Neutral Citation [2012] IEHC 442

**THE HIGH COURT**

**Record No. 2010 / 261 EXT**

**IN THE MATTER OF THE EXTRADITION ACTS 1965 to 2001**

**BETWEEN**

**THE ATTORNEY GENERAL**

**APPLICANT**

**AND**

**EMMET J. MARTIN**

**RESPONDENT**

**JUDGMENT of Mr. Justice Edwards delivered on the 2nd day of October, 2012.**

**1. Introduction**

1.1 In these proceedings the United States of America (hereinafter the United States of America or the United States or the U.S.A. or the U.S.) seeks the extradition of the respondent with a view to placing him on trial for three counts of lewd and lascivious molestation by a person over the age of 18, committed on a person under the age of 12 years, in violation of Section 800.04(5)(b) of the Florida Statutes; and three counts of lewd or and lascivious molestation by a person over the age of 18, committed on a person under the age of 16 years, but 12 years or older, in violation of Section 800.04(5)(c)(2) of the Florida Statutes.

**2. Extradition between Ireland and the USA: Principal Legal Provisions**

2.1 By virtue of the following measures the U.S.A. is a country to which Part II of the Extradition Act 1965, as amended (hereinafter the Act of 1965), applies.

2.2 On the 13th July, 1983, Ireland signed the Treaty on Extradition between the State and the U.S.A. at Washington D.C. (hereinafter the "Washington Treaty"). The Washington Treaty was later amended by the Agreement on Extradition between the United States of America and the European Union, entered into on the 25th June, 2003 (hereinafter "the E.U.–U.S. Treaty").

2.3 Section 8 of the Act of 1965, as it applied at the material time, stated:

> "8.—(1) Where by any international agreement or convention to which the State is a party an arrangement (in this Act referred to as an extradition agreement) is made with another country for the surrender by each country to the other of persons wanted for prosecution or punishment or where the Government are satisfied that reciprocal facilities to that effect will be afforded by another country, the Government may by order apply this Part in relation to that country."

2.4 The Government, by means of the Extradition Act 1965 (Application of Part II) Order, 2000 (S.I. No. 474 of 2000) made an order pursuant to s. 8(1) of the Act of 1965 applying Part II of that Act to the United States of America. Notice of the making of the said order was published in Iris Oifigiúil on the 6th February, 2001 at 245. Part 9 of S.I. No. 474 of 2000 was subsequently amended, in order to give effect to provisions of the E.U.–U.S. Treaty, by the Extradition Act 1965 (Application of Part II) (Amendment) Order 2010 (S.I. No. 45 of 2010). Notice of the making of this said order was published in Iris Oifigiúil on the 19th February, 2010.

2.5 Once Part II of the Act of 1965 applies there is a duty on the State to extradite by virtue of s. 9 of that Act, which is in the following terms:

> "9.—Where a country in relation to which this Part applies duly requests the surrender of a person who is being proceeded against in that country for an offence or who is wanted by that country for the carrying out of a sentence, that person shall, subject to and in accordance with the provisions of this Part, be surrendered to that country."

2.6 Section 10 of the Act of 1965, as amended, deals with extraditable offences and in that regard sets out the requirements that must be met as to correspondence and minimum gravity. In so far as it is relevant to the present case the Court is mainly concerned with subss. (1) and (3) which provide:

> "10.—(1) Subject to subsection (2), extradition shall be granted only in respect of an offence which is punishable under the laws of the requesting country and of the State by imprisonment for a maximum period of at least one year or by a more severe penalty and for which, if there has been a conviction and sentence in the requesting country, imprisonment for a period of at least four months or a more severe penalty has been imposed.
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> …
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> (3) In this section 'an offence punishable under the laws of the State' means—
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> (a) an act that, if committed in the State on the day on which the request for extradition is made, would constitute an offence, or
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> (b) in the case of an offence under the law of a requesting country consisting of the commission of one or more acts including any act committed in the State (in this paragraph referred to as 'the act concerned'), such one or more acts, being acts that, if committed in the State on the day on which the act concerned was committed or alleged to have been committed would constitute an offence, and cognate words shall be construed accordingly."
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> Subsection (2) is not relevant to the present case.

2.7 A request for a person's extradition is made to the Minister (for Justice and Equality – as he is currently entitled) in the first instance and any such request must comply with the formalities prescribed in s. 23 of the Act of 1965 and be accompanied by the supporting documentation specified in s. 25 of that Act.

2.8 Section 23 of the Act of 1965 provides:

> "23.—A request for the extradition of any person shall be made in writing and shall be communicated by—
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> (a) a diplomatic agent of the requesting country, accredited to the State, or
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> (b) any other means provided in the relevant extradition provisions."

