document when they so intended. For example, in cases where the fugitive is wanted to serve a sentence, Article 7.4(a) requires "the judgment of conviction, or, if a copy is not available, a statement by a judicial or other competent authority that the person has been convicted or found guilty." *See* Add. 90 (Treaty, Art. 7.4(a)). Thus, Article 7.4(a) is rigid: The requesting country must submit a specific type of document—the judgment of conviction—if it is available. Article 7.3(b) does not impose a similar constraint; any document that sets forth the charges may satisfy the provision.

The Dominican arrest warrant thus satisfies the plain terms of Article 7.3(b) of the Treaty. It describes the criminal acts that Aguasvivas is alleged to have committed and lists the Dominican statutes that Aguasvivas is alleged to have violated. *See* App. 23. It therefore qualifies as "the document setting forth the charges against the person sought." *See* Add. 90 (Treaty, Art. 7.3(b)).

2. Both Parties to the Treaty Agree that the Documentary Requirement Was Met in this Case

Another independent reason that this Court should find that the Dominican warrant satisfies the Treaty's documentary requirement is that doing so accords with the U.S. Department of State's interpretation of the Treaty, as well as that of the

Dominican Republic. As the Supreme Court has explained, “[w]hen the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.” *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). Such is the case here.

The State Department’s view, as set forth in a supplemental declaration from its Assistant Legal Adviser for the Office of Law Enforcement and Intelligence, is that a requesting country is not required to submit separate documents in order to satisfy Articles 7.3(a) and 7.3(b) of the Treaty. *See* App. 209. Accordingly, the State Department takes the position that the warrant issued for Aguasvivas’s arrest satisfies both requirements. App. 211. The State Department’s interpretation of the Treaty requirements, and their application to this case, is entitled to great weight. *See, e.g., Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (“It is well settled that the Executive Branch’s interpretation of a treaty is entitled to great weight.”) (internal quotation marks and citation omitted); *United States v. Li*, 206 F.3d 56, 63 (1st Cir. 2000) (en banc) (“We first consult the United States Department of State’s interpretation of the two treaties, to which we accord substantial deference.”).

While the view of the State Department is entitled to significant deference on its own, such deference is particularly warranted when its view is consistent with that of the treaty partner, as is the case here. *See, e.g., Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *cf. Arias Leiva v. Warden*, 928 F.3d 1281, 1288 (11th Cir. 2019) (holding that the

U.S.-Colombia extradition treaty is in full force and effect because, *inter alia*, both the United States and Colombia understand it to be in effect). Here the Dominican Republic, through an affidavit by Prosecutor Arias, has confirmed its similar view that the “Treaty does not state as a requirement for grant[ing] or deny[ing] extradition, the prior existence of an indictment against the person required in extradition.” *See App.* 213. The Court should give deference to the parties’ mutual understanding of the Treaty terms—that a separate charging document is not required to satisfy Article 7.3(b).

The parties’ intent not to require a formal charging document is further evidenced by the Dominican Republic’s criminal procedure. *See, e.g., United States v. Stuart*, 489 U.S. 353, 369 (1989) (“The practice of treaty signatories counts as evidence of the treaty’s proper interpretation, since their conduct generally evinces their understanding of the agreement they signed.”). As described in the extradition request, when a criminal suspect is located abroad, the Dominican Republic may first seek an arrest warrant from a court that states the charges against the fugitive, and the prosecution may obtain a separate charging document *after* the fugitive is arrested and interviewed. *See App.* 15. The Dominican Republic followed these procedures when initiating criminal proceedings against Aguasvivas. *See App.* 214 (“In the case of [Aguasvivas], the Prosecutor wants to know the version of the accused of how and why

he perpetrated the facts imputed to him . . . *prior [to] filing an indictment against him.*”) (emphasis added).¹⁰

Given this procedure, the district court’s determination that a separate charging document is required under Article 7.3(b) of the Treaty has potentially far-reaching consequences, as the Dominican Republic could find itself unable to satisfy the treaty requirements in other cases where the fugitive has similarly fled prior to arrest. It is nonsensical that the Dominican Republic would have negotiated and agreed to a treaty term that it may be unable to fulfill, thereby providing safe haven to criminals who have fled to the United States, and frustrating a fundamental purpose of the extradition treaty.

3. Canons of Construction Demand that the Treaty Be Interpreted Liberally in Favor of Extradition

Even if there were any ambiguity as to what Article 7.3(b) requires, an extradition treaty much be construed liberally in favor of extradition. As the Supreme Court articulated in *Factor v. Laubenheimer*, “if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.” 290 U.S. 276, 293-94 (1933); *see also, e.g., Grin v. Shine*, 187 U.S. 181, 184 (1902) (extradition treaties should be “interpreted with a view to fulfil our just obligations to other powers”). This Court, as well as numerous sister

¹⁰ The Dominican Republic’s determination that it complied with its own criminal laws is entitled to deference. *See, e.g., Emami*, 834 F.2d at 1449.

circuits, have observed that *Factor* demands that ambiguities in an extradition treaty be construed in favor of the state signatories—that is, in favor of surrendering a fugitive to the requesting country. *Kin-Hong*, 110 F.3d at 110 (“[E]xtradition treaties, unlike criminal statutes, are to be construed liberally in favor of enforcement.”); *see also, e.g., In re Extradition of Howard*, 996 F.2d at 1330-31; *Martinez v. United States*, 828 F.3d 451, 463 (6th Cir. 2016) (en banc) (same). Accordingly, to the extent that the Court finds the documentary requirement ambiguous, it must liberally interpret the provision and find that the Dominican warrant fulfills it.

Similarly, the district court’s determination is at odds with the longstanding principle that defenses “savor[ing] of technicality” are particularly inappropriate in extradition proceedings. *Bingham v. Bradley*, 241 U.S. 511, 517 (1916); *see also, e.g., Fernandez*, 268 U.S. at 312 (“Form is not to be insisted upon beyond the requirements of safety and justice.”); *Skaftouros v. United States*, 667 F.3d 144, 160 (2d Cir. 2011) (“[A]rguments that savor of technicality are peculiarly inappropriate in dealings with a foreign nation.”) (internal quotation marks and citation omitted). In this case, the Dominican arrest warrant fulfills the function of making Aguasvivas aware of the charges against him. To require something more would improperly elevate form over substance.

4. The District Court's Reasons for Imposing an Extra-Textual Requirement of a Formal Charging Document Are Unsupported

The district court's reasons for concluding that Article 7.3(b) "refers to a formal charging document," Add. 54, are flawed for a number of reasons. *First*, contrary to the district court's finding, the requirement that the requesting country support its extradition request with "*the* document setting forth the charges" rather than "*a* document setting forth the charges" does not demand submission of a formal charging document. *See id.* Any document, such as a warrant, that presents the criminal charges can serve as "*the* document setting forth the charges," just as much as it can serve as "*a* document setting forth the charges."

Second, the Treaty's requirement that the requesting country submit an arrest warrant, Article 7.3(a), is not "surplusage" if an arrest warrant also satisfies Article 7.3(b). Rather, the Treaty simply recognizes that, in some cases, the arrest warrant may not set forth the charges. In such circumstances, submission of an arrest warrant is still required under Article 7.3(a) to prove that the foreign country has the power to bring the fugitive into custody upon return, but a separate charging document may also be required to satisfy Article 7.3(b). Nothing, however, precludes an arrest warrant from satisfying both requirements, as is the case here. By way of example, if a treaty required the submission of "the document manifesting the views of Judge A" and "the document manifesting the views of Judge B," a single judicial opinion written by Judge A, but also joined by Judge B, would plainly fulfill both of these requirements.

Third, courts have repeatedly held that a foreign arrest warrant may also be considered a charging document. *See, e.g., Sainez v. Venables*, 588 F.3d 713, 717 (9th Cir. 2009) (“We agree that for the purpose of a civil proceeding such as an extradition, a Mexican arrest warrant is the equivalent of a United States indictment”); *In re Extradition of Sarellano*, 142 F. Supp. 3d 1182, 1186 n.2 (W.D. Okla. 2015) (finding that a Mexican judge’s “arrest warrant ‘is a charging document’ in the sense that ‘it identifies the offense in the criminal code, sets out the essential facts of the alleged crime, and details the evidentiary basis for the charge’”) (alteration omitted); *United States v. Nolan*, 651 F. Supp. 2d 784, 795 (N.D. Ill. 2009) (concluding that an arrest warrant from Costa Rica was sufficient to satisfy the treaty’s requirement of “the charging document, or any equivalent document issued by a judge or judicial authority”). By contrast, the district court did not cite any cases supporting its conclusion that a separate, formal charging document is required, even where the submitted arrest warrant sets forth the charges.

In sum, the district court erred in reaching the unprecedented conclusion that the Dominican Republic was required to submit a separate, formal charging document even though such an interpretation is not supported by the plain language of the Treaty, is contrary to the intent of the parties to the Treaty, is inconsistent with Dominican criminal procedure, and disregards Supreme Court guidance that favors liberal constructions of extradition treaties.

II. PURSUANT TO THE RULE OF NON-INQUIRY AND TWO CONGRESSIONAL ENACTMENTS, THE DISTRICT COURT WAS BARRED FROM REVIEWING PETITIONER'S CAT CLAIM, AND ITS APPLICATION OF RES JUDICATA WAS ERRONEOUS

The district court was the first court ever to exercise habeas jurisdiction to deny extradition based on a fugitive's CAT claim. In doing so, the court erred in a number of respects. It erroneously concluded that it had habeas jurisdiction to review a CAT claim, when such jurisdiction has never existed in extradition, as Congress has at least twice made clear. Moreover, even if the district court did otherwise have jurisdiction, Aguasvivas's claim was not ripe for the court's consideration because the Secretary has not yet rendered a decision on his surrender. And regardless, the district court's application of res judicata ignored that immigration and extradition are separate proceedings, and one is not preclusive on the other.

A. Standard of Review

While the scope of habeas review in extradition is narrow, *see supra* 17, issues of jurisdiction, justiciability, ripeness, and res judicata are reviewed de novo. *See, e.g., United States v. Santiago-Colon*, 917 F.3d 43, 49 (1st Cir. 2019); *Reddy v. Foster*, 845 F.3d 493, 501 (1st Cir. 2017); *Stern v. U.S. Dist. Court for the Dist. of Mass.*, 214 F.3d 4, 10 (1st Cir. 2000); *Universal Ins. Co. v. Office of Ins. Com'r*, 755 F.3d 34, 37 (1st Cir. 2014).

B. The District Court Was Precluded from Reviewing Petitioner's CAT Claim

1. Courts Have Long Recognized that It Is the Secretary of State's Responsibility to Evaluate Claims Regarding the Treatment a Fugitive May Face in a Requesting Country

Pursuant to 18 U.S.C. § 3186, following certification, the Secretary “determine[s] whether or not the [fugitive] should actually be extradited.” *Kin-Hong*, 110 F.3d at 109; *see also, e.g., Hilton v. Kerry*, 754 F.3d 79, 84 (1st Cir. 2014). As this Court has recognized, the Secretary may “decline to surrender the relator on any number of discretionary grounds, including but not limited to, humanitarian and foreign policy considerations.” *Kin-Hong*, 110 F.3d at 109.

In light of this legal framework, the Supreme Court, this Court, and myriad other courts have recognized, under the longstanding rule of non-inquiry, that “questions about what awaits the [fugitive] in the requesting country” are reserved for the Secretary and are not judicially reviewable. *Id.* at 111; *see Munaf v. Geren*, 553 U.S. 674, 700 (2008) (“Habeas corpus has been held not to be a valid means of inquiry into the treatment the [fugitive] is anticipated to receive in the requesting state.”) (internal quotations and citation omitted); *see also, e.g., Hoxha v. Levi*, 465 F.3d 554, 563 (3d Cir. 2006) (“Under the traditional doctrine of ‘non-inquiry’ . . . humanitarian considerations are within the purview of the executive branch and generally should not be addressed by the courts in deciding whether a petitioner is extraditable.”); *Abmad v. Wigen*, 910 F.2d 1063, 1067

(2d Cir. 1990) (“It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds.”).

As this Court has stated, “the rule of non-inquiry tightly limits the appropriate scope of judicial analysis in an extradition proceeding.” *Kin-Hong*, 110 F.3d at 110. Pursuant to the rule, “courts refrain from investigating the fairness of a requesting nation’s justice system, and from inquiring into the procedures or treatment which await a surrendered fugitive in the requesting country.” *Id.* (internal quotations and citation omitted). “The rule of non-inquiry, like extradition procedures generally, is shaped by concerns about institutional competence and by notions of separation of powers.” *Id.* That rule respects the unique province of the Executive Branch to evaluate claims of possible future mistreatment at the hands of a foreign state, its ability to obtain assurances of proper treatment (if warranted), and its capacity to provide for appropriate monitoring overseas of a fugitive’s treatment. Thus, “[i]t is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed.” *Id.* at 111.

The origins of the rule of non-inquiry date back well over a century. *See, e.g., Neely v. Henkel*, 180 U.S. 109, 122-23 (1901). In *Neely*, the Supreme Court held that habeas corpus was not available to defeat the extradition of an American citizen to Cuba despite the petitioner’s claim that Cuba’s laws violated the U.S. Constitution. *Id.* The

fact that the petitioner would be subjected to “such modes of trial and to such punishment as the laws of [Cuba] may prescribe for its own people” was not a claim for which “discharge on habeas corpus” could issue. *Id.* at 123, 125.

Neely has stood the test of time and was reaffirmed by the Court in *Munaf*, 553 U.S. at 695-703. There, the habeas petitioners contended that a federal court should enjoin their transfer to Iraqi authorities to face trial in Iraqi courts “because their transfer to Iraqi custody is likely to result in torture.” *Munaf*, 553 U.S. at 700. Relying on principles announced in extradition cases, the Court held that “[s]uch allegations are of course a matter of serious concern, but in the present context that concern is to be addressed by the political branches, not the Judiciary.” *Id.* The Court explained that, even where constitutional rights are concerned, “it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments.” *Id.* at 700-01.

The *Munaf* Court noted that the government had represented that “it is the policy of the United States not to transfer an individual in circumstances where torture is likely to result,” and that such determinations rely on “the Executive’s assessment of the foreign country’s legal system and the Executive’s ability to obtain foreign assurances it considers reliable.” *Id.* at 702 (cleaned up). The Court concluded that “[t]he Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government’s ability to speak with one voice in this area.” *Id.* “In contrast,” the Court

explained, “the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is.” *Id.* The Court rejected the view that the government would be indifferent to that prospect, concluding instead that “the other branches possess significant diplomatic tools and leverage the judiciary lacks.” *Id.* at 702-03 (internal quotations omitted).

2. The CAT, the FARR Act, and the REAL ID Act Also Leave No Doubt that Federal Courts Cannot Exercise Habeas Jurisdiction to Review CAT Claims in Extradition Cases

Against the historical backdrop in which the rule of non-inquiry has been consistently and repeatedly applied in extradition cases, the United States undertook international legal obligations under the CAT. The CAT did not alter the longstanding rule of non-inquiry. The Treaty is not self-executing, and Congress has twice made clear that federal courts may not review CAT claims other than in the immigration context.

a. The CAT Is Not Self-Executing

The CAT was adopted by the United Nations General Assembly in 1984. Article 3 of the CAT provides, in relevant part, that no state party shall “extradite a person to another State where there are substantial grounds for believing that he would be in

danger of being subjected to torture.”¹¹ That article directs the “competent authorities” responsible for evaluating torture claims to “take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.” CAT, Art. 3.

The Senate gave its advice and consent to the CAT subject to the declaration that “Articles 1 through 16 of the Convention are not self-executing.” 136 Cong. Rec. 36,198. Thus, “[t]he reference in Article 3 to ‘competent authorities’ appropriately refers in the United States to the competent administrative authorities who make the determination whether to extradite, expel, or return. . . . Because the Convention is not self-executing, the determinations of these authorities will not be subject to judicial review in domestic courts.” S. Exec. Rep. No. 101-30, at 17-18 (1990).

b. The FARR Act Does Not Provide for Court Review of CAT Claims in Extradition Cases

Congress implemented Article 3 of the CAT by enacting Section 2242 of the FARR Act. Section 2242(a) states that it is the “policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”

¹¹ In providing its advice and consent, the Senate stated its understanding that this provision means “if it is more likely than not that he would be tortured.” 136 Cong. Rec. 36,198 (Oct. 27, 1990).

Section 2242(b) of the FARR Act directs the “heads of the appropriate agencies” to prescribe regulations implementing Article 3 of the CAT. The Secretary of State has promulgated regulations providing that, when appropriate, “the Department considers the question of whether a person facing extradition from the U.S. ‘is more likely than not’ to be tortured in the State requesting extradition.” 22 C.F.R. § 95.2(b); *see also* 22 C.F.R. § 95.1(b) (defining torture). The regulations expressly state that the Secretary’s surrender decisions are “matters of executive discretion not subject to judicial review.” 22 C.F.R. § 95.4. The regulations also make clear that the provisions in the FARR Act providing for judicial review in the context of immigration removal proceedings are “not applicable to extradition proceedings.” *Id.*

Critically, Section 2242(d) of the FARR Act clarifies that the statute does not confer courts with jurisdiction to review claims under the CAT outside the context of a final order of removal entered in an immigration case. It states:

Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), . . . *nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the [CAT] or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).*

FARR Act § 2242(d), 112 Stat. 2681-822 (8 U.S.C. § 1231 note) (emphasis added).

c. The REAL ID Act Makes Doubly Clear that Courts May Not Review CAT Claims in Extradition Cases

Congress again addressed judicial review of claims under the CAT when it enacted 8 U.S.C. § 1252(a)(4) as part of the REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(B), 119 Stat. 231, 310. That provision states:

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28 or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

8 U.S.C. § 1252(a)(4).

The CAT is therefore not self-executing, the FARR Act does not create jurisdiction for judicial review of claims under the CAT except in certain immigration proceedings, and the REAL ID Act makes doubly clear that specified immigration proceedings “shall be the sole and exclusive means for judicial review of any cause or claim under the [CAT].” *See* FARR Act § 2242(d); 8 U.S.C. § 1252(a)(4). Thus, the CAT did nothing to alter the historical rule of non-inquiry; if anything, its implementing legislation cemented the fact that federal courts may not consider extradition CAT claims.

d. No Court Has Ever Exercised Habeas Jurisdiction to Deny Extradition Based on a CAT Claim

Consistent with the rule of non-inquiry and these congressional enactments, the case law amply supports the conclusion that courts may not exercise habeas jurisdiction to deny extradition based on a CAT claim. In *Hoxha*, 465 F.3d 554, for example, the petitioner sought to block his extradition to Albania on the grounds that it would violate the CAT and the FARR Act. See *Hoxha*, 465 F.3d at 564. The Third Circuit rejected the claim and held that the CAT is “not self-executing” and “therefore does not in itself create judicially enforceable rights.” *Id.* at 564 n.15. The *Hoxha* court held that the CAT’s implementing legislation, the FARR Act, “does not *create* court jurisdiction.” *Id.* at 564 (emphasis in original). It also held that the rule of non-inquiry continued to apply and the district court “correctly declined to consider Petitioner’s humanitarian claims.” *Id.*

Similarly, in *Mironescu v. Costner*, the petitioner asserted a CAT claim in an effort to bar his extradition to Romania. 480 F.3d 664, 674 (4th Cir. 2007). But the Fourth Circuit held that Section 2242(d) of the FARR Act “plainly conveys that although courts may consider or review CAT or FARR Act claims as part of their review of a final removal order, they are otherwise precluded from considering or reviewing such claims.” *Id.*; see also *id.* at 677 (“Thus, in light of the absence of any other plausible reading, we interpret § 2242(d) as depriving the district court of jurisdiction to consider Mironescu’s claims.”).

The D.C. Circuit reached the same conclusion in *Omar v. McHugh*, holding that “[b]y its terms, the FARR Act provides a right to judicial review of conditions in the receiving country only in the immigration context, for aliens seeking review of a final order of removal.” 646 F.3d 13, 17 (D.C. Cir. 2011) (Kavanaugh, J.). The D.C. Circuit also noted that “[t]he REAL ID Act states that *only* immigration transferees have a right to judicial review of conditions in the receiving country, during a court’s review of a final order of removal.” *Id.* at 18 (emphasis added).

The Ninth Circuit’s decision in *Trinidad y Garvia v. Thomas*, 683 F.3d 952, 957 (2012) (en banc) (per curiam), represents the outermost bounds to which a circuit court has ever exercised jurisdiction in the extradition habeas context to address a fugitive’s CAT claim. There, the Ninth Circuit held that the State Department may be required to confirm that it has complied with its regulations implementing the FARR Act; namely, that the Secretary considered the fugitive’s torture claims and did not find it “more likely than not” that the fugitive would face torture upon surrender to the requesting country. *See id.* (internal quotations omitted).¹² The *Trinidad* court made clear that if the State Department provides such confirmation, “the court’s inquiry shall have reached its end.” *Id.* That is because the “doctrine of separation of powers and

¹² The government respectfully disagrees with this aspect of the decision, which rests in part on the flawed premise that the REAL ID Act’s limitation on habeas jurisdiction can plausibly be confined to immigration proceedings. *See* 8 U.S.C. § 1252(a)(5).

the rule of non-inquiry block any inquiry into the substance of the Secretary's declaration." *Id.*

In short, the CAT did not displace the rule of non-inquiry and confer a habeas court with jurisdiction to review humanitarian arguments against extradition. To the contrary, the laws and regulations implementing the CAT unambiguously preclude judicial review of CAT claims in the extradition context.

3. The District Court's Contrary Conclusion Is Unsupported and Incorrect

In reaching its contrary conclusion, the district court violated the rule of non-inquiry and incorrectly determined that the Constitution's Suspension Clause required it to review Aguasvivas's CAT claim.

a. *The District Court Improperly Disregarded the Longstanding Rule of Non-Inquiry in Becoming the First Court Ever to Deny Extradition on Humanitarian Grounds*

When it found that the CAT barred Aguasvivas's extradition, the district court noted that the rule of non-inquiry is not jurisdictional in nature or absolute, applies only "when the petitioner questions the *wisdom* of the Secretary of State's decision to extradite," rather than the "*legality* of the extradition," and does not apply because the BIA has made a CAT determination. Add. 61-62 (emphasis in original). No court has ever cast aside the well-established doctrine on such grounds, and the court here erred in doing so for a number of reasons.

First, whether the rule of non-inquiry divests the court of jurisdiction to consider Aguasvivas's humanitarian claims or renders such claims non-justiciable makes no practical difference, as the import is the same: The Secretary is responsible for assessing humanitarian claims against extradition rather than the courts.

Second, contrary to the district court's finding, the rule of non-inquiry is routinely applied in cases where the petitioner challenges the legality of his extradition as opposed to its wisdom. *See, e.g., Munaf*, 553 U.S. at 700-01 ("Even with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments."); *see also supra* 27-29.

Third, while some courts have recognized a theoretical exception to the rule of non-inquiry in an extreme case, as this Court has noted, "[n]o court has yet applied such a theoretical . . . exception." *Hilton*, 754 F.3d at 87. Notably, the Supreme Court has never endorsed such an exception and did not entertain its application in *Munaf*, where the petitioners claimed they would be tortured in an Iraqi prison. Regardless, it would be particularly inappropriate to apply such a theoretical exception in this case, where the Secretary has not yet even reviewed Aguasvivas's claims and considered whether any torture concerns could be mitigated through conditions, assurances, and diplomatic leverage.

Fourth, the BIA's CAT determination does not eviscerate the rule of non-inquiry. As discussed below, *see infra* 45-52, while the Secretary may certainly consider the events

in Aguasvivas’s separate immigration proceedings, he is not bound by their resolution. In rendering his extradition decision, the Secretary will carefully consider any CAT claims or other arguments against extradition that Aguasvivas chooses to make, and he will not extradite Aguasvivas if he ultimately determines that Aguasvivas is more likely than not to be tortured if surrendered to the Dominican Republic.¹³ However, pursuant to the rule of non-inquiry, “[t]he Judiciary is not suited to second-guess” the Secretary’s extradition decision. *Munaf*, 553 U.S. at 702.

b. The Suspension Clause Does Not Require the Court to Review a CAT Claim in Extradition

Notwithstanding the rule of non-inquiry, the district court found that it must review Aguasvivas’s CAT claim in habeas proceedings because of the “Suspension Clause questions that would arise if the Court construed the provision to divest it of habeas jurisdiction.” *See* Add. 59-60, 65. This erroneous conclusion is based on the flawed premise that federal courts historically had jurisdiction to adjudicate CAT claims in extradition proceedings. The writ of habeas corpus cannot be deemed “suspended” because, as a matter of history and practice, the role of the habeas court in extradition cases has never been to adjudicate humanitarian or CAT claims.

¹³ The district court thus incorrectly likened this case to the “‘extreme case,’” where “‘the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway.’” *See* Add. 62 (quoting *Munaf*, 553 U.S. at 702) (emphasis omitted).

The Suspension Clause provides, “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. Const. art. I, § 9, cl. 2. At a minimum, the Clause “protects the writ as it existed when the Constitution was drafted and ratified.” *Boumediene v. Bush*, 553 U.S. 723, 746 (2008). The Supreme Court has not yet decided whether the Suspension Clause protects only the right of habeas corpus as it existed in 1789, or whether the Clause’s protections have grown with the expansion of the writ. *Id.* But under either view, the Clause does not require review of Aguasvivas’s CAT claim.

The habeas corpus right that existed in 1789 cannot plausibly be extended to the Secretary’s surrender decision in extradition proceedings. “At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention” *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). The historical writ covered “detentions based on errors of law, including the erroneous application or interpretation of statutes.” *Id.* at 302. But courts have traditionally “recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand.” *Id.* at 307. The Secretary of State’s surrender decision has historically fallen into the latter category, which is “not a matter of right” that can be judicially enforced through habeas. *Id.* at 308 (quoting *Jay v. Boyd*, 351 U.S. 345, 354 (1956)). The Secretary’s decision is thus not subject to habeas review under the writ as it existed when the Constitution was ratified.

Nor has the Supreme Court expanded habeas review of extradition decisions in the years since. As stated, the Supreme Court has consistently held that the treatment a fugitive might receive in the requesting country is not a proper basis for habeas relief to prevent extradition. In *Munaf*, the Supreme Court “examined the relevant history and held that . . . a right to judicial review of conditions in the receiving country before [the petitioner] is transferred[] is not encompassed by the Constitution’s guarantee of habeas corpus.” *Omar*, 646 F.3d at 23 n.10 (citing *Munaf*, 553 U.S. at 700-03); *see also* *Munaf*, 553 U.S. at 700 (“Habeas corpus has been held not to be a valid means of inquiry into the treatment the [fugitive] is anticipated to receive in the requesting state.”) (internal quotations and citation omitted); *Neely*, 180 U.S. at 123.

While the role of a habeas court in extraditions has not extended to reviewing humanitarian claims, the habeas court has historically had the limited role of determining whether the magistrate judge “had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.” *Fernandez*, 268 U.S. at 312. Aguasvivas had full and fair opportunity to litigate these issues, and therefore the writ was not suspended. *See Ye Gon v. Dyer*, 651 Fed. App’x 249, 252 (4th Cir. 2016) (per curiam) (unpublished) (rejecting petitioner’s Suspension Clause argument and noting that he “has clearly had the full benefit of habeas review of the extradition request under [the *Fernandez*] standard.”) (quoting the district court’s decision).

The district court erred in reaching the contrary conclusion that the Suspension Clause necessitated its review of Aguasvivas's CAT Claim. To support its finding that a CAT claim "fell within the historical ambit of habeas," it principally relied on this Court's decision in *Saint Fort v. Ashcroft*, 329 F.3d 191 (1st Cir. 2003), an immigration case. *See* Add. 60. That case, however, is inapposite. In *Saint Fort*, the Court held that a criminal alien subject to an immigration order of removal had a right to habeas review of a CAT claim because there would be a violation of the Suspension Clause if that right was not available. Critically, however, the Court's historical findings that undergirded its Suspension Clause analysis did not encompass the dispositive issue here: Whether fugitives historically had a right to judicial review of the treatment they anticipate receiving in the foreign country in connection with a habeas challenge to extradition. Because the answer to this question is clearly no, there cannot be a Suspension Clause issue in extradition cases.

In *Saint Fort*, the Court emphasized that "[h]istory is important here because the Suspension Clause's protections are at their greatest height when guarding usages of the writ that date to the founding." 329 F.3d at 202. In the immigration context, the Court noted that "[b]efore 1996, aliens had a *broad right* to judicial review in the courts of appeal," and they could also "challenge a final order of deportation through employing the writ of habeas corpus." *Id.* at 197 (emphasis added). The Court also relied heavily on *St. Cyr*, where the Supreme Court declined to interpret certain other immigration statutes as repealing habeas jurisdiction because "to conclude that the writ is no longer

available in this context would represent a departure from historical practice *in immigration law*.” *Id.* at 199 (quoting *St. Cyr*, 533 U.S. at 305) (emphasis added). In short, the “weight of historical precedent supporting continued habeas review in immigration cases” was instrumental to the Court’s holding that the FARR Act did not “repeal” habeas jurisdiction in that particular immigration context. *Id.* at 200-01.

The Court’s recognition in *Saint Fort* that aliens historically had a “broad right to judicial review” in immigration cases contrasts sharply with what this Court, the Supreme Court, and myriad other courts have found to be the case with habeas review in the extradition context, which has always been narrowly construed and where the rule of non-inquiry precludes courts from “inquiring into the procedures or treatment which await a surrendered fugitive in the requesting country.” *Kin-Hong*, 110 F.3d at 110 (internal quotations and citation omitted); *see also, e.g., Omar*, 646 F.3d at 19 (“[A]pplying what has been known as the rule of non-inquiry, courts historically have refused to inquire into conditions an extradited individual might face in the receiving country.”). Fugitives have never had a right to challenge their extradition based on the type of claim asserted by Aguasvivas, and thus the FARR Act and the REAL ID Act did not repeal or suspend any preexisting rights. Therefore, *Saint Fort* and its predicate, *St. Cyr*, do not support the district court’s conclusion. *See, e.g., Omar*, 646 F.3d at 23 n.10 (distinguishing *St. Cyr* on the grounds that it only “protected and enforced what it determined to be the historical scope of the writ”) (citing *St. Cyr*, 533 U.S. at 300-05);

Trinidad, 683 F.3d at 1013 (Kozinski, C.J., dissenting in part) (distinguishing *Saint Fort* from extradition cases where “there’s no preexisting ‘habeas review’ to ‘bar’”).

C. Even if Aguasvivas’s Claim Were Reviewable, It Is Not Ripe

In any event, Aguasvivas’s challenge to extradition under the CAT is not ripe for judicial review because the Secretary of State has not yet considered his CAT claim or decided to surrender him to the Dominican Republic. A decision by the Secretary not to surrender Aguasvivas would moot Aguasvivas’s judicial challenge.

The “ripeness doctrine seeks to prevent the adjudication of claims relating to ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” *Reddy*, 845 F.3d at 500 (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). “Its basic function is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *R.I. Ass’n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 33 (1st Cir. 1999) (internal quotations and citation omitted). That statement describes the facts here because Aguasvivas’s CAT-related claims are entirely contingent on whether the Secretary of State decides to extradite him, and that decision has not yet been made. In other words, a decision by the Secretary to deny extradition would moot Aguasvivas’s judicial challenge. Further, the district court’s decision to short-circuit this process contravenes the extradition statute, regulations, and decades of case law that make it unambiguously clear that the Secretary is responsible for evaluating Aguasvivas’s CAT claim and reaching a surrender decision.

In finding that Aguasvivas's claim was ripe for review, the district court disregarded the extradition statute's "two-step procedure which divides responsibility for extradition between a judicial officer and the Secretary of State." *Kin-Hong*, 110 F.3d at 109 (footnote omitted). Its decision to entirely bypass the Secretary of State and deny Aguasvivas's extradition on humanitarian grounds is unprecedented, and similar claims have been routinely rejected on ripeness grounds. *See, e.g., Meza v. U.S. Atty. Gen.*, 693 F.3d 1350, 1356 (11th Cir. 2012) ("There is nothing in the record to suggest that the Secretary has decided whether to surrender Yacaman. Yacaman's claim about torture is not ripe."); *Hoxha*, 465 F.3d at 565 ("We do not address Petitioner's . . . assertion that, should the Secretary of State decide to extradite Petitioner, we would have jurisdiction to review that decision [for compliance with the FARR Act] under the [Administrative Procedure Act].").

Contrary to the district court's finding, the BIA's CAT determination does not render Aguasvivas's claim ripe for review in this separate habeas proceeding challenging his extradition. As a threshold matter, what effect, if any, the BIA decision has on Aguasvivas's extradition remains academic unless the Secretary decides to surrender Aguasvivas to the Dominican Republic. In any event, as detailed below, immigration decisions do not have a "legally preclusive effect" on extradition cases. *Castaneda-Castillo*, 638 F.3d at 360-61.

D. Regardless, the District Court Erred in Applying Res Judicata

The district court erred in its unprecedented conclusion that the BIA's 2016 "adjudication of the likelihood of torture" as a defense to removal "preclude[s] or estop[s]" the Secretary of State "under res judicata from revisiting" the BIA's adjudication. Add. 65. The district court's application of this doctrine is fundamentally flawed for several reasons.

1. Res Judicata Does Not Apply Because Congress Has Expressly Provided that the Secretary Is the Decision Maker, and Courts Have Repeatedly Found that Immigration and Extradition Proceedings Are Separate and Distinct

As a threshold matter, the BIA's determination does not preclude the Secretary of State from independently reviewing Aguasvivas's CAT claim and rendering a surrender decision because Congress has made clear its intent to have the Secretary do so. *See, e.g., Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("[C]ourts may take it as given that Congress has legislated with an expectation that the principle [of preclusion] will apply *except when a statutory purpose to the contrary is evident.*") (internal quotations and citation omitted; emphasis added); *Aunyx Corp. v. Canon U.S.A., Inc.*, 978 F.2d 3, 7 n.4 (1st Cir. 1992) (citing provision in *Restatement* providing that res judicata does not apply if "according preclusive effect to determination of the issue would be incompatible with a legislative policy that . . . [t]he tribunal in which the issue

subsequently arises be free to make an independent determination of the issue in question”) (quoting *Restatement (Second) of Judgments* § 83).¹⁴

Congress’s intent is evidenced by its enactment of the extradition statutes, pursuant to which the Secretary has “sole discretion to determine whether or not the [fugitive] should actually be extradited,” once the extradition court has found the fugitive extraditable. *Kin-Hong*, 110 F.3d at 109 (citing 18 U.S.C. §§ 3184, 3186). Additionally, in enacting Section 2242(b) of the FARR Act, Congress entrusted the “heads of the appropriate agencies” to prescribe regulations implementing Article 3 of the CAT, and the Secretary of State has promulgated regulations providing that, when appropriate, “the Department considers the question of whether a person facing extradition from the U.S. ‘is more likely than not’ to be tortured in the State requesting extradition.” 22 C.F.R. § 95.2(b). Thus, giving the BIA’s determination res judicata effect would be contrary to Congress’ intent that the Secretary be the ultimate decision-maker in extraditions.

Moreover, the proposition that an immigration court decision could hold preclusive effect on the Secretary of State in the extradition context runs contrary to

¹⁴ See, also, e.g., *Shepherd v. Holder*, 678 F.3d 1171, 1184-85 (10th Cir. 2012) (holding that prior removal proceedings did not estop court’s independent determination of citizenship, noting that statute required court to make an independent judicial determination of citizenship) (citing *Restatement (Second) of Judgments* § 83(4)).

the admonitions of this Court and sister circuits that immigration and extradition are separate and distinct proceedings. As this Court stated in *Castaneda-Castillo*:

[T]he argument that adjudicating the asylum claim would somehow “complicate” the extradition proceedings would have more legs if a decision on the former had legally preclusive effect on the latter. But, as the United States concedes, asylum and extradition proceedings are “separate and distinct,” in the sense that “the resolution of even a common issue in one proceeding is not binding in the other.” Indeed, the government not only concedes this point, it positively stresses it, noting that in light of the current United States–Perú extradition treaty’s silence on the issue, the Secretary of State may, in her discretion, order the extradition of an individual to Perú even if that individual is granted asylum.

638 F.3d at 360–61; *see also, e.g., McMullen v. INS*, 788 F.2d 591, 597 (9th Cir. 1986) (“That a magistrate earlier found McMullen’s acts to be political offenses for purposes of denying extradition does not affect the BIA’s contrary finding under section 243(h)(2)(C) because extradition determinations have no *res judicata* effect in subsequent judicial proceedings.”); *Noeller v. Wojdylo*, 922 F.3d 797, 809 (7th Cir. 2019) (“[I]mmigration and extradition proceedings are separate and independent proceedings governed by different legal standards and procedures.”); *Barapind v. Reno*, 225 F.3d 1100, 1105 (9th Cir. 2000) (immigration proceedings are “separate and independent” from extradition proceedings).

There is also good reason why courts have repeatedly emphasized the independence of these proceedings. The BIA decides CAT claims in the domestic immigration context based upon the evidence presented to it. *See, e.g., Rotinsulu v. Mukasey*, 515 F.3d 68, 73 (1st Cir. 2008). By contrast, “the surrender of a person to a

foreign government is within the Executive's powers to conduct foreign affairs and the Executive is 'well situated to consider sensitive foreign policy issues.'" *Trinidad*, 683 F.3d at 961 (quoting *Munaf*, 553 U.S. at 702) (Thomas, J., concurring). Unlike the BIA, the Secretary of State's extradition determination is not confined to the public record, and he "may make confidential diplomatic inquiries and receive confidential diplomatic assurances about the treatment of an extraditee." *Id.* The Secretary of State possesses "significant diplomatic tools and leverage," *Munaf*, 553 U.S. at 703 (internal quotations omitted), that he may employ to enable the United States to fulfill its extradition treaty obligations. *See Kin-Hong*, 110 F.3d at 110 ("[T]he Secretary may also elect to use diplomatic methods to obtain fair treatment for the relator."). In the domestic immigration context, those tools may be unavailable, and the U.S. foreign policy interest in utilizing them may differ.

2. Even If Res Judicata Could Apply, Its Requirements Are Not Met

Even if res judicata principles theoretically could apply to the Secretary of State under certain circumstances, that standard is not satisfied here. The application of res judicata is only appropriate when: (1) the determination is over an issue that was actually litigated in the first forum; (2) the determination resulted in a valid and final judgment; (3) the determination was essential to the judgment rendered by, and in, the first forum; (4) the issue before the second forum is the same as the one in the first forum; and (5) the parties in the second action are the same as those in the first. *NLRB v. Donna-Lee*

Sportswear Co., Inc., 836 F.2d 31, 34 (1st Cir. 1987). In this case, at minimum, the fourth and fifth elements have not been met.

a. The Issues Are Different

Contrary to the district court's finding, the issues that would be before the Secretary of State in considering whether Aguasvivas is more likely than not to face torture if extradited to the Dominican Republic are not identical to those that were before the BIA years earlier. As a threshold matter, circumstances may have changed with the passage of time, and the development of new facts—including those learned through confidential diplomatic communications—may bear on the CAT claim. The immigration courts considered whether, based on evidence Aguasvivas presented in 2015 and early 2016, it was more likely than not that his removal to the Dominican Republic would result in his being tortured at the instigation, or with the consent or acquiescence of, officials there. By contrast, the issue for the Secretary of State's consideration is whether to surrender Aguasvivas for extradition years later given, *inter alia*, additional information gathered by the Department of State, including the status of other recent fugitives who have been extradited to the Dominican Republic,¹⁵ and whether there exist conditions or assurances indicating that Aguasvivas will not be subjected to the likelihood of torture.

¹⁵ For example, the Secretary may inquire into the status of Aguasvivas's uncle, Ramon Emilio Aguasvivas Mejia, who was extradited to the Dominican Republic in June 2018. *See In re Aguasvivas Mejia*, No. 17-mj-1250 (D. Mass. 2017), DE 1.

There is ample support—in both the claim preclusion and issue preclusion context—for the fact that an earlier decision does not have preclusive effect on a second case if circumstances have changed in the interim period. *See, e.g., Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016) (“[D]evelopment of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim.”) (citing *Restatement (Second) of Judgments* § 24, Comment f); *NLRB v. Davol, Inc.*, 597 F.2d 782, 787 (1st Cir. 1979) (holding that first decision by the National Labor Relations Board would not be “[r]es judicata as to the second grievance” if there were “changed circumstances”); *Walsh v. Int’l Longshoremen’s Ass’n*, 630 F.2d 864, 874 (1st Cir. 1980) (“We have no doubt that collateral estoppel applies only where the ‘controlling facts’ are unchanged.”). Such logic has particular force where, as here, the first tribunal’s finding concerns the likelihood of a future event rather than one that already has transpired.¹⁶

The Secretary’s ability to seek whatever conditions and assurances he deems appropriate to mitigate any potential torture concerns further underscores the fluidity of the issue. *See supra* 48. As this Court has noted, “[t]he State Department alone, and not the judiciary, has the power to attach conditions to an order of extradition” if the Secretary deems it appropriate, and the Secretary can bring the full weight and leverage

¹⁶ The regulatory framework underlying withholding of removal contemplates that a CAT determination may be subject to reopening based on changed circumstances. *See* 8 C.F.R. § 208.24(f).

of the United States government to ensure that any assurances or conditions given by the requesting country are met. *Kin-Hong*, 110 F.3d at 110; *see also, e.g., Munaf*, 553 U.S. at 703 (“the other branches possess significant diplomatic tools and leverage the judiciary lacks”) (internal quotations omitted).¹⁷

b. The Parties Are Different

Regardless, *res judicata* would still not apply because the parties are not the same. Even putting aside the Dominican Republic’s interest in the matter,¹⁸ the district court erred in merging DHS, which was a party to the BIA proceeding, with the respondents in the instant habeas proceeding, none of whom are employed by DHS. *United States v. Ledee*, 772 F.3d 21, 30 (1st Cir. 2014) (“[C]ourts have recognized in the preclusion context the folly of treating the government as a single entity in which representation by one government agent is necessarily representation for all segments of the government.”).¹⁹ Notably, DHS had no authority to represent the United States’

¹⁷ In light of the prospective nature of a CAT determination, as well as the Secretary’s ability to seek assurances, the same logic would apply even if a court had previously reviewed the BIA’s determination.

¹⁸ The Dominican Republic did not have a legal interest in the outcome of Aguasvivas’s immigration proceeding; indeed, CAT claims presented in immigration proceedings generally may not be disclosed to foreign governments without the consent of the applicant. *Cf.* 8 C.F.R. § 208.6. In this extradition, however, the Dominican Republic has a strong interest as the country requesting his extradition.

¹⁹ In a different context, the Fifth Circuit recently rejected a claim that the Securities and Exchange Commission and the Department of Justice are “the same party because they are both Executive Branch agencies.” *United States v. Baker*, 923 F.3d 390, 399-401 (5th Cir. 2019).

interests in complying with its extradition treaty obligations to the Dominican Republic, which had not submitted its extradition request to the United States at the time the BIA rendered its decision. *Cf. Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940) (“There is privity between officers of the same government” such that res judicata applies only if “in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy.”).

Accordingly, res judicata is inapplicable here. The Secretary will, of course, consider the record amassed in the immigration proceedings, in addition to the record in the extradition litigation and any additional materials that Aguasvivas may wish to submit to him. Ultimately, however, the Secretary has an independent statutory and regulatory obligation to review CAT claims and render a decision on surrender.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's Order.

Respectfully submitted,

ANDREW E. LELLING
United States Attorney
District of Massachusetts

BRIAN A. BENCZKOWSKI
Assistant Attorney General
Criminal Division

CYNTHIA A. YOUNG
Chief, Appeals Unit
District of Massachusetts

BRUCE C. SWARTZ
Deputy Assistant Attorney General
Criminal Division

THEODORE B. HEINRICH
Assistant United States Attorney
District of Massachusetts

/s/ Christopher J. Smith
CHRISTOPHER J. SMITH
Associate Director
PHILIP MIRRER-SINGER
Trial Attorney
Office of International Affairs
Criminal Division
U.S. Department of Justice
1301 New York Avenue NW
Washington, D.C. 20530
(202) 532-4154
Christopher.J.Smith@usdoj.gov

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), the undersigned counsel of record certifies that the foregoing Brief for the United States was this day served upon counsel for appellant, by notice of electronic filing with the 1st Circuit CM/ECF system. Upon notification that the electronically filed brief has been accepted as sufficient, a paper copy of the brief will be delivered by first-class mail to:

Amy Barsky

Fick & Marx, LLP
24 Federal Street
4th Floor
Boston, MA 02210
857-321-8360, Ext 4
Email: abarsky@fickmarx.com

Olin W. Thompson

Federal Defender's Office
10 Weybosset St.
Suite 300
Providence, RI 02903
401-528-4281 (ex. 14)
Email: olin_thompson@fd.org

Samia Hossain

Federal Public Defender Office
51 Sleeper Street
5th Floor
Boston, MA 02210
617-223-8061
Email: samia_hossain@fd.org

DATED: OCTOBER 21, 2019

/s/ Christopher J. Smith
CHRISTOPHER J. SMITH
Associate Director
Office of International Affairs
Criminal Division
U.S. Department of Justice
1301 New York Avenue NW
Washington, D.C. 20530
(202) 532-4154
Christopher.J.Smith@usdoj.gov

CERTIFICATE OF COMPLIANCE WITH RULE 32

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,852 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
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DATED: OCTOBER 21, 2019

/s/ Christopher J. Smith
CHRISTOPHER J. SMITH
Associate Director
Office of International Affairs
Criminal Division
U.S. Department of Justice
1301 New York Avenue NW
Washington, D.C. 20530
(202) 532-4154
Christopher.J.Smith@usdoj.gov

Addendum

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**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

In the Matter of the Extradition of

CRISTIAN STARLING AGUASVIVAS

No. 17-mj-4218-DHH

**ORDER, CERTIFICATION OF EXTRADITABILITY,
AND ORDER OF COMMITMENT**

December 6, 2018

Hennessy, M.J.

The United States seeks to extradite Cristian Starling Aguasvivas (“Aguasvivas” or “the Relator”) to the Dominican Republic to face criminal charges of murder, aggravated robbery, association of malefactors, and illegal firearm possession, in violation of Articles 265, 266, 295, 304, 379, and 383 of the Dominican Criminal Code, and Article 39, Paragraph III of Dominican Law 36 on Trade and Possession of Firearms. Dkt. no. 5, at p. 2. Aguasvivas opposes this request and has moved to dismiss the Government’s extradition complaint. Dkt. no. 23 (motion to dismiss); see also dkt. no. 24 (supplemental motion to dismiss); dkt. no. 30 (reply to Government’s opposition to Aguasvivas’s motion to dismiss); dkt. no. 73 (reply to Government’s supplemental memorandum in support of extradition). He contends that the extradition complaint does not comply with the treaty governing extraditions between the United States and the Dominican Republic: the Extradition Treaty between the Government of the United States of America and the Government of the Dominican Republic, Jan. 12, 2015, T.I.A.S. No. 06-1215, 2016 WL 9281220 (available at dkt. no. 23-1) (“the Treaty”). The United States opposes

dismissal. See dkt. no. 28 (opposition to motion to dismiss); see also dkt. no. 65 (supplemental memorandum in support of extradition).

The parties argued the motions to dismiss at a hearing on April 24, 2018. See dkt. nos. 32, 34.¹ The Court also held an extradition hearing on June 29, 2018, at which the parties submitted evidence and made legal arguments addressing whether Aguasvivas is extraditable under the Treaty. See dkt. nos. 57, 60.

For the reasons that follow, Aguasvivas's motion to dismiss (dkt. no. 23) and supplemental motion to dismiss (dkt. no. 24) are DENIED. Furthermore, I find that the extradition request satisfies the Treaty's requirements and that there is probable cause to believe that Aguasvivas committed murder, aggravated robbery, and illegal firearm possession. I therefore CERTIFY that Aguasvivas is extraditable as to those crimes and ORDER Aguasvivas detained pending both review of the Dominican Republic's extradition request by the Secretary of State and Aguasvivas's potential surrender to the Dominican Republic.

I. FACTUAL BACKGROUND

A. The Shooting

On December 6, 2013, the Dominican Republic issued a warrant for Aguasvivas's arrest. See dkt. no. 23-1, at pp. 63–67. The arrest warrant alleges that on or about December 6, 2013,² Aguasvivas and his brother, Frank Aguasvivas,³ were together in the Dominican city of Baní. Id. at 63. Three agents of the Dominican Republic's National Directorate for Drug Control (the "DNCD"), Captain Jimenez, Agent Hernandez, and Agent Ubri, tried to arrest Aguasvivas as

¹ On June 8, 2018, the Court held a hearing principally devoted to the parties' evidentiary and discovery disputes. See dkt. nos. 50, 54. On July 27, 2018, I issued an Order resolving evidentiary and discovery matters. See dkt. no. 62.

² Some documents list the date of the shooting as December 5, while others list the date as December 6.