2.9 Section 25 of the Act of 1965 provides:

> "25.—A request for extradition shall be supported by the following documents—
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> (a) the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or, as the case may be, of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting country;
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> (b) a statement of each offence for which extradition is requested specifying, as accurately as possible, the time and place of commission, its legal description and a reference to the relevant provisions of the law of the requesting country;
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> (c) a copy of the relevant enactments of the requesting country or, where this is not possible, a statement of the relevant law;
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> (d) as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality, and
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> (e) any other document required under the relevant extradition provisions."

2.10 Under s. 26(1)(a) of the Act of 1965 the Minister is required, upon receipt of a properly communicated request supported by the required documents, to certify having received the request. Section 26(1)(b) of the same Act (as amended by s. 7 of the Extradition (Amendment) Act 1994, and as further amended by s. 20 of the Extradition (European Union Conventions) Act 2001) then provides:

> "26.—(1)(b) On production to a judge of the High Court of a certificate of the Minister under paragraph (a) stating that a request referred to in that paragraph has been made, the judge shall issue a warrant for the arrest of the person concerned unless a warrant for his arrest has been issued under section 27."

2.11 Where an arrest warrant has been duly issued pursuant to a request for extradition, the Act of 1965 provides, in s. 26(2) thereof, that it may be executed by any member of An Garda Síochána in any part of the State. Moreover, s. 26(5) requires that a person arrested under a warrant issued under s. 26(1)(b) shall be brought as soon as may be before a judge of the High Court.

2.12 This Court's function and duty in relation to a request for surrender received from a country to which Part II of the Act of 1965 applies is set out at s. 29(1) of that Act, as amended by s. 20 of the Extradition (European Union Conventions) Act 2001, which (to the extent relevant) is in the following terms:

> "29—(1) Where a person is before the High Court under section 26 …. and the Court is satisfied that—
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> (a) the extradition of that person has been duly requested, and
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> (b) this Part applies in relation to the requesting country, and
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> (c) extradition of the person claimed is not prohibited by this Part or by the relevant extradition provisions, and
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> (d) the documents required to support a request for extradition under section 25 have been produced,
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> the Court shall make an order committing that person to a prison (or, if he is not more than twenty-one years of age, to a remand institution) there to await the order of the Minister for his extradition."

**3. The Request for Extradition in this Case**

3.1 The evidence before the Court establishes that on the 8th December, 2009, a request in writing was made by the United States of America for the extradition of the respondent for the purpose of having him stand trial in the U.S.A. for the alleged offences mentioned in the introduction to this judgment. The request was communicated to the Minister by the Embassy of the United States of America in Dublin. The Court is satisfied in the circumstances that it was duly communicated by a diplomatic agent of the requesting country, accredited to the State.

3.2 The Court has had produced to it a certificate of the Minister (for Justice and Law Reform - as he was then entitled), dated the 24th June, 2010, in which he certifies that a request has been duly made by and on behalf of the United States of America, and received by him, for the extradition of the respondent. The Court is satisfied that the said certificate was made under, and is sufficient for the purposes of s. 26(1)(a) of the Act of 1965.

3.3 The evidence before the Court further establishes that the applicant then applied to the High Court pursuant to s. 26(1)(b) of the Act of 1965, as amended, seeking a warrant for the arrest of the respondent; that the said application was successful and that such a warrant was issued by Peart J. on the 30th June, 2010.

3.4 The evidence further establishes that in execution of that warrant the respondent was subsequently arrested by Sergeant Sean Fallon, a member of An Garda Síochána, at Kilkenny Garda Station, Kilkenny City, in the county of Kilkenny on the 15th July, 2010. He was then brought before the High Court and was duly remanded from time to time, initially in custody, and later on bail, pending a s.

29 hearing in these proceedings, and he has duly appeared before the High Court and has answered his bail on all occasions on which he was required to do so.

3.5 Counsel for the respondent has informed the Court that no issue is taken as to the identity of the respondent.

3.6 The matter was before the Court for the purposes of a s. 29 hearing on the 22nd, 23rd, and 24th May, 2011, following which the Court reserved its judgment, which it now delivers.

**4. Broad Outline of the Case against the Respondent**

4.1 A prècis of the case against the respondent is set out in an affidavit sworn in support of the request for extradition with which the Court is presently concerned by Khary Oliver Gaynor, an Assistant State Attorney for the Fourth Judicial Circuit, Duval County, Florida on the 18th November, 2009. The said affidavit and its accompanying exhibits are receivable in evidence without further proof pursuant to s. 37(1) of the Act of 1965, the Court being satisfied that they have been signed by an officer of the requesting country and are certified by being sealed with the Seal of the Department of Justice of the United States of America on the authority of Hillary Rodham Clinton, Secretary of State. There are other affidavits and exhibits of the said Khary Oliver Gaynor, to which reference will be made as required later in this judgment, and these are authenticated, certified and sealed in a similar fashion.