³ Various documents refer to Aguasvivas's brother as Francis, Frank, or Fran. The Court will refer to him as Frank.

part of an anti-drug operation. Id. During the attempted arrest, Aguasvivas disarmed and shot Agent Ubri three times using Agent Ubri's gun. Id. Agent Ubri died from his wounds. Id. at 63-64. Aguasvivas also shot Captain Jimenez and Agent Hernandez, who both sustained serious but non-fatal injuries. Id. at 64. Aguasvivas and his brother fled the scene. Id.

An autopsy report regarding Agent Ubri that was prepared soon after the shooting concludes that Agent Ubri sustained three “[d]istant wound[s] by short-barreled firearm projectile.” See id. at 70–72. The autopsy report recounts that Agent Ubri “with other three agents [sic] tried to arrest and introduce into a vehicle . . . a presumed drug dealer, but they were injured by someone else, who tried to stop the arrest; in the shooting two more agents were wounded and one left unharmed.” Id. at 70. The report lists Agent Ubri's cause of death as “murder.” Id. at 71 (capitalization altered). As for Captain Jimenez and Agent Hernandez, medical certificates document “wound[s] by firearm” and express “[g]uarded prognos[e]s” that their wounds would heal. See id. at 73–74.

Three years after the shooting, on December 12, 2016, Feliz Sanchez Arias (“Sanchez”), a prosecutor of the Dominican judicial district of Peravia prepared an “[a]ffidavit justificatory” in support of the Dominican Republic's request for Aguasvivas's extradition. Dkt. no 23-1 at 54–62 (Dec. 12, 2016 Sanchez Aff.). Sanchez avers that on December 6, 2013, at 12:30 p.m., Captain Jimenez, Agent Hernandez, and Agent Ubri were conducting an anti-drug operation during which Aguasvivas was arrested and handcuffed. Id. at 57. Frank Aguasvivas was present and protested his brother's arrest. Id. Aguasvivas “took advantage of the distraction of the agents at the time of the intervention of his brother, and, in a surprising way, attacked . . . [Agent Ubri], to whom disarmed and killed [sic], opening fire on all the agents of the National

Directorate for Drug Control that were present.” Id. Sanchez avers that Aguasvivas shot and wounded Captain Jimenez and Agent Hernandez. See id.

Sanchez later signed an additional affidavit in support of the extradition request. See id. at 89–90. In it, Sanchez “reaffirm[s]” that a photograph attached to the extradition request depicts Aguasvivas. Id. at 90. Sanchez further avers:

The same photograph . . . has also been seen and recognized as corresponding to CRISTIAN STARLING AGUASVIVAS a/k/a Momón by the Captain Felipe de Jesús Jiménez García and the officer . . . José Marino Hernández Rodríguez, who are two surviving victims of the shootout attack on the anti-narcotics patrol carried out by CRISTIAN STARLING AGUASVIVAS a/k/a Momón in the city of Baní, Provincia Peravia; they are also eyewitnesses because they saw . . . CRISTIAN STARLING AGUASVIVAS a/k/a Momón . . . disarm, shoot and kill [] the officer . . . LORENZO UBRI MONTERO.

Id. (capitalization in original).

B. Immigration Proceedings

Eight months after the shooting, Aguasvivas fled the Dominican Republic and illegally entered the United States. Dkt. no. 23, at p. 4. Once in the United States, Aguasvivas sought in immigration court asylum, withholding of removal, and relief under the Convention Against Torture, citing fear of the Dominican police. Id. After nine hearings, several of which included witness testimony, an Immigration Judge denied all requested relief. Id. at 4–5. On appeal, the Board of Immigration Appeals (the “BIA”) reversed and granted Aguasvivas withholding of removal under the Convention Against Torture. Id. at 5. Among other things, the BIA found that witnesses credibly testified that the Dominican authorities had tortured them in an effort to learn Aguasvivas’s whereabouts. Id. The BIA concluded “that it is more likely than not that [Aguasvivas] w[ould] be tortured at the instigation of or with the consent or acquiescence of public official[s] in the Dominican Republic” if he were returned to the Dominican Republic. Id.

(third alteration in original). Aguasvivas was released from immigration custody after the BIA issued its decision. Id.

C. Procedural History

On September 15, 2017, Aguasvivas was arrested in Massachusetts on the instant extradition complaint. Dkt. no. 28, at p. 1. According to the extradition complaint, the Dominican Republic has charged Aguasvivas with murder, aggravated robbery, association of malefactors, and illegal firearm possession, in violation of Articles 265, 266, 295, 304, 379, and 383 of the Dominican Criminal Code, and Article 29, Paragraph III of Dominican Law 36 on Trade and Possession of Firearms. Id. at 22; see also dkt. no. 2 ¶ 4.

Following motions to continue the deadline for filing a motion to dismiss, (dkt. nos. 15, 20, 22) Aguasvivas filed a motion to dismiss the extradition complaint on February 27, 2018 and a supplemental motion to dismiss the complaint on March 1, 2018. Dkt. nos. 23, 24. After full briefing, the parties argued the motion on April 24, 2018. See dkt. nos. 32, 34. The Court then held further hearings on June 8 and June 29, 2018. See dkt. nos. 50, 54, 57, 60.

On August 1, 2018, the Government submitted a supplementary memorandum in support of extradition. Dkt. no. 65. Aguasvivas filed a response to the Government's supplemental memorandum on October 24, 2018. Dkt. no. 73.

II. LEGAL BACKGROUND AND STANDARD OF REVIEW

A. Statutory and Legal Framework

Extradition proceedings are governed by 18 U.S.C. ch. 209 ("Chapter 209").⁴ "The statute establishes a two-step procedure which divides responsibility for extradition between a judicial officer and the Secretary of State." United States v. Kin-Hong, 110 F.3d 103, 109 (1st

⁴ Chapter 209 comprises §§ 3181–3196 of Title 18 of the U.S. Code.

Cir. 1997). The judicial officer's responsibilities are set forth at 18 U.S.C. § 3184. That section instructs the judicial officer to determine whether the evidence is "sufficient to sustain the charge under the provisions of the proper treaty or convention." 18 U.S.C. § 3184. If so, the judicial officer "shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State," who then "may" order the relator's extradition. Id. Section 3184 further instructs that if the judicial officer makes this certification, the judicial officer "shall" order the relator incarcerated until the extradition is carried out. Id.

If the judicial officer certifies the relator's extraditability, "[i]t is then within the Secretary of State's sole discretion to determine whether or not the relator should actually be extradited." Kin-Hong, 110 F.3d at 109 (citing 18 U.S.C. § 3186). The Secretary of State may review the judicial officer's factual findings and legal conclusions de novo. Id. Further, "[t]he Secretary may also decline to surrender the relator on any number of discretionary grounds, including but not limited to, humanitarian and foreign policy considerations." Id. (collecting authorities).

Under this division of labor, the judicial officer's inquiry is narrow: it concerns "the existence of a treaty, the offense charged, and the quantum of evidence offered." Id. at 110. "The larger assessment of extradition and its consequences is committed to the Secretary of State," who is best positioned to address matters that implicate U.S. foreign policy.⁵ Id.; see also id. at 111 (noting that "another branch of government . . . has both final say and greater discretion in these proceedings"). But while the judicial officer's role is circumscribed, "[t]his is

⁵ Thus, a concern that the relator would be tortured after extradition is not properly before the judicial officer, but instead must be directed to the Secretary of State. "It is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed." United States v. Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997).

not to say that a judge . . . [in] an extradition proceeding is expected to wield a rubber stamp.” Santos v. Thomas, 830 F.3d 987, 1006 (9th Cir. 2016) (alterations and omission in original) (quoting Skaftouros v. United States, 667 F.3d 144, 158 (2d Cir. 2011)). Rather, in order to certify an extradition, the judicial officer must find that: (1) the judicial officer has jurisdiction to conduct the extradition proceedings; (2) the extradition court has jurisdiction over the relator; (3) the applicable extradition treaty is in full force and effect; (4) the crime or crimes for which extradition is sought comply with the extradition treaty’s terms; and (5) the evidence supports a finding of probable cause as to each offense for which the relator’s extradition is sought. Zanazanian v. United States, 729 F.2d 624, 625–26 (9th Cir. 1984) (citation omitted); see also, e.g., Skaftouros, 667 F.3d at 155–56; Yapp v. Reno, 26 F.3d 1562, 1565 (11th Cir. 1994); Emami v. U.S. Dist. Court for N. Dist. of Cal., 834 F.2d 1444, 1447 (9th Cir. 1987) (citations omitted); Dkt. no. 23, at p. 6 (collecting cases); Dkt. no. 28, at pp. 8–9 (citations omitted). “[A]s the party seeking extradition on behalf of the requesting state, the government bears the burden of demonstrating extraditability.” In re Extradition of Santos, 473 F. Supp. 2d 1030, 1037 (N.D. Cal. 2006).

Extradition proceedings have distinct evidentiary rules. See Kin-Hong, 110 F.3d at 120 (citations omitted) (“Neither the Federal Rules of Criminal Procedure . . . nor the Federal Rules of Evidence . . . apply to extradition hearings.”) (internal citations omitted). When conducting an extradition hearing, the judicial officer “shall” admit into evidence any “[d]epositions, warrants, or other papers or copies thereof . . . if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes” in the courts of the state requesting extradition. 18 U.S.C. § 3190. A certificate from “the principal diplomatic or consular officer of the United States” residing in the requesting country “shall be proof” that such documents are properly

authenticated. Id. Moreover, Article 8 of the Treaty also instructs, in relevant part, that documents submitted with an extradition request “shall be received and admitted as evidence in extradition proceedings if: (a) they bear the certificate or seal of the Department of Justice, or Ministry or Department responsible for foreign affairs, of the Requesting Party; or (b) they are certified or authenticated in any manner consistent with the laws of the Requested Party.” Dkt. no. 23-1, at p. 26.

Finally, insofar as the extradition hearing’s purpose is to determine whether probable cause supports the relator’s extradition, evidence supporting extraditability “may consist of hearsay, even entirely of hearsay.” Kin-Hong, 110 F.3d at 120 (citing Collins v. Loisel, 259 U.S. 309, 317 (1922)).

B. Relator’s Right to Submit Evidence⁶

A relator may submit “explanatory evidence,” within the discretion of the district court, when contesting an extradition. See Koskotas v. Roche, 931 F.2d 169, 176 (1st Cir. 1991) (citations omitted). However, “contradictory evidence” is not properly considered. See id. (citations omitted). “While the line between ‘contradictory’ and ‘explanatory’ evidence is not sharply drawn, the purpose of permitting explanatory evidence is to afford the relator ‘the opportunity to present reasonably clear-cut proof which would be of limited scope and have some reasonable chance of negating a showing of probable cause.’” Id. at 175 (quoting Matter of Sindona, 450 F. Supp. 672, 685 (S.D.N.Y. 1978)). Admissible explanatory evidence thus must be relevant to the question whether there is probable cause to believe the relator has committed the crimes for which his or her extradition is sought. Further, case law emphatically instructs that “extradition proceedings are not to be converted into a dress rehearsal trial.” Id.

⁶ In an Order dated July 27, 2018, the Court discussed at greater length Aguasvivas’s right to submit evidence, and ruled on Aguasvivas’s proposed exhibits and motion to compel discovery. See dkt. no. 62.

(quoting Jhirad v. Ferrandina, 536 F.2d 478, 484 (2d Cir. 1976)) (citing Quinn v. Robinson, 783 F.2d 776, 817 n.41 (9th Cir. 1986)).

C. The Extradition Treaty

I now summarize the Treaty's relevant provisions. Article 2 of the Treaty defines extraditable offenses. See dk. no. 23-1, at pp. 22–23. The definition follows the doctrine of “dual criminality.” Under that doctrine, “an accused may be extradited only if the alleged criminal conduct is considered criminal under the laws of both the surrendering and requesting nations.” United States v. Anderson, 472 F.3d 662, 665 n.1 (9th Cir. 2006) (citation omitted). “The purpose of the dual criminality requirement is simply to ensure that extradition is granted only for crimes that are regarded as serious in both countries.” Kin-Hong, 110 F.3d at 114 (citing United States v. Saccoccia, 58 F.3d 754, 766 (1st Cir. 1995)). Thus, Article 2 instructs, in relevant part, that “[a]n offense shall be an extraditable offense if, under the laws of both Parties, the maximum applicable penalty is deprivation of liberty for more than one year or a more severe penalty.”⁷ Dkt. no. 23-1, at p. 22. The dual criminality doctrine does not require that corresponding criminal offenses in the requesting and extraditing nations be identical. See In re Manzi, 888 F.2d 204, 207 (1st Cir. 1989). Instead, “[i]t is enough if the particular act charged is criminal in both jurisdictions,” including when the jurisdictions criminalize the act under different names, assign different elements to the relevant crimes, or impose different kinds of liability. Id. (quoting Collins v. Loisel, 259 U.S. at 312). Dual criminality is satisfied so long as “the acts upon which the [relator’s] . . . charges are based are proscribed by similar provisions of federal law, [state] law or the law of the preponderance of the states.” Id. (omission and second alteration in original) (quoting Brauch v. Raiche, 618 F.2d 843, 851 (1st Cir. 1980)).

⁷ In addition, an attempt or conspiracy to commit such a crime, or participation in the completion of such a crime, also is an extraditable offense under the Treaty. See dk. no. 23-1, at p. 22.

Article 7 of the Treaty sets forth extradition procedures and required documents. It provides, again in relevant part:

All extradition requests shall be supported by:

- (a) documents, statements, or other types of information that describe the identity, nationality, and probable location of the person sought;
- (b) information describing the facts of the offense or offenses and the procedural history of the case;
- (c) the text of the law or laws describing the offense or offenses for which extradition is requested and the applicable penalty or penalties; [and]
- (d) [a statement from the Requesting Party that its statute of limitations does not bar the relator's prosecution or punishment.]

Id. at 25. Further, where, as here, the relator is sought for prosecution, the extradition request also must contain:

- (a) a copy of the warrant or order of arrest or detention issued by a judge or other competent authority;
- (b) a copy of the document setting forth the charges against the person sought; and
- (c) such information as would provide a reasonable basis to believe that the person sought committed the offense or offenses for which extradition is requested.

Id.

Next, Article 15 adopts the “rule of specialty.” See id. at 28–29. That rule “requires that an extradited person be tried only ‘for the crime[s] for which he has been extradited.’”

Anderson, 472 F.3d at 665 n.1 (alteration in original) (quoting Benitez v. Garcia, 449 F.3d 971, 976 (9th Cir. 2006)). The Article provides, in part, the following:

- 1. A person extradited under this Treaty may only be detained, tried, or punished in the Requesting Party for:
 - (a) any offense for which extradition was granted, or a differently denominated offense carrying the same or lesser penalty and based on the same acts or omissions as the offense for which extradition

was granted, provided such offense is extraditable, or is a lesser included offense;

- (b) any offense committed after the extradition of the person; or
- (c) any offense for which the competent authority of the Requested Party . . . consents to the person’s detention, trial, or punishment.

Dkt. no. 23-1, at pp. 28–29.⁸ Accordingly, if Aguasvivas is extradited, the Dominican Republic may try him only for the offenses on which the United States orders his extradition.

Finally, two notable principles guide the judicial officer’s interpretation and application of an extradition treaty. First, “extradition treaties, unlike criminal statutes, are to be construed liberally in favor of enforcement because they are ‘in the interest of justice and friendly international relationships.’” Kin-Hong, 110 F.3d at 110 (quoting Factor v. Laubenheimer, 290 U.S. 276, 298 (1933)). Second, the judicial officer must abide by the “rule of non-inquiry.” Id. That rule requires the judicial officer to “refrain from ‘investigating the fairness of a requesting nation’s justice system,’ and from inquiring ‘into the procedures or treatment which await a surrendered fugitive in the requesting country.’” Id. (internal citation omitted) (quoting Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1995)). As noted above, Chapter 209 assigns consideration of such matters to the Secretary of State.

III. ANALYSIS

In order to prove Aguasvivas’s extraditability, the Government must demonstrate that: (1) the judicial officer has jurisdiction to conduct the extradition proceedings; (2) the extradition court has jurisdiction over the relator; (3) the applicable extradition treaty is in full force and effect; (4) the crime or crimes for which extradition is sought comply with the extradition

⁸ Article 15 also provides that a person extradited under the Treaty cannot then be extradited onward to another country or surrendered for an offense committed before the extradition, unless the extraditing nation consents. See id. at 29.

treaty's terms; and (5) the evidence supports a finding of probable cause as to each offense for which the relator's extradition is sought. Zanazanian, 729 F.2d at 625–26 (citation omitted). I address each prong in turn.

A. This Court Has Jurisdiction to Conduct this Extradition Proceeding

First, it is both clear and undisputed that this Court has jurisdiction over the instant matter. The text of 18 U.S.C. § 3184 instructs that when the United States has an extradition treaty with another nation, “any magistrate judge authorized to do so by a court of the United States . . . may, upon [an extradition] complaint made under oath, . . . issue [a] warrant for the apprehension of the person so charged, that he may be brought before such . . . magistrate judge, to the end that the evidence of criminality may be heard and considered.” Id. Rule 1(e) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts authorizes Magistrate Judges in this judicial district to “[c]onduct extradition proceedings, in accordance with 18 U.S.C. Section 3184” MJ L.R. 1(e). This Court thus has jurisdiction over this case.

B. This Court Has Jurisdiction over Aguasvivas

Second, it is equally apparent that this Court has jurisdiction over Aguasvivas. The text of § 3184 again resolves the question. That statute confers upon an authorized judicial officer jurisdiction over “any person found within [the judicial officer’s] jurisdiction.” 18 U.S.C. § 3184. It is undisputed that Aguasvivas was arrested in this District. See dk. no. 28, at p. 1. Therefore, the Court has jurisdiction over the Relator.

C. The Extradition Treaty Is in Full Force and Effect

Third, the Treaty is in full force and effect. When assessing this question, the judicial officer must defer to the executive branch. See Kastnerova v. United States, 365 F.3d 980, 986

(11th Cir. 2004) (“[E]xtradition is a function of the Executive and the ‘question whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial, and . . . the courts ought not . . . interfere with the conclusions of the political department in that regard.’” (omissions in original) (internal citation omitted) (quoting Terlinden v. Ames, 184 U.S. 270, 288 (1902))). The record contains a signed declaration from an Assistant Legal Adviser in the Office of the Legal Adviser for the Department of State, attesting that the treaty is in full force and effect. See dkt. no. 23-1, at pp. 2, 4. Aguasvivas has not challenged this contention. On this information the Court concludes that the Treaty is in full force and effect.

D. The Crimes Charged Comply with the Terms of the Extradition Treaty

Fourth, the crimes with which Aguasvivas has been charged in the Dominican Republic comply with the Treaty’s terms. As previously discussed, under Article 2 of the Treaty “[a]n offense shall be an extraditable offense if, under the laws of both Parties, the maximum applicable penalty is deprivation of liberty for more than one year or a more severe penalty.” Dkt. no. 23-1, at p. 22. This dual criminality requirement is satisfied so long as the relator’s alleged criminal acts are criminal in both jurisdictions, even if the requesting and extraditing nations “criminalize the act under different names, assign different elements to the relevant crimes, or impose different kinds of liability.” In re Manzi, 888 F.2d at 207 (quoting Collins, 259 U.S. at 312).

I find that the dual criminality requirement is satisfied. First, Aguasvivas is charged with murder. Article 295 of the Dominican Criminal Code provides: “Whoever voluntarily kills another, is guilty of murder.” See dkt. no. 23-1, at p. 59 (Dec. 12, 2016 Sanchez Aff.). Under Article 304, “[m]urder is punish[able] with thirty years of imprisonment, when its commission

precedes, accompanies or follows another crime.” Id. at 60. The law further states that the same penalty shall be imposed when “the murder was intended to prepare, facilitate, or execute a crime.” Id. Under Massachusetts law, Aguasvivas could be charged with either first or second-degree murder in connection with the alleged shooting and killing of Agent Ubri, crimes with maximum penalties well over one year’s imprisonment. MASS. GEN. LAWS ch. 265, §§ 1,2; see also 18 U.S.C. §§ 1111, 1114 (noting murder of a federal official is punishable with death or life imprisonment).

Second, Aguasvivas is charged with robbery on a public road. Article 379 of the Dominican Criminal Code defines robbery: “[w]ho by fraud subtracts a thing that does not belong to him, is guilty of robbery.” Dkt. no. 23-1, at p. 59 (Dec. 12, 2016 Sanchez Aff.). The Court notes Dominican Prosecutor Sanchez’s explanation that the term “fraud” as used in the statute means “the illegal appropriation of the property of others perpetrated by the offending agent to the detriment of the owner of the property.” Dkt. no. 65-1, at p. 7 (July 17, 2018 Sanchez Aff.). Under Dominican law, robbery on a public road is punishable by imprisonment of not less than three years. Id. (citing Dominican Criminal Code, Article 383 (“Robbery committed on public roads . . . shall be punished with the maximum penalty of imprisonment In all other cases, guilty parties will be sentenced to three to ten years in prison.”)). Under Massachusetts law, Aguasvivas could be charged with multiple crimes for the disarmament and forceful taking of Agent Ubri’s firearm. See Commonwealth v. Goldstein, 768 N.E. 2d 595, 598 (Mass. App. Ct. 2002) (“Larceny is the unlawful taking and carrying away of the personal property of another with the specific intent to deprive the person of the property permanently. Robbery includes all of the elements of larceny and in addition requires that force and violence be used against the victim or that the victim be put in fear.” (citations omitted)); see also MASS.

GEN. LAWS ch. 265, § 17 (“Whoever, being armed with a dangerous weapon, assaults another and robs, steals or takes from his person money or other property which may be the subject of larceny shall be punished by imprisonment in the state prison for life or for any term of years.”)

Third, the Dominican government has charged Aguasvivas with the crime of association of malefactors by collaborating with others to rob the DNCD agents and murder Agent Ubri. See dk. no. 65-1, at 6. Article 265 of the Dominican Criminal Code states “[a]ny association formed, regardless of its duration and number of members, any agreement established, for the purpose of preparing or committing crimes against persons or properties, constitutes a crime against public peace.” The succeeding Article provides “the person who has affiliated to an association or who has participated in an agreement established for the purposes specified [in Article 265]” shall be punished with imprisonment. Dominican Crim. Code Art. 266. Under domestic law, Aguasvivas could be charged with the offense of conspiracy for intending to and knowingly joining in an agreement or plan with one or more other persons for the purpose of carrying out some illegal activity. See Commonwealth v. Nee, 935 N.E.2d 1276, 1282 (Mass. 2010); Mass. Crim. Model Jury Instructions § 4.160 (2018) (setting forth elements of conspiracy); see also MASS. GEN. LAWS ch. 274, § 7 (describing penalties for committing conspiracy and stating “[i]f a person is convicted of a crime of conspiracy for which crime the penalty is expressly set forth in any other section of the General Laws, . . . the penalty therefor[e] shall be imposed pursuant to the provisions of such other section”). Federal law also provides for the alleged criminal conduct which underpins the Dominican charge. See 18 U.S.C. § 372 (“If two or more persons . . . conspire to prevent, by force, intimidation, or threat, any person . . . from discharging any duties . . . where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office .

. . or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be fined . . . or imprisoned not more than six years, or both.”).

Fourth, Aguasvivas could also be charged under domestic law for the firearms offense he is charged with under Dominican Law 36 of Trade of Possession of Firearms, Article 39.⁹ Under Massachusetts law, “Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded . . . shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction.” MASS. GEN. LAWS ch. 269, § 10.

Moreover, under Article 2, § 5 of the Treaty, a relator’s misdemeanor-level crimes are also extraditable if felony-level crimes are also charged and extraditable. Dkt. no. 23-1, at p. 23 (“If extradition has been granted for an offense specified in paragraphs 1 or 2 of this Article, it shall also be granted for any other offense specified in the request even if the latter offense is punishable by a maximum term of one year’s deprivation of liberty or less, provided that all other requirements of extradition are met.”).

Lastly, the crimes charged are not “political offenses” for which a person cannot be extradited under Article 4 of the Treaty. See id. at 23–24. Thus, the crimes with which Aguasvivas has been charged in the Dominican Republic comply with the Treaty’s terms, satisfy the dual criminality standard, and qualify for extradition.

⁹ “Any person who manufactures, receives, purchases in any way, has in his possession or custody, sells, uses or carries any firearms or airguns, its parts or spare parts and the ammunitions for them, at violation of the provisions of this Act, he shall be punished in the manner indicated below: Paragraph III. If it comes [sic] to gun or revolver, this is, those firearms for which it is possible to obtain a special license . . . it shall be punished with imprisonment.” Dominican Law 39 of Trade and Possession of Firearms. See dkt. no. 23-1 at pp. 58-59 (Dec. 12, 2016 Sanchez Affidavit).

E. There Is Probable Cause to Believe Aguasvivas Committed Crimes Charged

The Dominican Republic requests Aguasvivas's extradition to face prosecution for the following crimes: (1) murder; (2) illegal possession of firearms; (3) robbery; and (4) association of malefactors. See dkt. no. 23-1, at p. 55 (Dec. 12, 2016 Sanchez Aff.).¹⁰ The Treaty requires the Court to determine whether each of these offenses is supported by "such information as would provide a reasonable basis to believe that the person sought committed . . . the offenses." See id. at 25 (Treaty, Art. 7(3)(c)). Secretary of State John F. Kerry, in his letter submitting the Treaty to President Obama, explained that "this language mirrors the probable cause standard applied in U.S. criminal law." See dkt no. 23-1 at p. 15, attachment to letter of submittal, Extradition Treaty, Dom. Rep.-U.S., Jan. 12, 2015, S. Treaty Doc. No. 114-10, at VIII (2016). Secretary Kerry's interpretation is entitled to deference. See, e.g., El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999) (citation omitted) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."); United States v. Li, 206 F.3d 56, 63 (1st Cir. 2000) (en banc) (according "substantial deference" to the United States Department of State's interpretation of treaties).

The First Circuit has offered the following guidance on the meaning of probable cause:

Probable cause determinations are, virtually by definition, preliminary and tentative. The exact degree of certainty required to establish probable cause is

¹⁰ In one respect, the offenses identified in the request for extradition vary from those in the warrant for Aguasvivas's arrest that Acting Judge Garcia issued on December 6, 2013. The arrest warrant refers to Article 309 of the Dominican Code, while the extradition request refers to Article 379 of the Dominican Code, which defines robbery. I am satisfied that the warrant contains a typographical error, and that the warrant erroneously cites "309" and not "379." Unlike the extradition request, the arrest warrant also excludes a citation to Article 383, which prescribes punishment for robbery. In any case, because the treaty Articles refer throughout to the "request for extradition" as the controlling document, I analyze each offense listed in the extradition request.

difficult to quantify; it falls somewhere between bare suspicion and what would be needed to justify conviction. As always, the touchstone of the Fourth Amendment is reasonableness. Probable cause thus exists if the facts and circumstances within the relevant actors' knowledge and of which they had reasonably reliable information would suffice to warrant a prudent person in believing that a person has committed or is about to commit a crime.

Burke v. Town of Walpole, 405 F.3d 66, 80 (1st Cir. 2005) (quotations, citations, alterations, and internal quotation marks omitted).

In support of probable cause, the Government, on behalf of the Dominican Republic, offers the following: (1) the December 12, 2016 affidavit of Dominican prosecutor Sanchez, which attaches the arrest warrant; the autopsy report for Agent Ubri; medical certificates for the two other drug agents who were shot and wounded; and two photographs of the person sought; (2) the March 29, 2017 supplemental affidavit of prosecutor Sanchez; (3) the declaration of State Department legal counsel Tom Heinemann, which attaches the Treaty, the Secretary of State's Letter of Submittal, and the President's request to the Senate requesting ratification; (4) a supplemental declaration from Attorney Heinemann; (5) the May 25, 2018 supplemental affidavit of prosecutor Sanchez; and (6) the July 17, 2018 second additional affidavit of prosecutor Sanchez. Contesting probable cause, Aguasvivas has submitted the following information: (1) a Youtube video, with audio, of the shooting; (2) his concession that he is the person seen on the video wearing a blue shirt; (3) a Spanish transcription and English translation of statements heard on the video; (3) the affidavit of prosecutor Sanchez in support of extraditing Aguasvivas's uncle, Ramon Emilio Aguasvivas; (4) transcriptions and translations of the following articles of the Dominican Criminal Procedure Code: Article 161 on "Active Extradition," Article 294, regarding criminal procedure when an investigation provides a basis to prosecute a defendant, and Articles 328 and 329 regarding the effect of a finding of justification of self-defense; (5) an October 2018 affidavit of attorney Ambar M. Maceo, regarding the

elements necessary to charge the crime of conspiracy under Articles 265 and 266 of the Dominican Criminal Code; and (6) a decision from the Supreme Court of Justice of the Dominican Republic regarding the elements of conspiracy.

I now review the information submitted by the parties as to each of the offenses for which the Government seeks Aguasvivas' extradition.

1. Murder

Article 295 of the Dominican Code provides, "Whoever voluntarily kills another, is guilty of murder." See *dk. no. 23-1*, at p. 59 (Dec. 12, 2016 Sanchez Aff.). The penalty for murder is imprisonment for thirty years. Id. at 60.

The information from the Government concerning the murder charge is succinct, but compelling. The Sanchez affidavit recounts that just after noon on December 6, 2013, law enforcement agents were conducting an anti-drug operation in Bani. Id. at 57. Agents arrested and handcuffed Aguasvivas during the operation. Id. As they did so, Aguasvivas's brother Frank protested, distracting some agents from Aguasvivas's arrest. Id. Aguasvivas capitalized on the distraction to disarm Agent Ubri and then shoot and kill him, before shooting and injuring Captain Jimenez and Agent Hernandez. Id. at 57-58. Carrying the gun, Aguasvivas then escaped with his brother. Id. at 58.

An autopsy report, id. at 68-72, documents that Agent Ubri suffered three gunshot wounds. One bullet entered his chest from front to back and top to bottom, lacerating his pericardium, left lung, and left pulmonary veins and arteries before exiting his back—this one killed him. Id. at 70. A second bullet entered his chest below the above-described shot. Id. at 71. A third bullet entered and exited the anterior region of Agent Ubri's upper left arm. Id. The two agents who were shot by Aguasvivas and survived later identified a photograph of

Aguasvivas as the shooter. Id. at 83 (March 29, 2017 Sanchez Aff.). It is uncontested that the person produced in this Court is the person whom agents identified in the photograph. Nor could it be: the photographs are plainly of Aguasvivas.

I find that this information supports probable cause. In a nutshell, the prosecutor assigned to investigate this matter has sworn in an affidavit that two police officers who were present—and who were themselves wounded during the crime—saw Aguasvivas shoot Agent Ubri, and that Agent Ubri died of the gunshot wounds Aguasvivas inflicted. While a more detailed affidavit certainly could have been presented, more is not necessary to establish probable cause.

Aguasvivas has argued that probable cause is absent as to the murder charge because there is no evidence that he acted with an intent to kill. This argument ignores the autopsy report. That report documents that Agent Ubri suffered three gunshot wounds: two to the chest near the heart, and one to the upper left arm. Id. at 70–71. Three bullets fired at short range to the area of the heart are sufficient to establish probable cause that Aguasvivas shot Agent Ubri with an intent to kill him.

Aguasvivas offered into evidence a video recording events immediately before and during the shooting. Cognizant that contradictory evidence offered by the relator should not be admitted at an extradition hearing, see, e.g., Koskotas, 931 F.2d at 175 (citations omitted), I admitted the video because the Government did not object to its authenticity; because the video is narrow in scope, did not require cross-examination of a witness, and did not involve issues of credibility; and because the recording does not contradict the government's evidence.

Aguasvivas suggests that the video undermines probable cause because it establishes both the chaos surrounding the shooting and Aguasvivas's location when the shots were fired.

I find that the video certainly does establish both matters, but it does not undermine probable cause. If anything, the video supports a probable cause finding. The scene depicted in the video is clearly chaotic. But what the video also shows is that the arrest occurred at midday, in good light, with the agents within feet of Aguasvivas when the shots were fired. The agents thus were well positioned to see the shooting and identify the shooter. The video also shows Aguasvivas struggling with officers to resist being placed in the car, and therefore situated to disarm Agent Ubri. If, as the Government states, Aguasvivas was handcuffed, the video indicates that Aguasvivas's hands were cuffed in front of him, rather than behind his back.

More importantly, the video shows Aguasvivas's location when the shots were fired. It shows at least two agents struggling to put Aguasvivas into the front passenger seat of a parked car. The struggle implies that Aguasvivas resisted their efforts. At the same time, a male, presumably Frank, stood near the open passenger door screaming and protesting. At least one officer tried to move Frank away from the car. Aguasvivas was pushed into the car, principally by Agent Ubri. The video shows that once Aguasvivas was inside the car, his back faced the front windshield, with Aguasvivas apparently kneeling on the car's front seat. Agent Ubri's torso faced the open car door through which he pushed Aguasvivas. Agent Ubri's hands were on Aguasvivas when the first shot rang out, at approximately seventeen seconds into the video. Two more shots followed in quick succession.

Bearing in mind the location and trajectory of Agent Ubri's mortal wounds—from front to back and top to bottom—it is here that video serves a purpose Aguasvivas does not anticipate: it corroborates the prosecutor's sworn statement that the eyewitness law enforcement officers saw Aguasvivas shoot Agent Ubri. At the time of the shooting, Agent Ubri's torso was below the roof of the car and only inches outside the open passenger-side door. That means the shots

that struck Agent Ubri were not fired across the top of the car, from anywhere behind Agent Ubri, or from Agent Ubri's left or right. Rather, the shooter was either inside the car, or outside the car on the driver's side, with the bullet passing through the inside of the car. Aguasvivas was inside the car; of course, that corroborates the Government's allegation that Aguasvivas was the shooter. But more importantly, Aguasvivas's body was between Agent Ubri and the driver's side of the car. A still from the video at eighteen seconds shows Aguasvivas kneeling on the front seat with his head above the seat and near the car's roof, and with his back facing the front windshield. Thus, Aguasvivas occupied the space through which, if someone other than Aguasvivas shot Agent Ubri, the bullets would have had to travel before hitting Agent Ubri in the left side of his chest and his left upper arm. Hence, the video establishes that it is implausible that someone fired through the car from the driver's side, and into Agent Ubri. That, too, corroborates the Government's allegation that Aguasvivas is the killer.

Aguasvivas dissects the autopsy report to attack the Government's assertion of probable cause. First, he notes that the autopsy report contains a narrative that significantly varies from the account in the Sanchez affidavit. In relevant part, the autopsy report states, "the deceased with other three agents [sic] tried to arrest and introduced into a vehicle to [sic] a presumed drug dealer, but they were injured by someone else who tried to stop the arrest." Dkt. no. 23-1, at p. 70. Second, Aguasvivas attacks the pathologist's use of the word "distant" to describe Agent Ubri's wounds, arguing that this term does not describe the short distance between Aguasvivas and Agent Ubri when the shots were fired.

These matters are not unimportant, but they are not sufficient to negate probable cause. The tension between the investigating prosecutor's affidavit and the autopsy report must be kept in context. The autopsy report was prepared less than six hours after the shooting. See id. at 69

(listing the time of the examination as 6:00 p.m. on the day of the shooting). At that time, the eyewitnesses were hospitalized with guarded prognoses. See id. at 73–74 (medical certificates documenting the eyewitnesses’ prognoses). Moreover, the shooting of three law enforcement agents, and the killing of one of them, likely engendered confusion, especially given that Aguasvivas fled, was armed, and had not been apprehended. See id. at 58 (“[Aguasvivas] escaped from the place along with his brother helped by [an]other and carrying [illegible] gun.”).

Similarly, the pathologist’s description of Agent Ubri’s gunshot wounds as “distant” is also a concern. The Concise Oxford Dictionary, a descriptive dictionary, defines distant as “far” and “remote.” Distant, CONCISE OXFORD DICTIONARY (6th ed. 1976). Nevertheless, the Court is left with a prosecutor’s affidavit compellingly recounting two eyewitnesses’ statements, which are corroborated by the video that Aguasvivas has offered into evidence. Considering all the evidence before me, I find that the autopsy report’s discrepant narrative and its use of the word “distant,” while certainly fodder for cross-examination of witnesses at trial, do not negate the Government’s showing of probable cause that Aguasvivas committed murder.¹¹

Finally, Aguasvivas suggests that if he did shoot Agent Ubri, he was acting in self-defense. It is with this suggestion in mind that Aguasvivas has offered Articles 328 and 329 of the Dominican Criminal Code. Article 328 provides that “[t]here is no crime . . . when [a] homicide . . . [is] caused by the actual necessity for legitimate self-defense or defense of another.” Dkt. no. 56-1, at p. 2. Article 329 lists two circumstances “considered to be an actual necessity for legitimate defense”: first, “fending off the scaling or breaking into of homes, walls

¹¹ Aguasvivas also suggests that another affidavit, prepared by the same prosecutor in support of the extradition of Aguasvivas’s uncle, Ramon Emilio Aguasvivas, militates against finding probable cause. I disagree. That affidavit avers that Ramon was in a passenger vehicle at the scene of the shooting, exited the car, collected the agents’ guns after Aguasvivas shot the agents, fired several shots himself, and then drove his nephews, Aguasvivas and Frank, away from the scene. See dkt. no. 48-1, at p. 5. These allegations do not negate the Government’s probable cause showing in the instant case.

or fences, or breaking of doors or entrances to inhabited areas, or their dwellings or dependencies, during the night”; and second, an act “performed in defense against assault by persons committing [a] robbery or theft with violence.”¹² Id.

Neither Article applies here. But Aguasvivas claims that an expert on Dominican law, if the Court had allowed one, would have opined that the circumstances listed in Article 329 are meant to be illustrative and not exclusive. Setting aside Aguasvivas’s preserved objections to my rulings to exclude his proffered expert and not to afford him more time to find an expert satisfactory to the Court, this argument is a non-starter.

First, it is well-established that, given the circumscribed nature of extradition proceedings, affirmative defenses like self-defense are irrelevant and should not be considered. See Collins v. Loisel, 259 U.S. at 316-317 (finding that the relator’s proposed testimony establishing a defense was properly excluded); Charlton v. Kelly, 229 U.S. 447, 458 (1913) (holding that evidence of insanity, though clearly relevant at trial or a competency hearing, was properly excluded at an extradition proceeding); In re Harusha, No. 07-x-51072, 2008 WL 1701428, at *5 (E.D. Mich. Apr. 9, 2008) (citing Charlton, 229 U.S. at 462; Collins, 259 U.S. at 316–17) (“Given that a respondent may only introduce explanatory evidence, it follows that affirmative defenses, including self-defense, are not relevant in an extradition hearing and should not be considered.”). Relatedly, because the premise of Articles 328 and 329 is that a homicide has been committed, neither Article would undermine probable cause. Article 328 says, “There is no crime . . . when [a] homicide . . . [is] caused by the actual [need for self-defense].” Dkt. no.

¹² In full, Article 329 provides: “The following cases are considered to be an actual necessity for legitimate defense: 1. When homicide is committed or injuries are inflicted, or force is used in fending off the scaling or breaking into of homes, walls, or fences, or breaking of doors or entrances to inhabited areas, or their dwellings or dependencies, during the night. 2. When the act is performed in defense against assault by persons committing the robbery or theft with violence.” Id.

56-1, at p. 2 (emphasis added). Article 329 describes circumstances in which a “homicide is committed.” Id. Contrary to Aguasvivas’s contention, his theoretical assertion of self-defense, if successful, would not mean that a homicide did not occur; rather, the homicide would be deemed justified, negating Aguasvivas’s guilt at trial.

Second, even if self-defense were considered in the instant extradition proceeding, there is no evidence to support it. Rather, self-defense is based on a representation by Aguasvivas’s counsel that because the officers were in plainclothes, Aguasvivas could have believed he was being kidnapped, and thus lawfully resisted his apparent kidnappers with deadly force. Aguasvivas himself has not testified or proffered evidence of his state of mind at the time of the shooting. Moreover, the available information suggests that persons present at the shooting were, in fact, aware that the agents were law enforcement officers. For instance, the transcript of the audio component of the video includes the following attribution to an unidentified female: “Look what the Police does—Oh!” Dkt. no. 39-1, at 2.

Lastly, Aguasvivas testified at his asylum hearing in Immigration Court that he did not shoot anyone and has never fired a gun in his life. See dkt. no. 39-2, at p. 28 (Q: Okay. And do you know who fired those shots— . . . just to be very careful, not from what you’ve been told, but from what you saw, did you see who fired the shots? A: No, I didn’t see. I didn’t see. I can’t say. I didn’t see.”); id. at 136 (“Q: Have you ever fired a gun before? A: No, sir. Q: Never in your life? A: Never, sir.”). Putting aside this tension between the argument of Aguasvivas’s counsel and Aguasvivas’s testimony under oath, a self-defense claim in this case, even when raised in the proper forum, would be problematic.

For all these reasons, I find that there is probable cause to believe that Aguasvivas committed the murder with which he has been charged in the Dominican Republic. I will

therefore certify to the Secretary of State that Aguasvivas is extraditable to be tried on the murder charge.

2. Illegal Firearm Possession

Article 39 of Dominican Republic Law 36 on Trade and Possession of Firearms prohibits the possession, custody or use of a firearm in the commission of a crime or in violation of law. See dkt. no. 23-1, at pp. 58–59 (Dec. 12, 2016 Sanchez Aff.). Specifically, the law states: “Any person who . . . has in his possession or custody, . . . uses or carries any firearms . . . and ammunition for them, at violation of the provisions of this Act, he shall be punished [as indicated].” The law further states that possession of a “gun or revolver, this is, those firearms for which it is possible to obtain a special license . . . shall be punished with imprisonment.” Dkt. no. 28, at p. 13 n.8.

It is alleged that Aguasvivas violated this prohibition and faces imprisonment and a fine. Dkt. no. 23-1, at pp. 63–67. I find sufficient evidence to support probable cause to believe Aguasvivas committed this offense. As the discussion of probable cause for murder shows, Aguasvivas necessarily possessed a firearm and ammunition for it, given the compelling evidence that he murdered Agent Ubri by means of firing three shots from a gun. I will therefore certify to the Secretary of State that Aguasvivas is extraditable to be tried on the Firearm Possession charge.

3. Robbery

Article 379 of the Dominican Criminal Code defines robbery as “who, by fraud subtracts a thing that does not belong to him, is guilty of robbery.” See id. at 59. Robbery is punishable by imprisonment of not less than three years. Id. (citing Dominican Criminal Code, Article 383 (“Robbery committed on public roads . . . shall be punished with the maximum penalty of imprisonment In all other cases, guilty parties will be sentenced to three to ten years in prison.”)).

I find that the information submitted supports this offense. According to prosecutor Sanchez’s affidavit, Aguasvivas was arrested and handcuffed during an anti-drug operation on a public road in the city of Bani. See id. at 57. Aguasvivas’ brother, Frank, protested and distracted the arresting agents. Id. Aguasvivas took advantage of his brother’s distraction, disarmed Agent Ubri, and used the agent’s firearm to shoot Agent Ubri, Captain Jimenez, and Agent Hernandez. Id. The video also shows that a struggle involving Agent Ubri, other law enforcement officers, and Aguasvivas preceded the fatal shooting of Agent Ubri by Aguasvivas. Since Aguasvivas shot Agent Ubri, a fair inference from this evidence is that during the struggle Aguasvivas forcibly took Agent Ubri’s gun from him. Thus, probable cause exists to believe that Aguasvivas subtracted “a thing that [did] not belong to him” and therefore committed a robbery.

In addition, Aguasvivas participated with his uncle Ramon and brother Frank in taking by force firearms that belonged to Captain Jimenez and Agent Hernandez. In this regard, Aguasvivas was the “force” component of the robbery: he shot Captain Jimenez and Agent Hernandez causing them to drop their guns or neutralizing their ability to oppose Frank and Ramon’s removal of the guns from their persons. Accordingly, the evidence supports a probable

cause finding of robbery on this separate theory. Aguasvivas is extraditable on this charge, and I will certify the same to the Secretary of State.

4. Association of Malefactors

The Dominican Republic alleges two conspiracy-based crimes pursuant to Articles 265 and 266. Article 265 of the Dominican Criminal Code defines the crime of association of malefactors: “Any association formed, regardless of its duration or number of members, any agreement established, for the purpose of preparing or committing crimes against persons or properties, constitutes a crime against public peace.” Dkt. no. 65-1, p. 59. Pursuant to Article 266, the penalty imposed upon those found guilty of this crime is imprisonment. See id. In this case, the Government argues that because Aguasvivas acted in concert with his brother Frank and his uncle Ramon in committing the crimes of murder, illegal firearm possession, and robbery, Aguasvivas committed the crime of association of malefactors. Prosecutor Sanchez’s affidavit lays out the facts relevant to the charge, pointing to Frank’s distraction that allowed Aguasvivas to “snatch” Agent Ubri’s firearm and use it against him, Captain Jimenez, and Agent Hernandez. Dkt. no. 65-1, at pp. 6–7 (July 17, 2018 Sanchez Aff.). Additionally, the affidavit notes that Ramon Aguasvivas helped collect the remaining firearms and helped Aguasvivas and Frank into Ramon Aguasvivas’ vehicle to escape. Id. In the affidavit, Prosecutor Sanchez explains that given the sequence of events, “it has been determined that the behavior assumed by Cristian Starling Aguasvivas a/k/a Momon . . . has the characteristics of the criminal profile typified and sanctioned respectively by articles 265 and 266.” Id. The Government essentially argues that because Aguasvivas, his brother, and his uncle acted together, they must have had an agreement or plan to do the same.

The crime of association of malefactors can be likened to the domestic crime of conspiracy. As prosecutor Sanchez notes, in the Dominican Republic it includes as an element an “association formed or agreement established” to do something the law prohibits. See *dk. no. 23-1* at p. 59 (Dec. 12, 2016 Sanchez Aff.). In this case, there is evidence of joint action, and such joint action can sometimes serve as proof of an agreement or conspiracy. See United States v. Glover, 814 F.2d 15, 16 (1st Cir. 1987) (“a conspiratorial agreement need not be express, but may consist of no more than a tacit understanding”). Prosecutor Sanchez suggests that there are two objects of this conspiracy or association of malefactors: one to commit murder and one to carry off the weapons of the murdered and wounded drug agents. See *dk. no. 65-1* at pp. 6-7 (July 17, 2018 Sanchez Aff.). While the evidence could perhaps be cabined into such theories, I disagree with this analysis and find insufficient evidence of an “association formed” or “agreement established.”

Probable cause is not a stringent standard, yet there must be “reasonably reliable information . . . adequate to warrant a prudent person in believing that the object of his suspicions had perpetrated or was poised to perpetrate an offense.” Fernandez-Salicrup v. Figueroa-Sancha, 790 F.3d 312, 324, (1st Cir. 2015) (quoting Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249, 254 (1st Cir. 1996)) (citing Devenpeck v. Alford, 543 U.S. 146, 152 (2004)). Aguasvivas argues that there is insufficient evidence of a prior agreement to commit criminal acts in order to establish probable cause for the crime of association of malefactors. In Aguasvivas’s reply to the Government’s supplementary memorandum, he cites to “Sentencia NO. 25 de fecha 21 de Marzo del 2012, B.J. No. 1216,” a decision by the Dominican Supreme Court of Justice interpreting articles 265 and 266. *Dkt. no. 73*, at p. 2. According to Attorney Maceo’s affidavit, the referenced decision supports the proposition that an agreement, for

purposes of Article 265, “requires the following elements: (i) a meeting between co-conspirators; (ii) an agreement to commit two or more crimes, and (iii) an overt act.” Id. at 2–3.

Here, the chaos and reactive nature of the circumstances prove only crimes of opportunity and not an agreement or association. With respect to a conspiracy with murder as its object, Prosecutor Sanchez’s affidavit recites that Frank distracted agents who arrested Aguasvivas and that Aguasvivas “unexpectedly took advantage of this moment of distraction and snatched [Agent Ubri’s] firearm” which he used to shoot and kill Agent Ubri. See dkt. no. 65-1 at pp. 6-7 (July 17, 2018 Sanchez Aff.). Far from showing some tacit agreement or formed association, the recitation of facts shows that Aguasvivas seized an unanticipated advantage – “unexpectedly” – and committed a crime that circumstances positioned him to commit: to disarm Agent Ubri and shoot him to death. There is little room in these facts for the notion that there was a conspiracy, that Aguasvivas or anyone else even knew agents would arrest Aguasvivas and that Frank’s protestations would sufficiently distract agents from effecting Aguasvivas’s arrest.

Similarly, the evidence undermines the notion of a conspiracy with robbery as its object. No one could have anticipated that Aguasvivas, who was handcuffed, might be able to not only disarm Agent Ubri, but with that gun successfully fire it and kill Agent Ubri. Further, no one could anticipate that the remaining shots would hit and disable Captain Jimenez and Agent Hernandez, and that such a shooting would present Ramon and Frank with the opportunity to take Captain Jimenez and Agent Hernandez’s firearms (whether from their persons or from the ground where they might have been dropped). Indeed, the evidence shows it was precisely that: a crime of opportunity, not the product of an agreement, tacit or otherwise.