4.2 Mr. Gaynor states the following at paragraphs 5 to 9 inclusive of his affidavit of the 4th June, 2009:

**"SUMMARY OF THE FACTS OF THE CASE**

> 5. Steve Hinote ("S. Hinote") is the father of the victim, Leah Hinote ("Leah"). MARTIN was S. Hinote's best friend during the above-described time frame. In the fall of 2004, Leah told her parents that MARTIN had been sexually molesting her since she was six years old and continuing through June 2004, when she was 13 years old. Leah told her parents that MARTIN would rub her vagina, buttocks, and breasts, with his hands, both above and below her clothing on various occasions. Leah told her parents that these acts occurred at the Hinote's home when MARTIN visited the family in Jacksonville, Florida and that they also occurred when the Hinote family visited MARTIN at his residence in Stone Mountain, Georgia [1]
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> 6. On or about November 5, 2004, S. Hinote and Leah reported MARTIN's actions to the Department of Children and Family Services ("DCF"), and law enforcement authorities were made aware of the report. Leah told them that MARTIN began touching her when she was six years old, and that he would touch her on her breasts, under her shirt and bra when she started developing breasts, and that he put his hand down the back and front of her pants and on her vagina and buttocks.
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> 7. After hearing of the sexual molestation, S. Hinote contacted MARTIN by telephone. S. Hinote told MARTIN that he was recording the conversation. When S. Hinote confronted MARTIN with Leah's allegations, MARTIN did not deny the accusation and said "Steve, if I did fondle her, it was not in a fondling, a sexual way that I was fondling.
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> 8. Following the report, and once law enforcement was involved, S. Hinote placed another recorded telephone call to MARTIN, using police telephone recording equipment. Throughout the telephone call, MARTIN made numerous statements and admissions, including the following: "I feel so sorry and so sad…I never ever, ever went out of my way to hurt Leah…"; "Well, honestly, I wasn't thinking a lot.", "…there was one, one time I remember extremely inappropriate and I felt shocked at myself and, and I, that was it. I was rubbing her on the outside of her breasts and I didn't know what to say. I felt like, uh, oh, completely horrified. I felt horrible…" When S. Hinote told MARTIN that his behaviour was not "right", MARTIN agreed and said "I agree" and "I'm not trying to whitewash anything, believe me." MARTIN also mentioned providing money for therapy for Leah, and stated "well, if, if….wants to go to any therapy or anything like that, if there's something I can do to, I know this sounds really dumb, but, I mean and this doesn't do anything by monetarily it just, … I'm hoping that doesn't sound crass here.
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> 9. On December 6, 2004, MARTIN was arrested by the Jacksonville, Florida Sheriff's Office. In January 2005, MARTIN was charged by the Florida State Attorney's Office with six counts of Lewd or Lascivious Molestation. Three of these counts are first degree felonies and three are second degree felonies. The case was scheduled for trial on August 29, 2005. MARTIN failed to appear for trial. The State of Florida was advised by MARTIN'S attorney that MARTIN would not appear."

4.3 At paragraph 14 of his affidavit, Mr. Gaynor deposes that the Court then issued a "no bond capias" or warrant for Mr. Martin's arrest. At paragraphs 15-20 thereof, Mr. Gaynor then sets out the charges and pertinent United States law. The charges are framed on the basis that Emmett J. Martin committed the following offences:

Count 1. Lewd or Lascivious Molestation by a person over the age of 18, committed on a person under the age of 12 years by intentionally touching the breasts or clothing covering the breasts of the child victim contrary to section 800.04 (5) (b) of the Florida Statutes;

Count 2. Lewd or Lascivious Molestation by a person over the age of 18, committed on a person under the age of 12 years by intentionally touching the genitals or clothing covering the genitals of the child victim contrary to section 800.04 (5) (b) of the Florida Statutes;

Count 3. Lewd or Lascivious Molestation by a person over the age of 18, committed on a person under the age of 12 years by intentionally touching the buttocks or clothing covering the buttocks of the child victim contrary to section 800.04 (5) (b) of the Florida Statutes;

Count 4. Lewd or Lascivious Molestation by a person over the age of 18, committed on a person under the age of 16 years but 12 years or older by intentionally touching the breasts or clothing covering the breasts of the child victim contrary to section 800.04 (5) (c) (2) of the Florida Statutes;

Count 5. Lewd or Lascivious Molestation by a person over the age of 18, committed on a person under the age of 16 years but 12 years or older by intentionally touching the genitals or clothing covering the genitals of the child victim contrary to section 800.04 (5) (c) (2) of the Florida Statutes; and

Count 6. Lewd or Lascivious Molestation by a person over the age of 18, committed on a person under the age of 16 years but 12

years or older by intentionally touching the buttocks or clothing covering the buttocks of the child victim contrary to section 800.04 (5) (c) (2) of the Florida Statutes.

4.4 Mr. Gaynor has exhibited with his affidavit extracts from the relevant Florida statutes and the Court has had regard to these.

**5. Uncontroversial Matters - Correspondence and Minimum Gravity**
5.1 In so far as correspondence is concerned the Court has been invited to find that each of the six offences with which the respondent has been charged corresponds with the offence of sexual assault, contrary to s. 2(1) of the Criminal Law (Rape) (Amendment) Act, 1990. The Court has considered all of the information supplied in support of the request for extradition in this case, and having approached the matter in the manner indicated as appropriate by the Supreme Court in *Attorney General v. Dyer* [2004] IESC 1, [2004] 1 I.R. 40, is satisfied to do so.

5.2 In so far as minimum gravity is concerned, the offence of lewd or lascivious molestation by a person over the age of 18, committed on a person under the age of 12 years, contrary to section 800.04(5)(b) of the Florida Statutes, a felony of the first degree, is punishable by a sentence of up to 30 years imprisonment in the State of Florida, U.S.A.-see Florida Statute Section 775.082(3)3(b). This is the offence charged in Counts 1, 2 and 3 respectively as set out above.

5.3 The offence of lewd or lascivious molestation by a person over the age of 18, committed on a person under the age of 16 years, but 12 years or older, contrary to section 800.04(5)(c)(2) of the Florida Statutes, a felony of the second degree, is punishable by up to 15 years imprisonment in the State of Florida, U.S.A.-see Florida Statute section 775.082(3)3(c). This is the offence charged in counts 4, 5 and 6 respectively as set out above.

5.4 It is clear therefore that each offence is punishable under the laws of Florida by more than one year of imprisonment. The Court is satisfied in the circumstances that the requirements of s. 10(1) of the Act of 1965, and of article II (1) of the Washington Treaty with respect to minimum gravity are met.

**6. The Points of Objection**
6.1 A Notice of Objection to the proposed extradition filed on behalf of the respondent contains some eight points of objection. The Court was informed on the first day of the hearing that only points 1, 3, 4, 5 and 6 were being proceeded with. These are pleaded in the following terms:

> "1. The Prison conditions in the requesting state fall well below the accepted international norms. On the assumption that the Applicant will agree to defray the reasonable costs of preparing same the respondent will furnish further and better particulars once the relevant expert reports are to hand. For the time being the following specific objections arise on foot of the respondent's direct experience of detention in Jacksonville County Jail.
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> (a). The Respondent was subjected and exposed to unnecessary risk in that he was housed in a "pod" with other inmates without any regard to segregation of prisoners in accordance with the offences for which they were charged. The respondent, being a person who had been charged with a sexual offence against a minor, was in constant fear of being attacked by other inmates should they become aware of the nature of the offence with which he was charged. The prison authorities took no steps to ensure that other inmates did not become aware of the nature of the charges.
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> (b) The prison where the Respondent was detained prior to being granted bail was chronically overcrowded. Moreover the prison authorities were content to pay whatever administrative fines were imposed upon them by the relevant oversight authorities rather that address the situation.
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> (c) The accommodation in the Jacksonville County Jail comprised of one large "pod" which contained some two man cells. However, the majority of prisoners including the Respondent were accommodated in "boat beds" in the common area of the "pod". The effect of this was to deprive the prisoners of any meaningful recreation space. Whilst the Respondent was aware of the existence of a gymnasium to which the prisoners, in theory, had access it was not possible to use same as it was generally considered dangerous to go there due to the risk of violence.
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> (d) The "boat beds" provided were little more than plastic canoe shaped beds without a mattress.
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> (e) The "pod" was designed in such a way as to deprive the prisoners of any privacy. As such it was profoundly dehumanizing and degrading.
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> (f) The prisoners were *de facto* confined to the pod during the entirety of the day without any means of recreation or diversion save for basic board and table games. Many of the prisoners had subsisted in this condition for several months. The prison guards only entered the pod occasionally during the day. In effect the prisoners were left to their own devices. Given the very high levels of prisoner-on-prisoner violence in the issuing state the Respondent had and continues to have a very real fear of injury or death if extradited to be detained in such a prison.
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> By reason of the foregoing matters the surrender of the Respondent would expose him to a real risk of inhumane and degrading treatment and would further expose him to an unconscionable risk to life and bodily integrity. Same is incompatible with the Respondent's rights pursuant to the European Convention on Human Rights and the Constitution.

> 3. The Respondent, if surrendered, will be exposed to the possibility of indefinite post-sentence incarceration on foot of the "Jimmy Ryce Law". Same provides for the indefinite detention of those who have been released from prison for offences of the type with which the Respondent has been charged. Such detention is other than pursuant to a criminal conviction and the proof required to justify same is to the civil rather than the criminal standard. Such detention contravenes the provisions of the Constitution and the European Convention on Human Rights on the grounds that it amounts to indefinite detention without the possibility of parole or clemency and further amounts to detention otherwise than on foot of a criminal conviction.
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> 4. The potential post-sentence detention of a surrendered person on foot of the "Jimmy Ryce Law" amounts to a breach of the rule of specialty and as such surrender ought to be refused.