The United States is quite right that the courts owe deference to a foreign sovereign’s interpretation of its own laws. But here, it is not the law with which the Court has a quarrel, but

the evidence. It is insufficient to support a probable cause finding of an association of malefactors. I therefore deny the request to certify these offenses to Secretary of State Pompeo.¹³

F. Aguasvivas's Arguments for Dismissal

Aguasvivas presented in his motion to dismiss and supplemental motion to dismiss multiple arguments attacking the Government's request for extradition. See dkt. nos. 23, 24, 73. I address these arguments in turn.

1. Validity of the Arrest Warrant Pursuant to Article 7, § 3(a) of the Treaty

Aguasvivas argues that the arrest warrant is invalid because it fails to properly name Aguasvivas, because it lists only five of the seven charges on which the Dominican Republic seeks his extradition, and because the language of the arrest warrant is overbroad. The Court rejects Aguasvivas's arguments and finds that the arrest warrant is valid.

Aguasvivas first argues the arrest warrant is invalid because it lists his name as "Estarling Aguasvivas, AKA Mamon," whereas his actual name is Cristian Starling Aguasvivas, a/k/a Momón. Dkt. no. 23, at p. 9. The purposes for stating a name on an arrest warrant is to ensure that the person before the court is the person accused in the extradition request and that there exists evidence that the same person committed the offenses for which extradition is sought. Manta v. Chertoff, 518 F.3d 1134, 1143 (9th Cir. 2008). In the instant matter, there is no substantive dispute that the person described in the arrest warrant is Aguasvivas. Indeed, Aguasvivas concedes that he is the person depicted in the video recording of the shooting. Furthermore, as noted, the photographs of the person for which extradition is requested are

¹³ The Court's determination not to certify the charge of association of malefactors to the Secretary of State does not affect the Court's certification of extraditability for the charges of murder, illegal firearm possession, or robbery. See Kin-Hong, 939 F. Supp. at 947 n.12.

plainly the relator before the Court. See dkt. no. 23-1 at pp. 77, 78 (Dec. 12, 2016 Sanchez Aff. appending two photographs). Generally, “arguments that ‘savor of technicality’ are ‘peculiarly inappropriate in dealings with a foreign nation.’” Skaftouros v. United States, 667 F.3d 144, 160 (2d Cir. 2011) (citing Shapiro v. Ferrandina, 478 F.2d 894, 904 (2d Cir. 1973) (quoting Bingham v. Bradley, 241 U.S. 511, 517 (1916))). Therefore, the Court finds that any inaccuracies in Aguasvivas’s name on the arrest warrant are inconsequential.¹⁴

Aguasvivas also notes that the Government’s extradition request lists seven charges, but the Dominican arrest warrant lists only five. Dkt. no. 23, at p. 9. The Government argues this is accepted practice. Dkt. no. 28, at pp. 21–22. While Aguasvivas is correct that the Government must prove each individual charge is extraditable, the Treaty does not specifically require that all charges be listed on the arrest warrant. See Hill v. United States, 737 F.2d 950, 950 (11th Cir. 1984) (noting that “[t]he warrant may specify all the charges if the requesting country so chooses, but it need refer to only one”). The Court thus concludes that the Government has met its burden and that the absence, or error, in listing certain charges on the arrest warrant is unavailing.¹⁵

Furthermore, Aguasvivas claims that the arrest warrant is overbroad because it permits provisional arrest for investigative purposes. See dkt. no. 23 at 10-11. Aguasvivas claims that accepting a provisional arrest warrant as a warrant for purposes of extradition expands the

¹⁴ Aguasvivas also notes that the official English “translation” provided by the Dominican Government actually corrects this fundamental defect in the warrant: while the original warrant requests “Estarling Aguasvivas, AKA ‘Mamon,’” the English translation of the warrant calls for the arrest of “Cristian Starling Aguasvivas, aka Momón.” Dkt. no. 23, at p. 9. He further notes that “an interpreter cannot properly attempt to cure a defective warrant in this way” and as such “[t]he translation is incompetent.” See id. (stating that requesting government must provide translation pursuant to Article 9 of the Treaty). Nevertheless, identification of the accused by a different name does not bar extradition where the identity of the relator is unchallenged. Fernandez v. Phillips, 268 U.S. 311, 312–13 (1925).

¹⁵ In addition, and as previously discussed, the Court also finds that the warrant incorrectly cites Article 309 of the Dominican Criminal Code, rather than Article 379, a mistake which also does not alter the Court’s findings.

warrant requirement, intended to ensure some measure of judicial oversight in the requesting country, to the point of irrelevance. In this case, the facts of the incident were presented to Acting Judge Garcia for issuance of a warrant. See dkt. no. 23-1, at pp. 63-67. Judge Garcia lists the evidence upon which the issuance of the warrant is based as: the prosecutorial note dated December 6, 2013, Agent Ubri's death certificate, and the medical certifications for Captain Garcia and Agent Rodriguez. Id. Judge Garcia also recites the factual predicate for the warrant's issuance. Id. Based upon these submitted matters, Judge Garcia issued the warrant for Aguasvivas's arrest. Id. The Court finds the warrant was the product of sufficient and careful judicial oversight, and concludes that the warrant was sufficient to support criminal process against Aguasvivas pursuant to law of the Dominican Republic.

2. Pending Charges Pursuant to Article 7, § 3(b) of the Treaty

Aguasvivas argues that the warrant is insufficient to show that he has been formally charged with the crimes for which his extradition is sought. Dkt. no. 23, at p. 11–14. He argues that an acusación, or a similar formal initiation of criminal charges, is required, and cites to In re Extradition of Chapman in support of this contention. No. CIV07-00365SOM/BMK, 2007 WL 3254880, at *1 (D. Haw. Nov. 5, 2007). In Chapman, the District Court's decision to dismiss the request for extradition is based upon language in the extradition treaty between Mexico and the United States, which states that the countries agree to extradite: "persons who the competent authorities of the requesting Party have charged with an offense," and that the request be supported by "[a] certified copy of the warrant of arrest issued by a judge or other judicial officer of the requesting party." Id. at *1. The Court found, pursuant to the relevant treaty, that "[a] person may not be extradited where there are no pending criminal charges against that person, or where there is no valid arrest warrant as required by the treaty." Id. (citations omitted).

Aguasvivas asks the Court to interpret the word “charges” in the Treaty at issue here to mean “formal criminal charges,” or rather a charging document that conforms to the requirements for commencement of a criminal action under United States law.

The Government does not dispute Aguasvivas’s statement of the law as requiring pending charges against a fugitive in order for extradition to issue, but instead refutes Aguasvivas’s argument that the official documentation provided does not show that Aguasvivas has been charged. See dkt. no. 28, at p. 23.

While it appears that an *acusación* is one way to initiate a Dominican prosecution, the record does not establish that it is the only way. The Court finds that Judge Garcia’s arrest warrant demonstrates that Aguasvivas is currently charged with extraditable offenses. See dkt. no. 23-1 at pp. 62–66. Indeed, Prosecutor Sanchez’s affidavit avers that the procedures followed in this case are a proper way to initiate criminal proceedings in the Dominican Republic against a defendant who has fled the country.¹⁶ Dkt. no. 23-1, at pp. 54–55 (Dec. 12, 2016 Sanchez Aff.). Moreover, the Government cites to several cases that reject the argument that extradition based upon a warrant for investigation is improper. See, e.g., Emami v. U.S. Dist. Court for N. Dist. of Cal., 834 F.2d 1444, 1451 (9th Cir. 1987); In re Extradition of Handanovic, 829 F. Supp. 2d 979, 986 (D. Or. 2011); In re Lam, No. 1:08-MJ-247 GSA, 2009 WL 1313242, at *3 (E.D. Cal. May 12, 2009); In re Extradition of Sacirbegovic, 280 F. Supp. 2d 81, 83-84 (S.D.N.Y. 2003); Borodin v. Ashcroft, 136 F. Supp. 2d 125, 129–30 (E.D.N.Y. 2001). The nuances of the law of the Dominican Republic respecting the commencement of criminal process are not appropriately

¹⁶ Under the rule of non-inquiry, discussed herein, the Court should not attempt to discern the particularities of Dominican law; rather, the Dominican government’s representations about its domestic practices are entitled to deference. See Kin-Hong, 110 F.3d at 110.

before the Court. The Court finds that the warrant at issue shows, for purposes of the Treaty and extradition pursuant to it, that Aguasvivas has been charged with extraditable crimes.

3. Inconsistencies within Documentation

Aguasvivas contends that the information provided by the Government cannot support a finding of probable cause because there are numerous factual inconsistencies in the two Diplomatic Notes submitted by the State Department and four supporting documents submitted by the Dominican authorities in support of the extradition request. Dkt. no. 23, at pp. 14–17. Therefore, Aguasvivas argues, the Court should dismiss the request. Id. Aguasvivas directs the Court’s attention to inconsistencies involving the date of the incident, the place where the incident occurred, and Aguasvivas’s name, in addition to other inconsistencies as to which Treaty applies, as to the Articles intended to be charged, and as to whether anyone else was also responsible for the shooting. Id. at 1–4, 14–16.

The inconsistencies do exist—but even together, they do not undermine the Government’s probable cause showing. The photos submitted by the Government clearly depict Aguasvivas, and Aguasvivas concedes that the video of the shooting depicts him as present at the time and place of the crimes alleged. There is simply no question that Aguasvivas was present during the incident and centrally involved in it. Aguasvivas also relies on inconsistencies in the date of the shooting, noting that the arrest warrant list December 5, 2013, Prosecutor Sanchez’s affidavit lists December 6, 2013, and a prosecutor’s affidavit in support of extradition of Ramon Aguasvivas lists December 9, 2013. See dkt. no. 23-1, at pp. 57, 63; see also dkt. no 48. These inconsistencies are of no consequence. Charging documents in the U.S. typically allege commission of an offense “on or about” a particular date, and the modest discrepancies here are analogous to that pleading convention. More importantly, the inconsistencies create no doubt

about what incident is the subject of the crimes. Indeed, Aguasvivas himself has offered a video recording of the incident.

Inconsistencies concerning the location of the incident which Aguasvivas uses to attack the extradition request are similarly inconsequential, to the extent that an inconsistency exists at all. Aguasvivas notes that Prosecutor Sanchez's affidavit puts the shooting at Francisca la Francisquera Street in the Pueblo Nuevo sector of Bani, whereas Acting Judge Garcia puts it at 5th Street in the Pueblo Nuevo sector of Bani. See dkt. no. 23, at pp. 2-3. In fact, Prosecutor Sanchez puts the anti-drug operation on Francisca la Francisquera, while Acting Judge Garcia puts the shooting at 5th Street. See dkt. no. 23-1, at pp. 57, 63. Because Prosecutor Sanchez and Acting Judge Garcia are describing two different events, it is not clear that any discrepancy exists. However, if one does, Aguasvivas's offer of the video recording settles any meaningful concern about what incident is the subject of the charges. This proffer of the recording renders trivial any inconsistencies in the papers as to the shooting's precise location and timing, and as to the perpetrator's name.

4. Evidence of Torture

Aguasvivas argues the DNCD's alleged use of torture should undermine the Court's confidence in the Government's evidence. Dkt. no. 23, at p. 23 (citing Santos v. Thomas, 830 F.3d 987, 1006 (9th Cir. 2016) (stating "evidence that inculpatory statements were obtained through torture was admissible in extradition proceeding because 'the manner in which evidence used to support probable cause was obtained is relevant in determining whether the probable cause standard has indeed been satisfied'")).

It is true that the BIA found torture a likely proposition. But here, even accepting as true allegations in the record that the DNCD tortured civilians in search of Aguasvivas, none of the

evidence on which the extradition request relies was derived through torture. Rather, probable cause principally derives from the identifications of Aguasvivas by Captain Jimenez and Agent Hernandez, who were themselves shot and witnessed the shooting of Agent Ubri. Torture is not alleged to have played any role in the officers' photo identifications of Aguasvivas. The Ninth Circuit Court of Appeals rejected a similar argument in Barapind v. Enomoto, 360 F.3d 1061, 1073 (9th Cir. 2004). In that case, the relator argued that acknowledgment of torture, and therefore the unreliability of some evidence, negated probable cause for all evidence presented.

The Ninth Circuit considered and rejected the argument:

We faced similar situations in Mainero v. Gregg, 164 F.3d 1199 (9th Cir.1999) and Cornejo-Barreto v. Seifert, 218 F.3d 1004 (9th Cir.2000). In Mainero, both the magistrate judge and the district court acknowledged that evidence of torture was present in the record. Mainero, 164 F.3d at 1206. However, both judges reviewed all of the statements and determined, as found by the magistrate judge, that "none of the evidence on which it is necessary to rely was obtained by torture." Id.

Barapind, 360 F.3d at 1073. The Ninth Circuit found that evidence presented and obtained by reliable methods could be considered to support a determination of probable cause even in the wake of evidence of torture in the record. Id. Likewise, it is this Court's view that the evidence supporting the request for extradition was not obtained by torture and that reliable evidence supports the Court's probable cause determinations.

5. Insufficient Evidence of Charges for which Extradition Is Sought

Finally, Aguasvivas argues that the Government cannot demonstrate probable cause as to each offense for which extradition is sought, and that therefore extradition is inappropriate under Treaty Article 7, § 3(c). Dkt. no. 24, at p. 3. Except as noted in the Court's analysis above, this argument is unavailing. As mentioned above, the Court's determination not to certify the charge of association of malefactors to the Secretary of State does not affect the Court's certification of extraditability for the charges of murder, illegal firearm possession, or robbery. See Kin-Hong,

939 F. Supp. at 947 n.12. In addition, Article 15 of the Treaty provides in relevant part that any “person extradited under this Treaty may only be detained, tried, or punished . . . for (a) any offense for which extradition was granted.” Dkt. no. 23-1, at p. 28. In other words, pursuant to the Treaty, Aguasvivas may be tried in the Dominican Republic only for the crimes for which extradition was sought and for which probable cause exists.

For the above reasons, the Court denies Aguasvivas’s motion to dismiss (dkt. no. 23) and supplemental motion to dismiss (dkt. no. 24).

Conclusion

In accordance with the foregoing memorandum and pursuant to 18 U.S.C. § 3184, the Court finds that Cristian Starling Aguasvivas is extraditable to the Dominican Republic for the offenses charged of murder, aggravated robbery, and illegal firearm possession. The Court finds that Aguasvivas is not extraditable on the charges of association of malefactors. The Certificate of Extradition is stayed for 60 days from the date of its issuance to allow Aguasvivas to pursue habeas relief and, if a petition for writ of habeas corpus is filed, during the pendency of such proceedings.

It is further ORDERED that Aguasvivas shall be committed to the custody of the U.S. Marshal for this District, to be held pending final disposition of this matter by the Secretary of State, and pending Aguasvivas’s potential surrender to the Dominican Republic.

No later than seven days after the date of this decision, the government shall file a proposed extradition certification and order of commitment.

Aguasvivas’s motion to dismiss (dkt. no. 23) and supplemental motion to dismiss (dkt. no. 24) are DENIED.

The Court ORDERS that the Clerk of Court shall forward a certified copy of this Order, Certification of Extraditability, and Order of Commitment, together with a copy of all the testimony and evidence taken before this Court, to the Secretary of State, Department of State, to the attention of the Office of the Legal Adviser.

/s/ David H. Hennessy
David H. Hennessy
U.S. Magistrate Judge

Dominican Law 36 on Trade and Possession of Firearms. The Government of the Dominican Republic has jurisdiction over this criminal conduct;

(6) The above-referenced Treaty between the United States and the Dominican Republic, pursuant to Article 2, encompasses the offenses for which the Relator has been charged and for which extradition is sought for trial;

(7) The Government of the Dominican Republic submitted documents that were properly authenticated and certified in accordance with the terms of the Treaty. Those documents include the pertinent text for the crimes with which the Relator has been charged;

(8) There is probable cause and a reasonable basis to believe that the Relator before this Court, the same person identified in the extradition request from the Government of the Dominican Republic, committed the offenses of murder, aggravated robbery, and illegal firearm possession, in violation of Articles 295, 304, 379, and 383 of the Dominican Criminal Code, and Article 39, Paragraph III of Dominican Law 36 on Trade and Possession of Firearms, for which extradition is sought (but there is not probable cause to believe that the Relator before this Court committed the offense of association of malefactors, in violation of Articles 265 and 266);

(9) The probable cause finding rests upon the documents submitted by the Government of the Dominican Republic in this matter, including: (1) the December 12, 2016 affidavit of Dominican prosecutor Sanchez, which attaches the arrest warrant; the autopsy report for Agent Ubri; medical certificates for the two other drug agents who were shot and wounded; and two photographs of the person sought; (2) the March 29, 2017 supplemental affidavit of prosecutor Sanchez; (3) the declaration of State Department legal counsel Tom Heinemann, which attaches the Treaty, the Secretary of State's Letter of Submittal, and the President's request to the Senate requesting ratification; (4) a supplemental declaration from Attorney Heinemann; (5) the May 25, 2018 supplemental affidavit of prosecutor Sanchez; and (6) the July 17, 2018 second additional affidavit of prosecutor Sanchez.

(10) In making the probable cause determination, the Court also considered the following submissions by the Relator: (1) a Youtube video, with audio, of the shooting; (2) his concession that he is the person seen on the video wearing a blue shirt; (3) a Spanish transcription and English translation of statements heard on the video; (3) the affidavit of prosecutor Sanchez in support of extraditing Aguasvivas's uncle, Ramon Emilio Aguasvivas; (4) transcriptions and translations of the following articles of the Dominican Criminal Procedure Code: Article 161 on "Active Extradition," Article 294, regarding criminal procedure when an investigation provides a basis to prosecute a defendant, and Articles 328 and 329 regarding the effect of a finding of justification of self-defense; (5) an October 2018 affidavit of attorney Ambar M. Maceo, regarding the elements necessary to charge the crime of conspiracy under Articles 265 and 266 of the Dominican Criminal Code; and (6) a decision from the Supreme Court of Justice of the Dominican Republic regarding the elements of conspiracy.

THEREFORE, pursuant to 18 U.S.C. § 3184, the above findings and the findings of fact

and conclusions of law set forth in this Court's Order of December 6, 2018, which is hereby incorporated herein, I certify the extradition of the Relator, CRISTIAN STARLING AGUASVIVAS, to the Dominican Republic, on the offenses of murder, aggravated robbery, and illegal firearm possession, in violation of Articles 295, 304, 379, and 383 of the Dominican Criminal Code, and Article 39, Paragraph III of Dominican Law 36 on Trade and Possession of Firearms, for which extradition is sought and for which extradition was requested (but **NOT** for the offense of association of malefactors, in violation of Articles 265 and 266, for which extradition was also requested), and commit the Relator to the custody of the United States Marshal pending further decision on extradition and surrender by the Secretary of State pursuant to 18 U.S.C. § 3186.

I further order that the Clerk of this Court forward a certified copy of this Certification and Committal for Extradition, together with a copy of the evidence presented in this case, including the formal extradition documents received in evidence and any testimony received in this case, to the Secretary of State, Department of State, Attention: Office of the Legal Advisor.

This Certificate of Extradition is stayed for 60 days from the date of its issuance to allow Relator Aguasvivas to pursue habeas relief and, if a petition for writ of habeas corpus is filed, during the pendency of such proceedings in the district court.


DAVID H. HENNESSY
CHIEF UNITED STATES MAGISTRATE JUDGE



Dated: Dec 11, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CRISTIAN AGUASVIVAS,
Plaintiff,

v.

MIKE POMPEO, Secretary of State,
WILLIAM BARR, Attorney General,
JOHN GIBBONS, U.S. Marshal for the
District of Massachusetts, WING
CHAU, U.S. Marshal for the District of
Rhode Island, and DANIEL MARTIN,
Warden, Wyatt Detention Facility,
Defendants.

C.A. No. 19-123-JJM-PAS

MEMORANDUM AND ORDER

JOHN J. MCCONNELL, JR., United States District Judge.

Petitioner Cristian Aguasvivas filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 and a complaint for declaratory and injunctive relief, claiming that he faces the prospect of being extradited for a crime he did not commit to a country where he will be tortured. The Court grants Mr. Aguasvivas' Petition for a Writ of Habeas Corpus, dismisses the Extradition Complaint for failure to comply with the relevant Treaty¹; finds that Mr. Aguasvivas' extradition would violate the United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 ("CAT"), given

¹ Dominican Republic-American Treaty, DR-U.S., art. 7 § 3(c), Jan. 12, 2015, T.I.A.S. No. 06-1215 ("Treaty").

the final Board of Immigration Appeals ruling; and orders Mr. Aguasvivas released from custody.

I. FACTS

On December 6, 2013, Mr. Aguasvivas, a cabinet-maker apprentice and father of two, was waiting outside his boss' house to travel with him to a job, when agents of the Dominican Republic's National Directorate for Drug Control (DNCD) dressed in civilian clothing² and in an unmarked vehicle tried to arrest him for suspected drug dealing in the Dominican Republic.

Chaos erupted because Mr. Aguasvivas and his family and friends witnessing the event believed he was being kidnapped. The police cuffed Mr. Aguasvivas' hands in front of his body and forced him into the front passenger's seat of their unmarked vehicle. While two officers were physically pushing Mr. Aguasvivas into the vehicle, shots were fired. DNCD Agent Lorenzo Ubri Montero³ died from his wounds, and Captain Felipe de Jesus Jimenez Garcia and Agent Jose Marino Hernandez Rodriguez⁴ sustained non-fatal injuries in the commotion. Mr. Aguasvivas and his brother Francis Aguasvivas, who witnessed the event, fled from the scene.⁵

² According to Mr. Aguasvivas, police officers with the DNCD usually wear black vests marked with "DNCD." ECF No. 9-2 at 8.

³ Agent Ubri was the brother of a high-ranking military general in the Dominican Republic. ECF No. 1 at 5.

⁴ The Complaint seeking extradition listed this agent as Agent Hernandez, though all other documents refer to him as Henriquez. *In re Aguasvivas*, Misc. No. 17-MJ-4218-DHH (D. Mass. Sept. 13, 2017), ECF No. 2 at 2.

⁵ The available information about the shooting comes from the testimony of witnesses in the immigration proceedings, a YouTube video capturing the incident (*available at* <https://www.youtube.com/watch?v=sl8I71OFDyo>) (last visited Sept. 16, 2019), and the documents submitted by the Dominican Republic in support of its

Documents written after the incident give conflicting evidence of the perpetrator of the killing. The autopsy of Agent Ubri conducted hours after the shooting states that “[Agent Ubri] was seriously injured when he and other agents of the [DNCD] were performing an anti-drug operation...[and] tried to arrest and introduce into a vehicle to a presumed drug dealer, but they were injured by someone else, who tried to stop the arrest.” ECF No. 9-4 at 71. It also states that the decedent was killed by “distant” wounding. *Id.* But the arrest warrant issued by the Dominican police the day of the shooting, states “at the moment when the agents of the [DNCD] were making an anti-drug operation and were preparing to arrest Estarling Aguasvivas⁶...[he] disarmed and fired three shots to the [decedent].” *Id. at* 64. An affidavit by the Dominican prosecutor, written three years later, alleges that Mr. Aguasvivas “in a surprising way, attacked to the agent the [decedent], to whom disarmed and killed, opening fire on all the agents of the [DNCD] that were present.” *Id. at* 58. In a supplemental affidavit dated four months later, the prosecutor asserts that the two “surviving victims of the shootout attack on the anti-narcotics patrol carried out by [Mr. Aguasvivas]” are “eyewitnesses because they saw [Mr. Aguasvivas] disarm, shoot, and kill the [decedent].” *Id. at* 84.

Following the shooting, to extract information from them about Mr. Aguasvivas’ location, the DNCD tortured members of Mr. Aguasvivas’ family,

extradition request, including an arrest warrant, two affidavits by a Dominican prosecutor, the autopsy of the decedent, and medical certificates of the injured officers.

⁶ Mr. Aguasvivas’ middle name is “Starling.”

according to four family members.⁷ *See* ECF No. 9-2 at 16-18 (summarizing the torture victims' testimony). The victims consistently testified about "having [] black bags placed over their heads and onions placed in their mouths," and that "the black bag/onion tactic, [was] intended to simulate/cause suffocation." ECF No. 9-5 at 2.

The Dominican police shot and killed Mr. Aguasvivas' brother, Francis Aguasvivas, soon after the brothers went their separate ways. Mr. Francis Aguasvivas' autopsy shows that he was killed "by contact of a firearm projectile" to the chest and lists his manner of death as homicide caused by wound to the heart. ECF No. 9-7 at 5, 6. The police maintain that they killed him in a shootout.

Mr. Aguasvivas fled the country and came to the United States upon hearing the news of his family's torture and his brother's death.

II. PROCEDURAL HISTORY

Immigration Proceedings

Upon arrival in the United States, Mr. Aguasvivas sought asylum, withholding of removal, and protection under the CAT in immigration court. The Immigration Judge held nine hearings and considered the testimony of ten witnesses. *See* ECF No. 9-2 at 14-15 (listing witnesses). Mr. Aguasvivas testified and called eight witnesses: Joseline Ballez, Angel Pimenthal, Keila Aguasvivas, and Sandra Aguasvivas testified to being tortured; Yolanda Diaz testified as a percipient witness; and three individuals testified as character witnesses. The Government called one

⁷ They testified during Mr. Aguasvivas' immigration hearing proceedings. The Immigration Judge found all the victims credible, except for Sandra Aguasvivas. ECF No. 9-2 at 24.

witness, a DEA agent working in the Dominican Republic. *See id.* at 13-14 (summarizing the DEA agent's testimony). Mr. Aguasvivas also presented reports and articles documenting human rights violations by the Dominican police. *See id.* at 2-3, 5. The Government submitted documents in support of its allegation that Mr. Aguasvivas committed the shooting, including the Dominican arrest warrant, police reports, an Interpol notice for Mr. Aguasvivas, and news articles about Mr. Aguasvivas' involvement in the shooting. *See id.* at 4-5.

The Immigration Judge found that Mr. Aguasvivas was not eligible for asylum or withholding of removal because he did not establish persecution because of his race, religion, nationality, membership in a particular social group, or political opinion. *See id.* at 29. The Immigration Judge also found there were "serious reasons for believing" that Mr. Aguasvivas had committed the murder, a serious nonpolitical crime. *See id.* at 26, 29. The Immigration Judge also denied Mr. Aguasvivas the CAT relief. *See id.* at 30-31. Mr. Aguasvivas appealed.

The Board of Immigration Appeals ("BIA") reversed the decision on the CAT relief, concluding that Mr. Aguasvivas "met his burden of demonstrating on this record that it is more likely than not that he will be tortured at the instigation of or with the consent or acquiescence of public official[s] in the Dominican Republic." ECF No. 9-5 at 2. Significantly, the BIA held that

The record contains evidence of human rights conditions in the Dominican Republic, including evidence revealing that despite efforts to curb abuses, there have been persistent reports of arbitrary arrests, extrajudicial killings, impunity, and corruption involving police and security forces, and that "the police were involved in incidents that resulted in maiming or severe injury to unarmed civilians." Indeed,

“[a]lthough the law prohibits torture, beatings, and physical abuse of detainee and prisoners, there were instances in which members of the security forces, primarily police, reportedly carried out such practices.”

Id. (internal citations omitted). The BIA granted Mr. Aguasvivas withholding of removal. ECF No. 9-8. This represented the final order on the CAT. Mr. Aguasvivas was released from custody and the United States Government was barred from removing him from this country because of the likelihood that he would be tortured.

Extradition Proceedings

About one year after the BIA granted Mr. Aguasvivas withholding of removal under the CAT, the United States Government filed an Extradition Complaint in the United States District Court for the District of Massachusetts. *In re Aguasvivas*, Misc. No. 17-MJ-4218-DHH (D. Mass. Sept. 13, 2017). The request sought extradition on conspiracy, homicide, illegal possession of firearm, and robbery charges stemming from his arrest in the Dominican Republic. ECF No. 9-4 at 56. The United States Marshal Service detained Mr. Aguasvivas and he has been in federal custody at the Wyatt Detention Facility in Central Falls, Rhode Island for the last two years. Mr. Aguasvivas moved to dismiss the Extradition Complaint. The Magistrate Judge held a hearing on the motion to dismiss and an evidentiary hearing on the extradition request.

The Magistrate Judge found that the Treaty between the United States and the Dominican Republic was in full force and effect, and that the Treaty covered the crimes for which the Dominican Republic requested surrender. ECF No. 9-12 at 12-16. He also found that there was enough evidence to support a probable cause finding

on the charges of robbery, illegal possession of firearms, and murder, denying certification on the conspiracy charges. *Id.* at 17-31. He later issued an Order denying the motion to dismiss, issued a Certificate of Extraditability, and an Order of Commitment. *Id.* at 2, 38-39. The Magistrate Judge did not have the issue of the CAT before him. The matter now comes here by a Petition for Writ of Habeas Corpus, in essence appealing the Magistrate Judge's order.⁸

III. DISCUSSION

Mr. Aguasvivas sets forth two arguments in seeking review of the Magistrate Judge's certificate of extradition. First, he challenges his extradition under the Treaty between the two countries by both claiming that there was no probable cause established that he committed the crimes, and that the Dominican Republic government did not meet the documentary requirements of the Treaty. Second, he argues that extradition is unlawful under the CAT because he will be tortured in the Dominican Republic if the United States returns him there. While the Court agrees with some of Mr. Aguasvivas' arguments and disagrees with others, ultimately it finds that Mr. Aguasvivas is not extraditable under either the Treaty or the CAT.

⁸ The extradition proceedings were held in the District of Massachusetts, but Mr. Aguasvivas is being held in custody at the Wyatt Detention Facility in Rhode Island. The Government is not contesting that venue is proper in the District of Rhode Island. *Zhenli Ye Gon v. Holder*, 992 F. Supp. 2d 637, 643 (W.D. Va. 2014), *aff'd sub nom. Zhenli Ye Gon v. Holt*, 774 F.3d 207 (4th Cir. 2014) (venue is proper in the district of custody).

A. TREATY DETERMINATION

1. Probable Cause Finding

a. Standard of Review

An extradition request must establish probable cause that the accused committed the offense or offenses for which extradition is sought. 18 U.S.C. § 3184; *see* Treaty. The First Circuit has held that on habeas corpus review of a Certificate of Extraditability, the court need only examine the Magistrate Judge's determination of probable cause to see if there is "any evidence" to support it. *United States v. Kin-Hong*, 110 F.3d 103, 116 (1st Cir. 1997) (citing *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925)). Previously, the Circuit interpreted the concept of "any evidence" liberally and historically conducted a deferential review of a magistrate judge's findings. *See Koskotas v. Roche*, 931 F.2d 169, 176 (1st Cir. 1991); *In re Extradition of Manzi*, 888 F.2d 204, 205 (1st Cir. 1989); *Brauch v. Raiche*, 618 F.2d 843, 854 (1st Cir. 1980); *Greci v. Birknes*, 527 F.2d 956, 958 (1st Cir. 1976).

But in *Kin-Hong*, the First Circuit acknowledged that other appellate courts have engaged in a more rigorous review of the evidence presented before a magistrate judge, that "it is arguable that the 'any evidence' standard is an anachronism, and that this court should engage in a more searching review of the magistrate's probable cause findings." *Kin-Hong*, 110 F.3d at 117. Despite this reflection, the court failed to adopt explicitly a more searching review because the government had met its burden in that case through whatever prism the court reviewed the record. *Id.* Thus,

the Court need only examine the Magistrate Judge's determination of probable cause to see if there is "any evidence" to support it.

b. Any Competent Evidence

In support of probable cause, the Government, on behalf of the Dominican Republic, offered: (1) the affidavit of Dominican Prosecutor Feliz Sanchez Arias, which attached the arrest warrant; the autopsy report for Agent Ubri; medical certificates for the two other drug agents who were shot; and two photographs of the person sought; (2) the supplemental affidavit of Prosecutor Sanchez; (3) the declaration and the supplement of State Department legal counsel Tom Heinemann; and (4) the second additional affidavit of Prosecutor Sanchez.

Contesting probable cause, Mr. Aguasvivas submitted: (1) a YouTube video of the shooting; (2) his concession that he is the person in the video wearing a blue shirt; (3) a Spanish transcription and English translation of statements heard on the video; (4) the affidavit of Prosecutor Sanchez in support of extraditing Mr. Aguasvivas' uncle, Ramon Emilio Aguasvivas; (5) transcriptions and translations of pertinent articles of the Dominican Criminal Procedure Code; (6) an affidavit of attorney Ambar M. Maceo, about the elements necessary to charge the crime of conspiracy under the Dominican Criminal Code; and (7) a decision from the Supreme Court of Justice of the Dominican Republic on the elements of conspiracy.

The Magistrate Judge's probable cause determination was based in part on Prosecutor Sanchez's affidavit recounting the incident and citing two eyewitnesses to

the shooting.⁹ ECF No. 9-12 at 20 (“In a nutshell, the prosecutor assigned to investigate this matter has sworn in an affidavit that two police officers who were present—and who were themselves wounded during the crime—saw Mr. Aguasvivas shoot Agent Ubri, and that Agent Ubri died of the gunshot wounds Mr. Aguasvivas inflicted. While a more detailed affidavit certainly could have been presented, more is not necessary to establish probable cause.”). The Magistrate Judge also found that the autopsy report and the video evidence supported a probable cause finding. *Id.* at 20-21. He held that three bullets fired at short range to the area of the heart, as documented in the autopsy report, are enough to establish probable cause that Mr. Aguasvivas shot Agent Ubri with the intent to kill him. *Id.* at 20. He also held that the video supports a probable cause finding because it shows that the arrest occurred in good light with the agents within feet of Mr. Aguasvivas when the shots were fired, and thus they were well positioned to see the shooting and identify the shooter. *Id.* at 21.

Through the generous and deferential prism of “any evidence warranting the finding that there was reasonable ground to believe the accused guilty,” the Court finds that the Magistrate Judge’s probable cause determination was supported by

⁹ Mr. Aguasvivas argues that the statements of the two eyewitnesses are not “competent evidence” because the source of the statements is unknown. But “competent evidence” is defined as “that which is properly admissible at the extradition hearing.” *Castro Bobadilla v. Reno*, 826 F. Supp. 1428, 1433 (S.D. Fla. 1993). The First Circuit has held that evidence supporting extraditability “may consist of hearsay, even entirely of hearsay.” *Kin-Hong*, 110 F.3d at 120.

evidence (the affidavit, the video, the autopsy physical findings) and so this Court must uphold that decision.¹⁰ *Fernandez*, 268 U.S. at 312.

2. Treaty Compliance

Article 7 § 3 of the Treaty states that “a request for extradition of a person sought for prosecution shall [] be supported by,” *inter alia*:

- (a) a copy of the warrant or order of arrest or detention issued by a judge or other competent authority;
- (b) a copy of the document setting forth the charges against the person sought; and
- (c) such information as would provide a reasonable basis to believe that the person sought committed the offense or offenses for which extradition is requested.

Mr. Aguasvivas argues that in addition to the warrant, the Treaty requires a formal charging document lodged in the court system be presented. He stresses that the warrant alone cannot satisfy the second requirement of section 3. The Court agrees with Mr. Aguasvivas.

a. Document Setting Forth the Charges

¹⁰ A more searching review of the evidence, however, raises questions about the source and sufficiency of the eyewitness statements in the prosecutor’s affidavit and the finding of probable cause. First, about the eyewitness statements in the prosecutor’s affidavit, there is nothing in the record sourcing the statements from the officers identifying Mr. Aguasvivas as the shooter—the identification is assumed from a single sentence in the final paragraph of the prosecutor’s supplemental affidavit. ECF No. 9-4 at 83-84. Additionally, the context in which the paragraph appears suggests that the police included that sentence to bolster the reasons why the officers were qualified to identify a photograph of Mr. Aguasvivas, rather than to serve as a statement by eyewitnesses. *Id.* Second, the medical examiner, who wrote the autopsy report only hours after the shooting, concluded that someone else, not Mr. Aguasvivas, committed the shooting. *Id.* at 71. Third, by the Government’s own account, Mr. Aguasvivas was handcuffed throughout the event and during the time the shots were fired. *Id.* at 58. This Court’s review of the video supports a finding that Mr. Aguasvivas was not the shooter. But this Court does not believe it has the legal mandate to do a more rigorous review.

The Treaty's requirement that the Dominican Republic government must include "the document setting forth the charges against the person," refers to a formal charging document. The Government has not set forth any evidence to show that the Dominican Republic government has formally charged Mr. Aguasvivas because there was no charging document. But the Government argues that formal charges are not required, and as the Magistrate Judge agreed, the arrest warrant itself satisfies the Treaty's requirement under both sections (a) and (b) cited above.

This Court rejects the Government's interpretation of Article 7 § 3.¹¹ The plain language of the Treaty supports the requirement that the requesting country must produce a formal charging document in addition to the warrant to support extradition.¹² The use of the qualifier "the" instead of "a" in front of "document setting forth the charges" in § 3(b) signifies that there must be a specific charging document presented. Additionally, the canon against surplusage supports this interpretation of § 3(b). If section (b) is to have any meaning, it must impose a requirement beyond what is required by subsection (a). In other words, if a warrant, required by § 3(a), satisfied both the warrant requirement and the charging document requirement, § 3(b) would be stripped of any meaning.

While the Magistrate Judge agreed with the Government's contention that the single Dominican arrest warrant could satisfy both requirements, the Court finds the

¹¹ Because this is a question of law, this Court reviews this issue de novo. *Bath Iron Works Corp. v. U.S. Dept. of Labor*, 336 F.3d 51, 55 (1st Cir. 2003).

¹² The Court also notes the use of the conjunction "and" in between sections (b) and (c).

basis for Magistrate Judge's reasoning flawed. In finding Mr. Aguasvivas extraditable, the Magistrate Judge relied on cases involving extradition treaties with other countries that did not contain the added requirement of a charging document. *See In re Assarsson*, 635 F.2d 1237, 1243 (7th Cir. 1980) (U.S.-Switzerland treaty required "a duly certified or authenticated copy of the warrant of arrest or other order of detention"); *Emami v. U.S. Dist. Ct. for N. Dist. of Cal.*, 834 F.2d 1444, 1448 n. 3 (9th Cir. 1987) (U.S.-Germany treaty required "[a] warrant of arrest issued by a judge of a Requesting State and such evidence as...would justify his arrest and committal for trial"); *In re Extradition of Sarellano*, 142 F. Supp. 3d 1182, 1186 n.2 (U.S.-Mexico treaty required a "certified copy of the warrant of arrest issued by a judge or other judicial officer"). Indeed, the courts in *Assarsson* and *Emami* noted that the inclusion of the charging document in the list of required documents would have resulted in a different outcome. *See Assarsson*, 635 F.3d at 1243 ("If the parties had wished to include the additional requirement that a formal document called a charge be produced, they could have so provided."); *Emami*, 834 F.2d at 1448.

Here, the Treaty clearly requires that the requesting country produce and include a copy of the warrant *and* "the document setting forth the charges against the person." Because the Government's request for extradition was not supported by both a warrant and charging document, the Court finds that the Treaty does not allow for the extradition of Mr. Aguasvivas. But even if the Government fulfilled all the requirements of the Treaty, the extradition of Mr. Aguasvivas would still be prohibited.

B. EXTRADITION AND TORTURE DETERMINATION

Mr. Aguasvivas' second point in support of his argument that he is not extraditable is that the United States Government cannot lawfully extradite him because it is more likely than not that the Dominican Republic government will torture him if he returns to the Dominican Republic. The BIA has already found that Mr. Aguasvivas is more likely than not to be tortured, so Mr. Aguasvivas argues that extradition is barred by the CAT, the Foreign Affairs Reform and Restructuring Act ("FARRA"), and the implementing regulations. The relevant guiding laws state:

- *Convention Against Torture*: Article 3 of the CAT states that "[n]o State Party shall expel, return ("refouler") or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture." CAT Art. 3, § 1.

- *Foreign Affairs Reform and Restructuring Act*: Congress implemented the United States' obligations under the CAT through the FARRA in 1998. It states that:

It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture....

FARRA, Pub. L. No. 105-227, Div. G, § 2242(a), 112 Stat. 2681-822 (1998) (codified as Note to 8 U.S.C. § 1231).

- *Department of State Regulations*: The Department of State's ("DOS") implementing regulations state: "Article 3 of the Convention imposes on the parties

certain obligations with respect to extradition” and quotes the non-refoulement language of Article 3. *See* 22 C.F.R. § 95.2(a).¹³ The “substantial grounds” language has been interpreted to mean that torture is “more likely than not.” 22 C.F.R. § 95.1(c). The regulations also contemplate an internal procedure for determining compliance:

In order to implement the obligation assumed by the United States pursuant to Article 3 of the Convention, the Department considers the question of whether a person facing extradition from the U.S. “is more likely than not” to be tortured in the State requesting extradition when appropriate in making this determination.

22 C.F.R. § 95.2(b).

- *Department of Justice Regulations:* Under the Department of Justice’s (“DOJ”) implementing regulations on the CAT,¹⁴ an individual cannot be returned to a country if “it is more likely than not that he or she would be tortured.” 8 C.F.R. § 1208.16(c)(2)-(4). There are two types of protection under the CAT: withholding of removal and deferral of removal. *See* 8 C.F.R. § 1208.16(c); 8 C.F.R. § 1208.17.

CAT prohibits a signatory country from returning an individual to a country where they would be tortured. Given CAT and its implementing statute and regulations, it is without question that it is United States’ policy that it will not extradite a person after a determination is made that he or she is more likely than not to be tortured in that other country. The Government levels arguments against

¹³ The full text of the DOS’ implementing regulations appear at 22 C.F.R. §§ 95.1-95.4.

¹⁴ *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999).

the applicability of these legal authorities and precedent. Mr. Aguasvivas argues that *res judicata* precludes the DOS from revisiting the Executive Branch determination on torture. The Court will deal with each of these arguments in turn.

1. Ripeness

In arguing against application of the CAT, the Government first presses that the claims are not ripe for review because the Secretary of State has not yet decided whether to extradite Mr. Aguasvivas. The Government cites several cases where courts have held that the CAT torture claims are not ripe where the Secretary of State has not yet decided whether to surrender the petitioner. *See Meza v. U.S. Atty. Gen.*, 693 F.3d 1350, 1357 (11th Cir. 2012); *Hoxha v. Levi*, 465 F.3d 554, 565 (3d Cir. 2006); *Masopust v. Fitzgerald*, No. 2:09-cv-1495-ARH, 2010 WL 324378, at *4 (W.D. Pa. Jan. 21, 2010); *Perez v. Mims*, Case No. 1:16-cv-00447-DAD-SKO, 2016 WL 3254036, at *2-3 (E.D. Cal. June 14, 2016).

But these cases did not involve a finding on the torture issue. Here, the BIA has already found that the Dominican Republic government is likely to torture Mr. Aguasvivas if the United States returns him. Indeed, the cited authority recognized that a prior finding on the likelihood of torture affects ripeness. *See Hoxha*, 465 F.3d at 565 (noting that petitioner's argument that he would be tortured was not ripe under the Administrative Procedures Act *because there was no prior finding on the torture issue*); *see also Meza*, 693 F.3d at 1357 (finding that the CAT claim is unripe before the Secretary's consideration *in the first instance* of humanitarian issues before Secretary's consideration). Because there has been a

final and conclusive finding of likelihood of torture, the issues in this habeas corpus case are ripe for this Court's review.

2. Jurisdiction

Next, the Court considers the Government's argument that it is barred from hearing the claims Mr. Aguasvivas raises under the statutes and regulations. The Government argues that the Court has no jurisdiction (1) because the doctrine of non-inquiry precludes consideration of torture claims; (2) under the CAT and FARRA; and/or (3) under the REAL ID Act. The Government also argues that limiting habeas corpus review here does not implicate the Suspension of Habeas Corpus Clause because the Secretary of State's surrender decision is outside the scope of habeas review. The Court rejects the Government's arguments and finds that there is jurisdiction to review the claims. The Court will begin with the Suspension Clause argument.

a. Suspension of Habeas Corpus Clause

The United States Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001).

The Government argues that the Suspension Clause does not apply in this context because historically and practically, the role of a habeas court has not been

extended to issues about the treatment a fugitive would receive in a foreign state, but the caselaw says otherwise. The Supreme Court has held that “at the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’” *Id.* (citation omitted). The First Circuit has looked at whether a CAT claim fell within the historical ambit of habeas and found that it did. *See Saint Fort*, 329 F.3d at 201 (“American courts have exercised habeas review over claims of aliens based on treaty obligations since the earliest days of the republic.”). It specifically recognized that review of extradition was historically among the functions of habeas, noting that “for centuries” “federal courts employed the writ of habeas corpus to inquire into [,] [*inter alia*,] ..., extradition of aliens accused of crime....” *Id.* at 197 (quoting G.L. Neuman, *Jurisdiction and the Rule of Law after the 1996 Immigration Act*, 113 Harv. L. Rev. 1963, 1966 (2000)). Thus, because the Suspension Clause of the Constitution has been interpreted to guarantee this Court’s habeas jurisdiction, any attempt to remove such jurisdiction over Mr. Aguasvivas’ CAT claim would violate the Suspension Clause. *See Saint Fort*, 329 F.3d at 200-02.¹⁵

¹⁵ The Government argues that Mr. Aguasvivas’ claims fall outside the Suspension Clause because the Secretary of State’s decision to extradite involves an exercise of discretion, but the Court notes that Mr. Aguasvivas is arguing that his extradition is *prohibited* and so the Secretary has *no* discretion to extradite him. *Plaster v. United States*, 720 F.2d 340, 349 (4th Cir. 1983); *see also Mironescu v. Costner*, 480 F.3d 664, 670 (4th Cir. 2007) (“although the Executive has unlimited discretion to *refuse* to extradite a fugitive, it lacks the discretion to extradite a fugitive when extradition would” be unlawful).

b. Doctrine of Non-Inquiry

The Government next argues the doctrine of non-inquiry deprives this Court of jurisdiction here. First, the rule of non-inquiry is not a jurisdictional rule. This doctrine counsels that extradition courts should refrain from evaluating petitioner claims that they will face mistreatment in a Requesting State in deference to the Executive Branch on such matters. While the First Circuit has held that non-inquiry encourages deference to the Executive Branch, it is not an absolute restraint on the courts. *See Kin-Hong*, 110 F.3d at 112 (“[n]one of these principles, including non-inquiry, may be regarded as an absolute.”). A few courts that have applied non-inquiry have held that the rule implicates the *scope* of habeas review and does not affect federal habeas *jurisdiction*. *See Munaf v. Geren*, 553 U.S. 674, 700 (2008) (holding that the political branches should address the torture claims raised by habeas petitioners seeking to avoid transfer to a foreign country); *see also Trinidad y Garcia v. Thomas*, 683 F.3d 952, 956 (9th Cir. 2012) (“the rule [of non-inquiry] implicates only the *scope* of habeas review; it does not affect federal habeas *jurisdiction*.”) (emphasis in original); *Escobedo v. United States*, 623 F.2d 1098, 1107 (5th Cir. 1980) (holding that the degree of risk to petitioner’s life from extradition is an issue that falls within the purview of the Executive Branch). Thus, the rule of non-inquiry is applied when the petitioner questions the *wisdom* of the Secretary of State’s decision to extradite, but it does not fit here, where Mr. Aguasvivas questions the *legality* of the extradition.

Additionally, and notably, the Executive Branch has already found that torture is probable. The Government argues that the doctrine of non-inquiry is important so as to not “undermine the Government’s ability to speak with one voice in this area,” *Munaf*, 553 U.S. at 702, but here, the Executive Branch has already spoken—the BIA found that it is more likely than not that the Dominican Republic government will torture Mr. Aguasvivas. Indeed, the Supreme Court in *Munaf* determined that habeas was not appropriate in a case in which the petitioners were in a foreign country, not seeking release from U.S. custody, and who had not raised a bona fide CAT/FARRA claim,¹⁶ but distinguished that situation from “a more extreme case” where “the Executive *has determined that a detainee is likely to be tortured but decides to transfer him anyway.*” *Id.* (emphasis added). This is precisely that extreme case.

c. The CAT and FARRA

FARRA contains a jurisdiction-limiting provision:

[N]o court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, ... except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. [§] 1252).

FARRA § 2242(d). The Government argues that this language restricts a court’s CAT review of a final order of removal in an immigration case, effectively repealing a court’s habeas jurisdiction. But to repeal habeas jurisdiction, the Supreme Court has

¹⁶ Mr. Aguasvivas is not in a foreign country, is seeking release from United States custody, and has raised a bona fide CAT/FARRA claim.

recognized a “strong presumption in favor of judicial review of administrative action and [a] long standing rule requiring a clear statement of congressional intent to repeal habeas jurisdiction.” *St. Cyr*, 533 U.S. at 298. When statutory language signals an intent to strip jurisdiction, courts must consider whether “an alternative interpretation of the statute is ‘fairly possible.’” *Id.* at 299-300 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). The United States Supreme Court in *St. Cyr* found that language much like FARRA § 2242(d) had no clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas, and so did not remove habeas jurisdiction. *Id.* at 314.