5. The Treaty as between the State and the Requesting state makes no, or no adequate provision for the rule of specialty as required by Section 20 of the Extradition Act, 1965. In particular Article XI.1 of the Treaty fails to preclude surrender where it is anticipated that the Respondent might also be subjected to a "detention order" not contemplated in the extradition request. The type of detention contemplated by the "Jimmy Ryce Law" is in the nature of such a "detention order".

6. If surrendered and convicted the Respondent will be subject to registration as a sex offender pursuant to the relevant state law. Such registration includes requirements that are so vague as to be incapable of being complied with meaningfully unless the registered sex offender substantially absents himself from mainstream society. Unwarranted and disproportionate restrictions are placed upon the places in which registered sex offenders can live. Moreover, the address, photograph, description and personal details of sex offenders are made available to the public generally and the public are encouraged to access such information. The effect of same is to make it impossible for any such registered sex offender to reside within the community without running an unacceptably high risk of injury or death. The same amounts to a gross infringement of the privacy and right to family life of such persons and as such contravenes the Respondent's rights under the Constitution and European Convention on Human Rights. Same also amounts to an abdication of the punitive function of the executive to the public generally and as such contravenes the rule of specialty."

(The references above to what is described as the "Jimmy Ryce Law" are presumed to be references to the "Jimmy Ryce Act")

6.2 In addition, counsel for the respondent sought the leave of the Court in the course of the hearing to argue a further point of objection i.e. that the respondent ought not to be surrendered to the United States of America in circumstances where, in the event of his conviction, he may be subjected to chemical castration, because to do so would expose him to a real risk of inhuman and degrading treatment and breach of his right to bodily integrity, contrary to his rights both under the European Convention on Human Rights and under the Constitution of Ireland.

**7. The Evidence before the Court.**
7.1 The first affidavit upon which the respondent relies is his own affidavit sworn on the 15th December, 2010. He makes the following averments at paragraphs 3-12 thereof concerning the conditions in Jacksonville County Jail, a pre-trial detention facility of which Mr. Martin has previous experience. He states:

"3. I say that when I was arrested in December, 2006 I was detained in Jacksonville County Jail. I say that having been processed I was sent to a "pod" designated 3E4A. This was one of a group of pods which were arranged in a circle around a central guard station. Each such pod had a plexiglass front so that the prison guards could look into it 24 hours a day.

4. I say that the pod accommodated in excess of 30 men including myself and comprised of a number of cells and a communal area that contained nothing but 4 or 5 round metal tables. The cells were located at the back of the pod and faced the guard command post. I say that there were two levels of six cells per level to make at most twelve two man cells. There were only two men housed in each cell and each had their own beds and toilet.

5. I say that all of the prisoners were accommodated in the cells that were part of the pod. Some, including myself, slept in "boat beds" that were arranged along one wall of the pod. I say that there were between 10 and 20 such beds. I believe that the "boat beds" were so called because they were shaped like a canoe. They were made of hard plastic and didn't have a mattress. The beds were very short and were insufficient to allow a person of average height to stretch out their legs. I say that I was provided with a sheet and a blanket but that no pillow was provided. I say that myself and the other prisoners accommodated in boat beds improvised by means of rolling up a towel that had been provided to us.

6. I say that it was very cold in the pod and that most of the time I wrapped myself in the blanket that had been provided to me. As all prisoners wore a standard orange uniform we were not provided with clothing appropriate to the temperature.

7. I say and believe that the use of boat beds was in violation of either state or federal law but that the prison authorities considered it cheaper to pay a daily fine in respect of their use than to deal with the issue of overcrowding.

8. I say that there was a communal toilet facility for those housed in the boat beds and that there was also a communal showering area but that this had no privacy as it faced the guard station. I say that many of the prisoners showered whilst attempting to preserve their modesty by means of covering their genitals with a free hand.

9. I say that there was little or no diversion or recreational activity available in the pod. I say that whilst I was made aware that there was a gym available for the use of inmates I was advised by other prisoners that it was generally considered too dangerous to go there due to the possibility of violence. I say that for the most part the prisoners were left to their own devices and that only occasionally did the prison guards actually enter the pod for the purpose of doing a head count.

10. I say that the lights were never turned off in the pod and that the lights at night-time were strong enough to illuminate the entirety of the pod.

11. I say that whilst I spent only a very short period of time, two days, in Jacksonville County Jail I was struck by the extraordinary degree of overcrowding. The sole response of the prison authorities to same was apparently to make use of "boat beds" which I understood to effectively be illegal. Moreover I say that the pod accommodation appeared to have been designed for the purpose of essentially allowing prison guards to withdraw from any meaningful interaction with prisoners and simply observe from a distance. I say that this necessarily deprived all prisoners of even the most basic degree of privacy and was profoundly dehumanizing. I say that the prison authorities appear to have taken the view that the appropriate response to violence from and between prisoners is simply to withdraw prison guards from harm's way by means of such a system rather than take any steps to actually address the issue of prison violence.

12. I say that the other prisoners being accommodated in the pod were a mixture of those awaiting trial and those serving sentences. I say that very little by way of activity or diversion was made available to any of the prisoners."

7.2 The respondent goes on at paragraphs 18 and 19 of the same affidavit to make the following averments in connection with the so-called *Jimmy Ryce Act*. He states:

"18. I say that in the event that I am extradited and convicted I am liable to incarceration which may well continue subsequent to the expiration of any sentence imposed. This is by reason of what is commonly referred to as the Jimmy Ryce Act. In this regard I beg to refer to a true copy of an article from the Florida State University Law Review [Vol. 26:487 1999] entitled "Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act: Replacing Criminal Justice with Civil Commitment" upon which marked with the Letter "B' I have signed my name prior to the swearing hereof.

19. I say that as appears from some prisoners who are coming to the end of their sentence in respect of certain sexual offences are liable to assessment and subsequent indefinite incarceration on certain specified criteria. I say that this would largely appear to be predicated upon the grounds that the commission of certain sexual offences amounts to a mental illness of sorts."

7.3 The respondent also makes the following averments concerning the registration of sex offenders in Florida at paragraphs 21-27, inclusive of the same affidavit. He states:

"21. I say that in the event of my extradition and conviction I will be liable to be registered as a "sexual predator" in Florida. I say that unlike the manner in which the Sex Offenders Register operates in Ireland registration as a "sexual predator" in Florida is principally designed to ensure that those convicted of such offences are in practical terms at least precluded from reintegration within the community.

22. I say that the obligation to register and the consequences of same are set out in the Florida Sexual Predators Act and I beg to refer to a true copy of the relevant excerpt from same upon which marked with the letter "C" I have signed my name prior to the swearing hereof. I say that as is apparent from same one of the principle purposes of such registration is to ensure that the public generally are notified of the whereabouts of anyone convicted of a qualifying sexual offence. In particular the following information must be provided:

The person's name;

A description of the person including a photograph;

Their current address;

Details of the relevant offence;

Whether the victim of the offence was a minor or an adult;

The legislative provisions go on to require the relevant sheriff or police chief to ensure that the public are notified by means of the internet.

23. I say that the information required to be given is available to the public who may access it anonymously from any number of sources. I say, for example, that on one website, www.flsexoffender.net, members of the public can conduct a search to see if any sex offenders live in their locality. They are provided with a photograph and address of the offender. Members of the public are also invited to sign up for email alerts to let them know if at any future point a sex offender moves into their neighbourhood.

24. I beg to refer by way of example to printouts from the said website. In the first instance I beg to refer to a printout on foot of a search for all such registered sex offenders living within one mile of the Florida Department of Law Enforcement, Florida Offender Registration & Tracking Services, 2331 Phillips Road, Tallahasse, Florida upon which marked with the letter "D" I have signed my name prior to the swearing hereof. In the second instance I beg to refer to a printout of the "flyer" in respect of the first individual listed in the search upon which marked with the letter "E" I have signed my name prior to the swearing hereof.

25. I say that in addition to this those convicted of qualifying sexual offences are precluded from residing within a specified distance of schools, playgrounds and other areas where children may congregate.

26. I say that the effect of these provisions is that anyone convicted of a relevant offence is more or less precluded from reintegrating back into society. I further say that the obligation to furnish an address and photograph exposes such persons to an unacceptable risk of physical violence.

27. I say and am advised that the system of registration and public notification of offenders as it operates in Florida amounts to a flagrant breach of the right to privacy and family life which would otherwise be guaranteed by Article 8 of the European Convention on Human Rights."

7.4 The Court has an affidavit of Khary Oliver Gaynor (described as, A Second Supplemental Affidavit) sworn on the 6th July, 2011 in which Mr. Gaynor responds to the various matters contained in the affidavit of the respondent just reviewed. He deals first with Mr. Martin's claim in respect of state and local prison conditions and he asserts that the respondent is mistaken on several levels. It is not necessary for the purposes of this judgment to rehearse the contents of Mr. Gaynor's Second Supplemental Affidavit in full; the Court has considered the entirety of its contents, and it is sufficient to quote selectively from it. He makes the following averments at paragraphs 6-14 inclusive:

"6. As a preliminary matter, Mr. Martin after his arrest, spent less than two days in the Duval County Jail, which is also know as the "John E. Goode Pre-Trial Detention Facility." Mr. Martin was arrested on December 6, 2004, and he was released on bail (after posting a bond) a day later on December 7, 2004. Although he was released within 24 hours of his arrest, he will be given credit for two days of detention.