Following *St. Cyr*, the First Circuit held that FARRA § 2242(d) does not remove habeas jurisdiction over the CAT claims. *Saint Fort v. Ashcroft*, 329 F.3d 191, 201 (1st Cir. 2003). In that case, Mr. Saint Fort sought to challenge the BIA’s denial of the CAT relief and his only recourse was habeas as he was statutorily ineligible for a review of a final order of removal. *Id.* at 193. The Government argued that FARRA § 2242(d) precluded habeas jurisdiction, but the First Circuit disagreed, holding that § 2242(d) “is a consolidation of statutory jurisdiction, not a repeal of habeas jurisdiction.” *Id.* at 201. The First Circuit concluded that “FARRA does not expressly refer to 28 U.S.C. § 2241 or to habeas review and we would not imply an intent to repeal habeas jurisdiction from silence.” *Id.* at 201.

The Government argues that *Saint Fort* is distinguishable because it is an immigration case with no applicability to extradition. The Court rejects the distinction and finds no legal, statutory, or policy basis to read the language of

§2242(d) with one result for immigration habeas petitioners and another result for extradition habeas petitioners. Because FARRA contains no clear statement removing this Court's habeas jurisdiction, the Court finds that it does not do so.

d. REAL ID Act

Congress passed the REAL ID Act in 2005. It provides:

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

8 U.S.C. § 1252(a)(4). The Government argues that this provision removes habeas jurisdiction over Mr. Aguasvivas' CAT claims. The Court disagrees.

It is undisputed that Mr. Aguasvivas has no alternative to habeas to obtain judicial review of his claims so before finding that 8 U.S.C. § 1252(a)(4) removes habeas jurisdiction, the Court should look for "an alternative interpretation of the statute [that] is 'fairly possible.'" *Trinidad y Garcia*, 683 F.3d at 956 (quoting *St. Cyr*, 533 U.S. at 299-300). In *Trinidad y Garcia*, the Ninth Circuit explained that the REAL ID Act can be construed as confined to addressing final orders of removal, without affecting habeas jurisdiction as the surrounding provisions of § 1252 relate to immigration orders. *Id.* at 956.¹⁷ "Given the plausible alternative statutory

¹⁷ The purpose of the REAL ID Act's jurisdiction-stripping provisions was to "consolidate judicial review of immigration proceedings into one action in the court of appeals." *Id.* at 958 (Thomas, J., concurring) (quoting *St. Cyr*, 533 U.S. at 313).

construction,” the court found that it could not “conclude that the REAL ID Act actually repealed the remedy of habeas corpus.” *Id.* (citing *St. Cyr*, 533 U.S. at 299-300). Here, considering the Suspension Clause questions that would arise if the Court construed the provision to divest it of habeas jurisdiction, the Court must find that the statute does not affect its habeas jurisdiction “to avoid such problems.” *See St. Cyr*, 533 U.S. at 300. The Court has habeas jurisdiction over Mr. Aguasvivas Petition.

3. Res Judicata

Mr. Aguasvivas asserts that the DOS is precluded or estopped under res judicata from revisiting the BIA’s adjudication of the likelihood of torture. Res judicata is a principle that “a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies.” *S. Pac. R.R. v. United States*, 168 U.S. 1, 48-49 (1897). For an issue to be precluded from reexamination, the First Circuit requires that five elements must be met:

1. the determination must be over an issue which was actually litigated in the first forum; 2. that determination must result in a valid and final judgment; 3. the determination must be essential to the judgment which is rendered by, and in, the first forum; 4. the issue before the second forum must be same as the one in the first forum; and 5. the parties in the second action must be the same as those in the first.¹⁸

¹⁸ The First Circuit has recognized that those in privity are also bound by res judicata. *NLRB*, 836 F.2d at 34-35 (finding privity where the interests of one party “cannot be disassociated from the interests” of the other).

See NLRB v. Donna-Lee Sportswear Co., Inc., 836 F.2d 31, 34 (1st Cir. 1987). The Court finds that all factors here have been met, res judicata applies, and the BIA's torture determination cannot be disputed.

First, the issue was fully and fairly litigated. In immigration court, there were nine hearings, testimonial and documentary evidence that Mr. Aguasvivas' brother Francis was killed, extensive documentation of police practices in the Dominican Republic, and testimony by four victims of DNCD torture. *See* ECF No. 9-2. The record supports the conclusion that the Government had the capacity to litigate fully its position that the police acted in a legitimate law enforcement capacity. Mr. Aguasvivas appealed the Immigration Judge's denial of his asylum application and the Government opposed it. ECF No. 9-5. In litigating this case, the Government had all the available tools and utilized all opportunities to obtain diplomatic assurances from the Dominican Republic. Indeed, the Government contacted the Dominican Republic during the 2015-2016 litigation and submitted documents obtained from the Dominican Republic in the immigration proceedings. *See* ECF 9-2 at 4-7, 30-31. Both parties had a full and fair opportunity to litigate the issue.

Second, a valid and binding judgment found that Mr. Aguasvivas would likely be tortured in the Dominican Republic. The BIA determined that "[i]n view of the country conditions evidence in the record and the credible and detailed testimony of the respondent's witness,...the respondent has met his burden of demonstrating on this record that *it is more likely than not that he will be tortured at the instigation or with the consent or acquiescence of public officials in the Dominican Republic.*"

ECF No. 9-5 at 2 (emphasis added). The Government argues that the BIA finding is not binding on the Secretary of State in this extradition proceeding because immigration and extradition proceedings are separate and independent proceedings governed by different legal standards and procedures, relying on *Castaneda-Castillo v. Holder*, 638 F.3d 354, 361 (1st Cir. 2011). The Court rejects the Government's argument and its reliance on *Castaneda-Castillo* for two reasons: (1) the First Circuit in *Castaneda-Castillo* was determining whether the court should stay an asylum proceeding while an extradition proceeding moved forward and cited the Government's own language as dicta, *id.* at 360; and (2) the standard for an asylum proceeding bore no weight on the extradition proceeding¹⁹ while here, the standard in the CAT proceeding is exactly the same as what the Secretary of State must use in the extradition determination. *See* CAT Art. 3, § 1, 22 C.F.R. § 95.1(c). The Court therefore finds no basis to decide that one arm of the Executive Branch can make a determination and another arm of the Executive Branch can ignore that determination when deciding the exact issue.

Third and fourth, whether torture is "more likely than not" was the central issue in the BIA's determination, *see* ECF No. 9-5, and the same one considered and

¹⁹ In *Castaneda-Castillo*, the First Circuit rejected the government's argument that the court should hold an asylum appeal in abeyance as not to complicate extradition proceedings and noted that "the argument that adjudicating the asylum claim would somehow 'complicate' the extradition proceedings would have more legs if a decision on the former had legally preclusive effect on the latter." *Id.* at 360. The court also cited the government's own concession that "the resolution of even a common issue in one proceeding is not binding in the other." *Id.*

decided in the immigration litigation as both agencies implement the same obligation under the CAT. *Compare* 8 C.F.R. § 1208.16(c)(4), *with* 22 C.F.R. § 95.2(b).

Lastly, Mr. Aguasvivas and the United States appear as the parties in both cases, so the parties are the same as or in privity with the parties in the immigration proceeding.²⁰

With all factors satisfied, the Court holds that res judicata bars reexamination of the BIA's binding resolution that Mr. Aguasvivas is likely to be tortured upon extradition to the Dominican Republic.²¹

IV. CONCLUSION

The mandate of the Treaty requiring that the Government produce the document setting forth the charges has not been met, and therefore Mr. Aguasvivas cannot be extradited under the Treaty. Moreover, the BIA's finding that Mr. Aguasvivas is likely to be tortured by the Dominican Republic government if he is returned to that country prohibits his extradition under CAT and its authorizing statutes and regulations.

For the reasons detailed above, it is hereby ORDERED as follows²²:

²⁰ It may appear that the Dominican Republic is the party in this action and was not represented in the immigration proceeding. The United States Attorney's Manual states that the prosecutor who appears in court "in support of the request for extradition [] is representing the United States in fulfilling its obligations under the extradition treaty." USAM 9-15.700, 1997 WL 1944616 (June 1, 2018).

²¹ Because the Court has found that extradition violates the CAT, FARRA, and implementing regulations and that the BIA finding is binding in the extradition proceeding, it need not examine the Due Process and Administrative Procedures Act arguments.

²² The Court DENIES AS MOOT Mr. Aguasvivas' Motion for Bail. ECF No. 16.

- (1) The Extradition Complaint against Cristian Starling Aguasvivas is DENIED AND DISMISSED WITH PREJUDICE under both the (a) Dominican Republic-American Treaty, DR-U.S., art. 7 § 3(c), Jan. 12, 2015, T.I.A.S. No. 06-1215 and (b) United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85;
- (2) The United States Department of State is enjoined from surrendering Cristian Starling Aguasvivas to the Dominican Republic or any official of the Dominican Republic; and
- (3) The United States Marshals Service is ordered immediately to release Cristian Starling Aguasvivas from custody.

IT IS SO ORDERED.

A handwritten signature in blue ink, reading "John J. McConnell, Jr.", is written over a horizontal line.

John J. McConnell, Jr.
United States District Judge

September 18, 2019

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CRISTIAN AGUASVIVAS

v.

**MIKE POMPEO, Secretary of
State, WILLIAM BARR, Attorney
General, JOHN GIBBONS, U.S.
Marshal for the District of
Massachusetts, WING CHAU, U.S.
Marshal for the District of Rhode
Island and DANIEL MARTIN, Warden,)
Wyatt Detention Facility**

C.A. NO: 19-123-JJM

AMENDED JUDGMENT

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

**Judgment is hereby entered for the Plaintiff against the Defendants,
pursuant to the Memorandum and Order dated September 18, 2019
GRANTING the Petition for Habeas Corpus under 28 U.S.C. § 2241.**

Enter:

**/s/ Barbara L. Barletta
Deputy Clerk**

DATED: September 18, 2019

(June 25, 1948, ch. 645, 62 Stat. 822; Pub. L. 104-294, title VI, § 601(f)(9), Oct. 11, 1996, 110 Stat. 3500.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 662 (R.S. § 5278).

Last sentence as to costs and expenses to be paid by the demanding authority was incorporated in section 3195 of this title.

Word "District" was inserted twice to make section equally applicable to fugitives found in the District of Columbia.

"Thirty days" was substituted for "six months" since, in view of modern conditions, the smaller time is ample for the demanding authority to act.

Minor changes were made in phraseology.

AMENDMENTS

1996—Pub. L. 104-294 inserted comma after "District" in section catchline and in two places in text.

§ 3183. Fugitives from State, Territory, or Possession into extraterritorial jurisdiction of United States

Whenever the executive authority of any State, Territory, District, or possession of the United States demands any American citizen or national as a fugitive from justice who has fled to a country in which the United States exercises extraterritorial jurisdiction, and produces a copy of an indictment found or an affidavit made before a magistrate of the demanding jurisdiction, charging the fugitive so demanded with having committed treason, felony, or other offense, certified as authentic by the Governor or chief magistrate of such demanding jurisdiction, or other person authorized to act, the officer or representative of the United States vested with judicial authority to whom the demand has been made shall cause such fugitive to be arrested and secured, and notify the executive authorities making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear.

If no such agent shall appear within three months from the time of the arrest, the prisoner may be discharged.

The agent who receives the fugitive into his custody shall be empowered to transport him to the jurisdiction from which he has fled.

(June 25, 1948, ch. 645, 62 Stat. 822; Pub. L. 107-273, div. B, title IV, § 4004(d), Nov. 2, 2002, 116 Stat. 1812.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 662c (Mar. 22, 1934, ch. 73, § 2, 48 Stat. 455).

Said section 662c was incorporated in this section and sections 752 and 3195 of this title.

Provision as to costs or expenses to be paid by the demanding authority were incorporated in section 3196 of this title.

Reference to the Philippine Islands was deleted as obsolete in view of the independence of the Commonwealth of the Philippines effective July 4, 1946.

The attention of Congress is directed to the probability that this section may be of little, if any, possible use in view of present world conditions.

Minor changes were made in phraseology.

AMENDMENTS

2002—Pub. L. 107-273 struck out "or the Panama Canal Zone," after "possession of the United States" in first par.

§ 3184. Fugitives from foreign country to United States

Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate judge of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b), he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

(June 25, 1948, ch. 645, 62 Stat. 822; Pub. L. 90-578, title III, § 301(a)(3), Oct. 17, 1968, 82 Stat. 1115; Pub. L. 100-690, title VII, § 7087, Nov. 18, 1988, 102 Stat. 4409; Pub. L. 101-647, title XVI, § 1605, Nov. 29, 1990, 104 Stat. 4843; Pub. L. 101-650, title III, § 321, Dec. 1, 1990, 104 Stat. 5117; Pub. L. 104-132, title IV, § 443(b), Apr. 24, 1996, 110 Stat. 1281.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 651 (R.S. § 5270; June 6, 1900, ch. 793, 31 Stat. 656).

Minor changes of phraseology were made.

AMENDMENTS

1996—Pub. L. 104-132, in first sentence, inserted "or in cases arising under section 3181(b)," after "United States and any foreign government," and "or provided for under section 3181(b)," after "treaty or convention," and in third sentence, inserted "or under section 3181(b)," after "treaty or convention,".

1990—Pub. L. 101-647 inserted "or, if there is reason to believe the person will shortly enter the United States" after "are not known" in second sentence.

1988—Pub. L. 100-690 inserted after first sentence "Such complaint may be filed before and such warrant may be issued by a judge or magistrate of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known."

1968—Pub. L. 90-578 substituted "magistrate" for "commissioner" in two places.

CHANGE OF NAME

Words "magistrate judge" substituted for "magistrate" wherever appearing in text pursuant to section 321 of Pub. L. 101-650, set out as a note under section 631 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90-578 effective Oct. 17, 1968, except when a later effective date is applicable, which is the earlier of date when implementation of amendment by appointment of magistrates [now United States magistrate judges] and assumption of office takes place or third anniversary of enactment of Pub. L. 90-578 on Oct. 17, 1968, see section 403 of Pub. L. 90-578, set out as a note under section 631 of Title 28, Judiciary and Judicial Procedure.

§ 3185. Fugitives from country under control of United States into the United States

Whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who, having violated the criminal laws in force therein by the commission of any of the offenses enumerated below, departs or flees from justice therein to the United States, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed.

(1) Murder and assault with intent to commit murder;

(2) Counterfeiting or altering money, or uttering or bringing into circulation counterfeit or altered money;

(3) Counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same;

(4) Forgery or altering and uttering what is forged or altered;

(5) Embezzlement or criminal malversation of the public funds, committed by public officers, employees, or depositaries;

(6) Larceny or embezzlement of an amount not less than \$100 in value;

(7) Robbery;

(8) Burglary, defined to be the breaking and entering by nighttime into the house of another person with intent to commit a felony therein;

(9) Breaking and entering the house or building of another, whether in the day or nighttime, with the intent to commit a felony therein;

(10) Entering, or breaking and entering the offices of the Government and public authorities, or the offices of banks, banking houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein;

(11) Perjury or the subornation of perjury;

(12) A felony under chapter 109A of this title;

(13) Arson;

(14) Piracy by the law of nations;

(15) Murder, assault with intent to kill, and manslaughter, committed on the high seas, on

board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States, or of some other government;

(16) Malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings, when the act endangers human life.

This chapter, so far as applicable, shall govern proceedings authorized by this section. Such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged.

No return or surrender shall be made of any person charged with the commission of any offense of a political nature.

If so held, such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such a person a fair and impartial trial.

(June 25, 1948, ch. 645, 62 Stat. 823; May 24, 1949, ch. 139, § 49, 63 Stat. 96; Pub. L. 99-646, § 87(c)(6), Nov. 10, 1986, 100 Stat. 3623; Pub. L. 99-654, § 3(a)(6), Nov. 14, 1986, 100 Stat. 3663.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., § 652 (R.S. § 5270; June 6, 1900, ch. 793, 31 Stat. 656).

Reference to territory of the United States and the District of Columbia was omitted as covered by definitive section 5 of this title.

Changes were made in phraseology and arrangement.

1949 ACT

This section [section 49] corrects typographical errors in section 3185 of title 18, U.S.C., by transferring to subdivision (3) the words, "indebtedness, bank notes, or other instruments of public", from subdivision (2) of such section where they had been erroneously included.

AMENDMENTS

1986—Par. (12). Pub. L. 99-646 and Pub. L. 99-654 amended par. (12) identically, substituting "A felony under chapter 109A of this title" for "Rape".

1949—Pars. (2), (3). Act May 24, 1949, transferred "indebtedness, bank notes, or other instruments of public" from par. (2) to par. (3).

EFFECTIVE DATE OF 1986 AMENDMENTS

Amendments by Pub. L. 99-646 and Pub. L. 99-654 effective, respectively, 30 days after Nov. 10, 1986, and 30 days after Nov. 14, 1986, see section 87(e) of Pub. L. 99-646 and section 4 of Pub. L. 99-654, set out as an Effective Date note under section 2241 of this title.

§ 3186. Secretary of State to surrender fugitive

The Secretary of State may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.

Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty.

A person so accused who escapes may be retaken in the same manner as any person accused of any offense.

(June 25, 1948, ch. 645, 62 Stat. 824.)



114TH CONGRESS }
2d Session

SENATE

{ TREATY DOC.
114-10

EXTRADITION TREATY WITH THE DOMINICAN
REPUBLIC

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE
UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE
DOMINICAN REPUBLIC (THE "TREATY"), SIGNED AT SANTO DO-
MINGO ON JANUARY 12, 2015



FEBRUARY 10, 2016.—Treaty was read the first time, and together with
the accompanying papers, referred to the Committee on Foreign Rela-
tions and ordered to be printed for the use of the Senate

U.S. GOVERNMENT PUBLISHING OFFICE

59-118

WASHINGTON : 2016

EX-AGUASVIVAS-000008

Add. 74

LETTER OF TRANSMITTAL

THE WHITE HOUSE, February 10, 2016.

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Extradition Treaty between the Government of the United States of America and the Government of the Dominican Republic (the "Treaty"), signed at Santo Domingo on January 12, 2015. I also transmit, for the information of the Senate, the report of the Department of State with respect to the Treaty.

The Treaty would replace the extradition treaty between the United States and the Dominican Republic, signed at Santo Domingo on June 19, 1909. The Treaty follows generally the form and content of other extradition treaties recently concluded by the United States. It would replace an outmoded list of extraditable offenses with a modern "dual criminality" approach, which would enable extradition for such offenses as money laundering and other newer offenses not appearing on the list. The Treaty also contains a modernized "political offense" clause and provides that extradition shall not be refused based on the nationality of the person sought. Finally, the Treaty incorporates a series of procedural improvements to streamline and speed the extradition process.

I recommend that the Senate give early and favorable consideration to the Treaty, and give its advice and consent to ratification.

BARACK OBAMA.

(III)

EX-AGUASVIVAS-000010

Add. 76

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, December 4, 2015.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you the Extradition Treaty between the Government of the United States of America and the Government of the Dominican Republic, signed at Santo Domingo on January 12, 2015 (the "Treaty"). Upon its entry into force, the Treaty would replace the Extradition Treaty between the United States of America and the Dominican Republic of June 19, 1909 ("the 1909 Treaty"). I recommend that the Treaty be transmitted to the Senate for its advice and consent to ratification.

The Treaty follows generally the form and content of other extradition treaties recently concluded by the United States. It is an important part of a concerted effort by the Department of State and the Department of Justice to modernize the legal tools available for the extradition of serious offenders. The Treaty is self-executing. It will not require implementing legislation.

An Overview of the Treaty, including a detailed article-by-article analysis, is enclosed with this report. The Department of Justice joins the Department of State in favoring approval of the Treaty by the Senate at the earliest possible date.

Respectfully submitted.

JOHN F. KERRY.

(V)

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**Extradition Treaty between the Government of the United States of America and the
Government of the Dominican Republic**

Overview

Introduction

The Extradition Treaty between the Government of the United States of America and the Government of the Dominican Republic (the "Treaty") replaces an extradition treaty between the two countries signed in 1909 (the "1909 Extradition Treaty").

Article-by-Article Analysis

The following is an article-by-article description of the provisions of the Treaty:

Article 1 obligates each Party to extradite to the other persons sought by the Requesting Party for prosecution or for imposition or service of a sentence for an extraditable offense.

Article 2 defines extraditable offenses. Under Article 2(1), an offense is extraditable if it is punishable under the laws of both Parties by deprivation of liberty for a period of more than one year or by a more severe penalty. This formulation is consistent with the modern "dual criminality" approach. The new Treaty eliminates the requirement, found in the 1909 Extradition Treaty, that the offense be among those listed in the treaty. The dual criminality formulation obviates the need to renegotiate or supplement the Treaty as additional offenses become punishable under the laws of both Parties and ensures a comprehensive coverage of criminal conduct for which extradition may be sought.

Article 2(2) further defines an extraditable offense to include an attempt or a conspiracy to commit, or participation in the commission of, an extraditable offense, if the offense of attempt, conspiracy, or participation is punishable under the laws of both Parties by deprivation of liberty for a period of more than one year or by a more severe penalty. Under the broad term of "participation," the Treaty covers such offenses as aiding, abetting, counseling, or procuring the commission of an offense, as well as being an accessory to an offense, at whatever stage of development of the criminal conduct and regardless of the alleged offender's degree of involvement.

Additionally, Article 2(3) identifies a number of situations in which an offense will be extraditable despite potential differences in the criminal laws of both Parties. For instance, an offense shall be extraditable whether or not the laws of the Requesting and Requested Parties place the acts constituting the offense within the same category of offenses or describe the offense by the same terminology. In addition, an offense involving tax fraud or tax evasion, customs duties, or import/export controls shall be extraditable regardless of whether the Requested Party provides for the same sort of taxes, duties, or controls. This provision also makes explicit that an offense is extraditable

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where United States federal law requires the showing of certain matters merely for the purpose of establishing U.S. federal jurisdiction, including interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce; this clarifies an important issue for the United States in requesting extradition for certain federal crimes.

Article 2(4) addresses issues of territorial jurisdiction and specifies that an offense shall be extraditable regardless of where the act or acts constituting the offense were committed.

Article 2(5) prescribes that, if extradition is granted for an extraditable offense, it shall be granted for any other offense specified in the request even if the latter offense is punishable by a maximum of one year's deprivation of liberty or less, provided that all other requirements for extradition are met. Article 2(6) provides that, where the extradition request is for service of a sentence of imprisonment, extradition may be denied if, at the time of the request, the remainder of the sentence to be served is less than six months.

Article 3 establishes that extradition shall not be refused based on the nationality of the person sought.

As is customary in extradition treaties, Article 4 governs political and military offenses as a basis for the denial of extradition. Article 4(1) states generally that extradition shall not be granted if the offense for which extradition is requested is a political offense.

Article 4(2) describes five categories of offenses that shall not be considered to be political offenses. This list of exceptions was included in the extradition treaty between the United States and Chile (signed 2013) and is slightly broader than similar lists that appear in other, modern treaties, including those with Hungary (signed 1994), Poland (signed 1997), the United Kingdom (signed 2003), Bulgaria (signed 2007) and Romania (signed 2007). In addition to offenses that involve the possession, placement, use or threatened use of an explosive, incendiary or destructive device, the exception at Article 4(2)(d) also includes biological, chemical or radiological agents when such agent is capable of endangering life or causing substantial bodily harm or substantial property damage. Further, Article 4(2)(e) makes clear that aiding or abetting another person to commit, attempt to commit or participate in the commission of such offenses also is excluded from the political offense exception. This slight expansion of the political offense exception is in keeping with a major priority of the United States to ensure that an overbroad definition of political offense not impede the ability to extradite terrorists.

Notwithstanding Article 4(2), Article 4(3) provides that extradition shall not be granted if the competent authority of the Requested Party determines that the request was politically motivated.

Under Article 4(4) the executive authority of the Requested Party may refuse extradition for offenses under military law that are not offenses under ordinary criminal law. Desertion would be an example of such an offense.

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Article 5 addresses denial of extradition in instances in which an individual has previously been prosecuted for the offense for which extradition is requested and denial for lapse of time.

Article 5(1) precludes extradition of a person who has been convicted or acquitted in the Requested Party for the offense for which extradition is requested. Under Article 5(2), a person shall not be considered to have been convicted or acquitted when the authorities of the Requested Party: (a) have decided not to proceed against the person sought for the acts for which extradition is requested; (b) have decided to discontinue any criminal proceedings against the person for those acts; or (c) are still investigating or proceeding against the person sought for those acts. Article 5(3) provides that only the laws of the Requesting Party regarding lapse of time shall be considered for purposes of deciding whether or not to grant extradition. In this regard, the Requested Party is bound by the statement of the Requesting Party that the statute of limitation has not run.