7. If surrendered, Mr. Martin would be housed in the Duval County Jail until he is either acquitted at trial or convicted and sentenced. Mr. Martin fled from the State of Florida on the eve of his trial in this case. Because all discovery depositions and pre-trial litigation had been completed at the time of Mr. Martin's flight, it is unlikely that he will be detained for a lengthy period of time before trial.

8. The Duval County Jail is not a "prison" but rather a multi-story, pre-trial detention facility operated by the corrections

department of the Jacksonville Sheriff's Office. The facility is air conditioned, with inmates housed in shared cells or communal areas depending on the length of their stay.

9. It is the stated mission and vision of the corrections department to provide secure, humane, corrective, and productive detention of individuals incarcerated in Duval County. See http://www.coj.net/Departments/Sheriffs-Offlce/Department-of-Corrections.aspx. According to its website, the corrections department offers a wide variety of programs and services designated to bring about positive change in the lives of inmates, including medical and dental services, religious services, recreation, telephone privileges, visitation, mail delivery, and commissary. Numerous educational, vocational, and rehabilitative programs are available upon request of the inmate. Although there are no television privileges, detainees are provided with books and library access. Inmates are afforded opportunities to exercise outside of their cells. Each inmate is served three regular meals a day which are planned by an in-house dietician/nutritionist. For the safety and well being of all inmates, institutional rules are clearly defined and enforced.

10. The corrections department performs medical screening and evaluation as part of an inmate's intake processing. Inmates have access to health care services 24 hours a day, 7 days a week, as is federally mandated. According to the website, all services - medical, mental, and dental health care - are provided in compliance with the National Commission on Correctional Health Care and the American Correctional Association accreditation standards. Services are provided with professionalism, dignity, and respect, according to the website.

11. Although the total number of inmates housed in the Duval County jail has increased over the years, overall crime and the total number of arrests in Duval County has decreased, thereby reducing the total number of inmates entering the criminal system. Moreover, beginning in at least 2009, county officials have taken several steps to relieve potential overcrowding concerns. For instance, circuit court judges are placing more pre-trial detainees on bail (with supervision) pending trial and have ordered bail review hearings to reevaluate whether non-violent detainees could be released on conditional bail. Prosecutors, defense attorneys, and judges in the county have also expanded diversion programs and the availability of plea bargains for non-violent offenders. Beginning in January 2011, for example, county officials created a new court docket in the Duval County Jail, the Pre-calendar Court, which is designed to streamline dispositions for defendants jailed on minor, nonviolent third-degree felonies, such as minor felony drug charges, habitually driving without a license, and prostitution. Instead of being detained for several weeks, defendants are offered pleas shortly after their arrests in the type of cases that typically are resolved in one or two court appearances. This program has reduced the overall size of the prison population, reduced the cost to taxpayers, and improved resource allocation.

12. As of May 2011, the current population of the Duval County Jail is 2,919 detainees. The average length of stay for a detainee is 135 days. Additionally, the Duval County Jail has various classifications for the male population. General Population (medium) is designated for misdemeanor or petty offenders as well as some third degree felonies. General Population (maximum) is designated for offenders charged with second degree felonies, first degree felonies or felonies punishable by life. As of June 27, 2011, the current population for General Population (maximum) is 1,025 male detainees with 128 vacant beds available. Based on Mr. Martin's charges, he would be housed under a General Population (maximum) designation.

13. The corrections department has also taken remedial steps, such as adding additional beds to certain cells, ensuring that convicted felons are transferred to the state prison system instead of being housed in Duval County facilities and exploring the possibility of building a larger prison facility. Consequently, the Duval County Jail will receive the American Correctional Association's national accreditation as well as the Florida Model Jails accreditation.

14. If surrendered, convicted, and sentenced, Mr. Martin would be transferred from the Duval County Jail to the Florida State Prison System, which is run by the Florida Department of Corrections (FDC). It is evident from the FDC's website that Mr. Martin will not be subject to cruel, inhumane, or degrading treatment if incarcerated in the Florida state prison system. See http://www.dc.state. fl.us/index.html

7.5 Mr. Gaynor goes on to describe in some detail the various representations made, and information contained on the FDC's website in support of his assertions. He concludes at paragraphs 23 to 27 inclusive that:

"23. In summary, it cannot be credibly claimed by Mr. Martin that health care in FDC facilities is lacking or substandard. The FDC is constitutionally required to provide a health care delivery system that meets the clinical needs of all inmates and achieves community standards. Federal and state law, whether constitutional or statutory, sets forth minimum standards that the FOC must meet in order to provide minimally adequate medical and mental health care for inmates under its care and supervision.