Article 6 addresses punishment. When an offense for which extradition is sought is punishable by death under the laws of the Requesting Party but not under the laws of the Requested Party, under Article 6(1) the Requested Party may refuse extradition of the person sought unless the Requesting Party provides assurances that the death penalty shall not be imposed or, if for procedural reasons the Requesting Party cannot provide that assurance, if imposed, the death penalty shall not be carried out. If the Requesting Party provides such an assurance, the Requested Party shall grant extradition and the Requesting Party shall comply with the assurance. Except in instances in which the death penalty applies, Article 6(2) precludes the Parties from refusing extradition on the basis that the term of imprisonment for the offense is greater in the Requesting Party than in the Requested Party. This provision was included to ensure that extradition was not limited in cases in which the offense was eligible for life imprisonment as a maximum offense in one Party but not the other.

Article 7 specifies the procedures and documents required to support a request for extradition. Article 7(1) prescribes that all extradition requests be submitted through the diplomatic channel. Among several other requirements, Article 7(3)(c) establishes that extradition requests must be supported by such information as would provide a reasonable basis to believe that the person sought committed the offense(s) for which extradition is requested. Notably, this language mirrors the probable cause standard applied in U.S. criminal law. Article 7(6) permits the submission of additional information to enable the Requested Party to decide on the extradition request.

Article 8 sets out the procedures for the certification and admissibility of documents in extradition proceedings.

Article 9 requires that all documents that the Requesting Party submits pursuant to the Treaty be accompanied by an official translation into the language of the Requested Party, unless otherwise agreed in exceptional circumstances.

Article 10 provides that the Requesting Party may request the provisional arrest of fugitives and sets forth the procedures for making such a request pending presentation of the

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formal extradition request. Article 10(2) specifies the information that must accompany a provisional arrest request. Article 10(3) provides that the Requesting Party shall be notified without delay of the date of a provisional arrest or the reasons why the Requested Party cannot proceed with the request. Article 10(4) permits the release of the person provisionally arrested if the executive authority of the Requested Party does not receive the extradition request and supporting documents within 60 days of the date on which the person was provisionally arrested. This paragraph also specifies that receipt of the extradition request and supporting documents by the embassy of the Requested Party in the territory of the Requesting Party constitutes receipt by the executive authority of the Requested Party. Thus, such receipt by the embassy of the Requested Party constitutes timely receipt for purposes of complying with the time limitation for submission of the extradition request and supporting documents. Article 10(5) makes clear that the release of a person pursuant to Article 10(4), does not impede the person's re-arrest and extradition if the Requested Party receives the extradition request and supporting documents at a later date.

Article 11 requires the Requested Party to promptly notify the Requesting Party of its decision on an extradition request. Under Article 11(2), if the requested Party denies extradition, it must provide an explanation of the reasons for the denial. Article 11(3) provides for the person's surrender, while Article 11(4) addresses the person's discharge from custody if the person is not removed from the territory of the Requested Party within 60 days from the time that the person is made available for surrender or within the time prescribed by the law of that Party, whichever is longer. If the person is discharged from custody, the Requested Party retains the discretion to subsequently refuse extradition for the same offense.

Article 12 addresses deferred and temporary surrender of the person sought. Under Article 12(1), if the person sought is being proceeded against in the Requested Party, the Requested Party may defer the extradition proceedings until its own proceedings have been concluded. Under Article 12(2) when extradition proceedings have been concluded and extradition has been authorized, but the person sought is being criminally proceeded against or is serving a sentence in the Requested Party, the Requested Party may either defer the surrender of the person sought or temporarily surrender the person to the Requesting Party for the purpose of prosecution. Article 12(3) provides that the person may be detained until the surrender, while Article 12(4) requires the Requesting Party to keep the person temporarily surrendered in custody while in the territory of the Requesting Party and to return the person to the Requested Party at the conclusion of proceedings. The person's return to the Requested Party shall not require any further extradition request or proceedings.

Pursuant to Article 13, if the Requested Party receives extradition requests for the same person from the Requesting Party and from any other States or State, either for the same offense or for different offenses, the executive authority of the Requested Party shall determine to which State, if any, it will surrender that person. Additionally, this Article sets forth a non-exclusive list of factors to be considered by the Requested Party in making its decision.

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Article 14 provides that, subject to certain conditions, the Requested Party may seize and surrender to the Requesting Party all items that are connected with the offense for which extradition is sought or that may be required as evidence in the Requesting Party.

Article 15 sets forth the rule of specialty, which prohibits a person extradited under the Treaty from being detained, tried, or punished in the Requesting Party, except for any offense for which extradition was granted, or for a differently denominated offense carrying the same or lesser penalty that is based on the same acts or omissions as the offense for which extradition was granted, provided such offense is extraditable or is a lesser included offense. The rule of specialty does not bar detention, trial or punishment of the extradited person if the offense is committed after the extradition of the person, or if the competent authority of the Requested Party consents. Similarly, Article 15(2) provides that a person extradited under the Treaty may not be the subject of onward extradition or surrender for any offense committed prior to extradition, unless the competent authority of the Requested Party consents. This provision would preclude the Dominican Republic from transferring to a third State or an international tribunal a fugitive that the United States surrendered to the Dominican Republic, unless the United States consents. The competent authority for the United States for purposes of this article is the executive authority. Article 15(4) provides that the rule of specialty provisions in this article do not apply if the person sought waives extradition under Article 16(a).

Article 16 allows the Parties to expedite the transfer of the person whose extradition is sought to the Requesting Party. If the person waives extradition, a judicial officer may direct the person's transfer to the Requesting Party without further proceedings. If the person consents to extradition or to a simplified extradition proceeding, the Requested Party may surrender the person as expeditiously as possible.

Article 17 governs the transportation through the territory of one Party of a person being extradited between the other Party and a third State. It also specifies the procedures for requesting such transit and makes clear that a person who is being transported pursuant to this article may be detained during the period of transit.

Article 18 requires the Requested Party to advise, assist, appear in court on behalf of, and represent the interests of the Requesting Party in any proceedings arising out of an extradition request. Additionally, the Requested Party must bear all expenses incurred in that State in connection with the extradition proceedings, except for expenses related to translation and transportation of the person surrendered.

Article 19 provides that the U.S. Department of Justice and the Dominican Office of the General Prosecutor may consult with each other directly in connection with individual cases and in furtherance of efficient implementation of the Treaty.

Article 20, like its counterparts in many other United States extradition treaties, establishes that the Treaty shall apply to requests submitted after the Treaty's entry into force even if the offenses for which extradition is requested were committed before the Treaty's entry into

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force, so long as the conduct on which the extradition request is based constituted an offense under the laws in both Parties at the time it occurred.

Article 21 notes that the Treaty is subject to ratification and shall enter into force upon the exchange of the instruments of ratification. Article 21(3) provides that, upon entry into force, the 1909 Extradition Treaty will cease to have any effect between the Parties, except that the requests pending upon entry into force shall continue under the procedures of the 1909 Extradition Treaty supplemented by Article 6 of the Treaty.

Under Article 22, either Party may terminate the Treaty by giving written notice to the other Party through the diplomatic channel. The termination shall be effective six months after the date of such notice. Nevertheless, extradition requests made before the termination becomes effective shall be governed by the Treaty until final resolution of the request.

EX-AGUASVIVAS-000018

Add. 84

EXTRADITION TREATY
BETWEEN
THE GOVERNMENT OF THE UNITED STATES OF AMERICA
AND
THE GOVERNMENT OF THE DOMINICAN REPUBLIC

(1)

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The Government of the United States of America and the Government of the Dominican Republic, hereinafter referred to as "the Parties,"

Recalling the Convention for Extradition between the United States of America and the Dominican Republic, signed at Santo Domingo June 19, 1909, entered into force August 2, 1910 (hereinafter "the 1909 Treaty");

Noting that both the Government of the United States of America and the Government of the Dominican Republic currently apply the terms of the 1909 Treaty; and

Desiring to provide for more effective cooperation in accordance with the demands of the times;

Having decided to conclude a new treaty for the extradition of offenders,

Have agreed as follows:

Article 1

Obligation to Extradite

The Parties undertake the obligation to extradite to each other, pursuant to the provisions of this Treaty, persons sought by the Requesting Party from the Requested Party for prosecution or for imposition or service of a sentence for an extraditable offense or offenses.

Article 2

Extraditable Offenses

1. An offense shall be an extraditable offense if, under the laws of both Parties, the maximum applicable penalty is deprivation of liberty for more than one year or a more severe penalty.
2. An offense shall also be an extraditable offense if it:
 - (a) consists of an attempt or a conspiracy to commit, or participation in the commission of, any offense described in paragraph 1 of this Article at whatever stage and regardless of the degree of involvement; and
 - (b) is punishable under the laws of both Parties by deprivation of liberty for a maximum period of more than one year or by a more severe penalty.
3. For purposes of this Article, an offense shall be an extraditable offense:
 - (a) whether or not the laws in the Requesting and Requested Parties place the acts or omissions constituting the offense within the same category of offenses or describe the offense by the same terminology; or
 - (b) whether or not the offense is one for which United States federal law requires the showing of certain matters merely for the purpose of establishing jurisdiction in a United States federal court, including but not limited to interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce; or

(c) for offenses involving fraud or evasion of obligations with respect to taxes, customs duties, or controls on the import or export of commodities or currency, whether or not the laws of the Requesting and Requested Parties provide for the same sort of taxes or duties or for controls on the same sorts of commodities or on the same amounts of currency.

4. An offense shall be extraditable regardless of where the act or acts constituting the offense were committed.

5. If extradition has been granted for an offense specified in paragraphs 1 or 2 of this Article, it shall also be granted for any other offense specified in the request even if the latter offense is punishable by a maximum term of one year's deprivation of liberty or less, provided that all other requirements for extradition are met.

6. When the request for extradition refers to a person sought for service of a sentence of imprisonment, the Requested Party, which for the United States shall be the Executive Authority and for the Dominican Republic shall be the competent authority, may deny extradition if, at the time of the request, the remainder of the sentence to be served is less than six months.

Article 3 Nationality

Extradition shall not be refused based on the nationality of the person sought.

Article 4 Political and Military Offenses

1. Extradition shall not be granted if the offense for which extradition is requested is a political offense.

2. For the purposes of this Treaty, the following offenses shall not be considered political offenses:

(a) an offense for which both the Requesting and Requested Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for the purpose of prosecution;

(b) murder, manslaughter, malicious wounding, inflicting grievous bodily harm, assault with intent to cause serious physical injury, and serious sexual assault;

(c) an offense involving kidnapping, abduction, or any form of unlawful detention, including the taking of a hostage;

(d) an offense involving placing, using, threatening the use of, or possessing an explosive, incendiary or destructive device, or a biological, chemical or radiological agent, when such device or agent is capable of endangering life, or causing substantial bodily harm, or causing substantial property damage; and

(e) a conspiracy or attempt to commit, or participation in the commission of, or aiding or abetting a person who commits or attempts to commit or participates in the commission of such offenses.

3. Notwithstanding the terms of paragraph 2 of this Article, extradition shall not be granted if the Executive Authority of the Requested Party determines that the request was politically motivated.

4. The Executive Authority of the Requested Party may refuse extradition for offenses under military law that are not offenses under ordinary criminal law.

Article 5
Prior Prosecution and Lapse of Time

1. Extradition shall be denied when the person sought has been convicted or acquitted in the Requested Party for the offense for which extradition is requested.

2. For purposes of this Article, a person shall not be considered to have been convicted or acquitted when the competent authorities of the Requested Party:

(a) have decided not to proceed against the person sought for the acts for which extradition is requested;

(b) have decided to discontinue any criminal proceedings which have been instituted against the person sought for those acts; or

(c) are still investigating or otherwise proceeding against the person sought for the same acts for which extradition is sought.

3. With respect to laws regarding the lapse of time, only the laws of the Requesting Party shall be considered for purposes of deciding whether or not to grant extradition. In this regard, the Requested Party shall be bound by the statement of the Requesting Party that the statute of limitations of the Requesting Party does not bar the prosecution or the execution of the penalty.

Article 6
Punishment

1. When the offense for which extradition is sought is punishable by death under the laws of the Requesting Party and is not punishable by death under the laws of the Requested Party, the Executive Authority of the Requested Party may refuse extradition unless the Requesting Party provides the Executive Authority of the Requested Party with an assurance that the death penalty shall not be imposed or, if for procedural reasons such an assurance cannot be provided by the Requesting Party, with an assurance that the death penalty, if imposed, shall not be carried out. If the Requesting Party provides an assurance pursuant to this Article, the Requested Party shall grant the extradition, and the Requesting Party shall comply with the assurance.

2. Except as provided in paragraph 1 of this Article, extradition shall not be refused on the basis that the term of imprisonment for the offense is a term that is greater in the Requesting Party than in the Requested Party.

Article 7
Extradition Procedures and Required Documents

1. All requests for extradition shall be submitted through the diplomatic channel.
2. All extradition requests shall be supported by:
 - (a) documents, statements, or other types of information that describe the identity, nationality, and probable location of the person sought;
 - (b) information describing the facts of the offense or offenses and the procedural history of the case;
 - (c) the text of the law or laws describing the offense or offenses for which extradition is requested and the applicable penalty or penalties;
 - (d) the statement required by Article 5, paragraph 3; and
 - (e) the documents, statements, or other types of information specified in either paragraph 3 or paragraph 4 of this Article, as applicable.
3. In addition to the requirements in paragraph 2 of this Article, a request for extradition of a person who is sought for prosecution shall also be supported by:
 - (a) a copy of the warrant or order of arrest or detention issued by a judge or other competent authority;
 - (b) a copy of the document setting forth the charges against the person sought; and
 - (c) such information as would provide a reasonable basis to believe that the person sought committed the offense or offenses for which extradition is requested.
4. In addition to the requirements in paragraph 2 of this Article, a request for extradition relating to a person who is sought for imposition or service of a sentence shall also be supported by:
 - (a) a copy of the judgment of conviction, or, if a copy is not available, a statement by a judicial or other competent authority that the person has been convicted or found guilty;
 - (b) information establishing that the person sought is the person to whom the finding of guilt refers; and
 - (c) if the person has been sentenced, a copy of the sentence imposed, or if a copy is not available, a statement by a competent authority stating what sentence was imposed, as well as a statement establishing to what extent the sentence has been carried out.
5. If the person sought has been convicted or found guilty in absentia, the Requesting Party shall submit the information required by paragraphs 2, 3(c) and 4 of this Article and a statement satisfactory to the Executive Authority of the Requested Party regarding the circumstances under which the person was absent from the proceedings and the procedures, if any, that would be available to the person sought to have a new trial or other judicial review of the proceedings if the person were extradited.
6. If the Requested Party asks for additional information to enable it to decide on the request for extradition, the Requesting Party, within the period specified by the Requested Party, may provide such information or respond with an explanation of the legal reasons for which it is unable to provide the information requested.

Article 8
Admissibility of Documents

1. The documents, statements, and other types of information that accompany an extradition request shall be received and admitted as evidence in extradition proceedings if:

(a) they bear the certificate or seal of the Department of Justice, or Ministry or Department responsible for foreign affairs, of the Requesting Party; or

(b) they are certified or authenticated in any other manner consistent with the laws of the Requested Party.

2. Documents certified or authenticated pursuant to this Article shall not require further certification, authentication, or other legalization.

Article 9
Translation

All documents submitted under this Treaty by the Requesting Party shall be accompanied by an official translation into the language of the Requested Party, unless otherwise agreed in exceptional circumstances.

Article 10
Provisional Arrest

1. In case of urgency, the Requesting Party may request the provisional arrest of the person sought pending presentation of the extradition request and supporting documents. A request for provisional arrest may be transmitted through the diplomatic channel or directly between the United States Department of Justice and the Dominican Republic Office of the General Prosecutor.

2. The application for provisional arrest shall contain:

(a) a description of the person sought and such other information as may be useful in identifying the person;

(b) the location of the person sought, if known;

(c) a brief statement of the facts of the case, including, if possible, the time and location of the offense;

(d) a description of the law(s) violated;

(e) information concerning the warrant or order of arrest or detention; and

(f) a statement that the extradition request and supporting documents will follow within the time specified by this Treaty.

3. The Requesting Party shall be notified without delay of the date of the provisional arrest or the reasons for any inability to proceed with the request.

4. A person who is provisionally arrested may be discharged from custody upon the expiration of sixty (60) calendar days from the date of provisional arrest pursuant to this Treaty if the Executive Authority of the Requested Party has not received the extradition request and supporting documents required in Article 7. For this purpose, receipt of the extradition request and supporting documents by the Embassy of the Requested Party in the Requesting Party shall constitute receipt by the Executive Authority of the Requested Party.

5. The fact that the person sought has been discharged from custody pursuant to paragraph 4 of this Article shall not prejudice the subsequent re-arrest and extradition of that person if the extradition request and supporting documents are received at a later date.

Article 11 Decision and Surrender

1. The Requested Party shall promptly notify the Requesting Party through the diplomatic channel and otherwise as appropriate of its decision on the request for extradition.

2. If the request is denied in whole or in part, the Requested Party shall provide an explanation of the reasons for the denial. The Requested Party shall provide copies of pertinent judicial decisions upon request.

3. If the extradition is granted, the authorities of the Requesting and Requested Parties shall agree on the date and place for the surrender of the person sought.

4. If the person is not removed from the territory of the Requested Party by the Requesting Party within sixty (60) calendar days from the time of the notification described in paragraph 1 of this Article or within the time prescribed by the law of that Party whichever is longer, the person may be discharged from custody, and the Requested Party, in its discretion, may subsequently refuse extradition for the same offense.

Article 12 Deferral of Extradition Proceedings and Deferred or Temporary Surrender

1. When the person whose extradition is sought is being criminally proceeded against in the Requested Party, that Party may defer the extradition proceedings against the person sought until its own proceedings have been concluded.

2. When the extradition proceedings have been concluded and extradition has been authorized, but the person sought is being criminally proceeded against or is serving a sentence in the Requested Party, that Party may:

(a) defer the surrender of the person sought until the proceedings have been concluded or until the sentence has been served; or

(b) temporarily surrender the person to the Requesting Party for the purpose of prosecution.

3. In the case of deferred surrender, the person may be kept in custody until surrendered.

4. A person temporarily surrendered shall be kept in custody in the Requesting Party and shall be returned to the Requested Party after the conclusion of the Requesting Party's proceedings against that person, in accordance with any conditions that may be agreed to by the Parties. The return of the person to the Requested Party shall not require any further extradition request or proceedings.

Article 13
Requests for Extradition Made by Several States

If the Requested Party receives requests from the Requesting Party and from any other State or States for the extradition of the same person, either for the same offense or for different offenses, the Executive Authority of the Requested Party shall determine to which State, if any, it will surrender the person. In making its decision, the Requested Party shall consider all relevant factors, including but not limited to:

- (a) whether the requests were made pursuant to a treaty;
- (b) the place where each of the offenses was committed;
- (c) the respective interests of the requesting States;
- (d) the gravity of the offenses;
- (e) the nationality of the victim;
- (f) the possibility of any subsequent extradition between the requesting States; and
- (g) the chronological order in which the requests were received from the requesting States.

Article 14
Seizure and Surrender of Items

1. To the extent permitted under its law, the Requested Party may seize and surrender to the Requesting Party all items that are connected with any offense for which extradition is sought or that may be required as evidence in the Requesting Party. The items mentioned in this Article may be surrendered even when the extradition cannot be effectuated due to the death, disappearance, or escape of the person sought.

2. The Requested Party may condition the surrender of the items upon satisfactory assurances from the Requesting Party that the items shall be returned to the Requested Party as soon as practicable. The Requested Party may also defer the surrender of such items if they are required as evidence in the Requested Party.

3. The rights of third parties in such items shall be duly respected in accordance with the laws of the Requested Party.

Article 15
Rule of Specialty

1. A person extradited under this Treaty may only be detained, tried, or punished in the Requesting Party for:

- (a) any offense for which extradition was granted, or a differently denominated offense carrying the same or lesser penalty and based on the same acts or omissions as the offense for which extradition was granted, provided such offense is extraditable, or is a lesser included offense;
- (b) any offense committed after the extradition of the person; or

(c) any offense for which the competent authority of the Requested Party, which for the United States shall be the Executive Authority, consents to the person's detention, trial, or punishment. For the purpose of this subparagraph:

(i) the Requested Party may require the submission of the documentation specified in Article 7; and

(ii) the person extradited may be detained by the Requesting Party for ninety (90) days, or for such longer period of time as the Requested Party may authorize, while the request is being processed.

2. A person extradited under this Treaty may not be the subject of onward extradition or surrender for any offense committed prior to extradition unless the competent authority of the Requested Party, which for the United States shall be the Executive Authority, consents.

3. Paragraphs 1 and 2 of this Article shall not prevent the detention, trial, or punishment of an extradited person, or the onward extradition or surrender of that person, if that person:

(a) leaves the territory of the Requesting Party after extradition and voluntarily returns to it; or

(b) does not leave the territory of the Requesting Party within thirty (30) days of the day on which that person is free to leave.

4. The provisions of this Article do not apply in the case of a waiver of extradition under Article 16(a).

Article 16 Waiver and Simplified Extradition

The Requested Party may expedite the transfer of the person sought to the Requesting Party:

(a) when the person sought waives extradition, and in such case the competent judicial authority before whom such waiver is made may direct the transfer of the person to the Requesting Party without further proceedings; or

(b) when the person sought consents to extradition or to a simplified extradition proceeding, and in such case the Requested Party may surrender the person as expeditiously as possible.

Article 17 Transit

1. Either Party may authorize transportation through its territory of a person being extradited to the other Party by a third State or from the other Party to a third State for purposes of prosecution or imposition or service of a sentence. A request for transit may be transmitted through the diplomatic channel or directly between the United States Department of Justice and the Dominican Republic's Office of the General Prosecutor or through such other channels as the Parties may agree. The request for transit shall contain a description of the person being transported and a brief statement of the facts of the case. A person in transit may be detained in custody during the period of transit.

2. Authorization is not required when air transportation is used by one Party and no landing is scheduled on the territory of the other Party. If an unscheduled landing does occur, the Party in whose territory the unscheduled landing occurs may require a request for transit pursuant to paragraph 1 of this Article, and it may detain in custody the person being transported until the request for transit is received and the transit is effected, as long as the request is received within ninety-six (96) hours of the unscheduled landing.

Article 18
Representation and Expenses

1. The Requested Party shall advise, assist, appear in court on behalf of, and shall represent the interests of the Requesting Party, in any proceedings arising out of a request for extradition.

2. The Requesting Party shall pay all the expenses related to the translation of extradition documents and the transportation of the person surrendered. The Requested Party shall pay all other expenses incurred in that State in connection with the extradition proceedings.

3. Neither Party shall make any pecuniary claim against the other Party arising out of the arrest, detention, examination, or surrender of persons under this Treaty.

Article 19
Consultation

The United States Department of Justice and the Office of the General Prosecutor of the Dominican Republic may consult with each other directly in connection with individual cases and in furtherance of efficient implementation of this Treaty.

Article 20
Application

The process of extradition provided for by this Treaty shall apply to requests submitted after its entry into force even if the offenses for which extradition is requested were committed before the Treaty's entry into force, provided that the conduct on which the extradition request is based constituted an offense under the laws of both Parties at the time that the conduct occurred.

Article 21
Ratification and Entry into Force

1. This Treaty shall be subject to ratification. The instruments of ratification shall be exchanged as soon as possible.

2. This Treaty shall enter into force upon the exchange of the instruments of ratification.

3. Upon entry into force of this Treaty, the 1909 Treaty shall cease to have any effect as between the Parties, except that the requests pending upon entry into force shall continue under the procedures of the 1909 Treaty supplemented by Article 6 of this Treaty.

Article 22
Termination

Either Party may terminate this Treaty at any time by giving written notice to the other Party through the diplomatic channel, and the termination shall be effective six months after the date of such notice. Nevertheless, extradition requests presented to the Requested Party before the termination becomes effective shall continue to be governed by the provisions of this Treaty until the final resolution of the extradition request.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Treaty.

DONE at Santo Domingo, this 12th day of January 2015, in duplicate, in the English and Spanish languages, both texts being equally authentic.

FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA



JAMES W. BREWSTER, JR.
United States Ambassador to the
Dominican Republic

FOR THE GOVERNMENT OF THE
DOMINICAN REPUBLIC



ANDRES NAVARRO GARCIA
Minister of Foreign Affairs