24. Mr. Martin has also not identified any serious condition from which he suffers or for which the FDC would not be able to treat. Because Mr. Martin suffers from no serious health problems, the quality of health care in a Florida state prison should have no impact on his extradition.

25. Although the number of inmates incarcerated in state correctional facilities has increased by approximately 15.4 percent over the last five years, it is the FDC's constitutional responsibility to meet this growing need. The FDC website states that as of June 30, 2010, the FDC had approximately 102,000 inmates in its 63 state prisons (including six or seven private prisons), and it supervises more than 115,000 active offenders on community supervision at 156 probation offices throughout the state. The FDC employs approximately 28,000 employees, the majority of whom are Correctional Officers or Correctional Probation Officers, and it is the third largest state prison system in the United States with a budget of $2.4 billion.

26. The stated mission of the FDC is to protect the public safety, to ensure the safety of FDC personnel, and to provide proper care and supervision of all offenders under FDC's jurisdiction while assisting, as appropriate, their reentry into society. To that end, the FDC provides dozens of academic, vocational and substance abuse programs to inmates and offenders, including in such areas as General Educational Development programs, adult basic education and mandatory literacy; printing and graphics, carpentry and digital design; and Alcoholics Anonymous and Narcotics Anonymous. As stated on the FDC website, in Fiscal Year 2008-09, approximately 39,354 inmates were admitted into prisons, 37,391 were released, 100,619 offenders were placed on community supervision, and another 103,392 were released from supervision. Given the fact that most of those who serve time in prison and on supervision will eventually be free, the FDC - as stated on its website - is focusing on equipping its inmates and offenders with the tools they will need to become productive citizens.

27. Like Duval County, Florida state officials have taken several steps in recent years to address potential overcrowding concerns. For instance, on or about July 1, 2009 Florida's state legislature enacted a law that would allow the FDC to transfer inmates to other states in the event that prison overcrowding forces emergency release. State officials have also funded additional state prisons and are funding prevention and rehabilitation programs, including counseling, job-training, life-skills classes, and access to needed services for troubled families. State officials are also seeking to address measures and programs aimed at reducing recidivism."

7.6 Moving then to the issues raised by the respondent concerning the *Jimmy Ryce Act,* Mr. Gaynor asserts that the respondent's contentions are incorrect and avers that although Mr. Martin's offences would subject him to the *Jimmy Ryce Act* if he were convicted, it is highly unlikely that he would be recommended for civil commitment after completing any criminal sentence based solely upon the facts of the case. Mr. Gaynor then makes the following further averments in paragraphs 44 to 49, inclusive, of this affidavit:

44. It is alleged in this case that Mr. Martin sexually molested his best friend's daughter, Leah Hinote, in Hinote's residence in Jacksonville, Florida, between October 1999 and June 2004. Hinote was between the ages of 8 and 13 during this time period. Hinote told her parents that Mr. Martin would rub her vagina, buttocks, and breasts with his hands, both above and below her clothing on various occasions. The offenses charged in the Third Amended Information are contact only offenses, the alleged conduct does not involve penetration, and there is no indication that Mr. Martin has additional victims. Based upon these factors, it is very unlikely that Mr. Martin would be civilly committed upon the completion of any criminal sentence.

45. In 1998, the Florida legislature enacted the Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act, ch. 98-64, 1998 Fla. Laws 445 (codified at F.S. §§ 394.910 through 394.931). The Act directs the Secretary of Children and Family Services to create a multi-disciplinary team that will evaluate whether a detainee is a "sexually violent predator" warranting civil commitment. The team's composition must include two licensed psychiatrists or psychologists, or one licensed psychiatrist and one licensed psychologist. Prior to releasing an inmate convicted of a sexually violent crime, the agency controlling the inmate must notify both the multi-disciplinary team and the appropriate state attorney of the inmate's impending release. The team then assesses whether the detainee is a "sexually violent predator," which is defined as a person who: (1) has been convicted of a sexually violent offense; and (2) suffers from a personality disorder or mental abnormality that makes the person likely to engage in sexually violent acts if not confined in a secure facility for long-term control, care, and treatment A copy of F.S. § 394.910 through 394.931 are attached to this second supplemental affidavit as a part of Exhibit A.

46. Upon receipt of the team's report and recommendation, the state attorney may elect to file a petition requesting the inmate's commitment. The judge reviewing the petition for commitment must determine if probable cause exists to believe the inmate is a sexually violent predator. If so, the inmate must be placed in custody in an appropriate secure facility until resolution of the commitment proceedings. The state attorney, but not the detainee, may petition for an adversarial probable cause hearing. If one is granted, the detainee has a right to introduce evidence, be represented by counsel, cross-examine witnesses, and view and copy all reports and petitions in the file.

47. The trial for civil commitment must occur within 30 days after the determination of probable cause, unless either the petitioner or respondent shows good cause for a continuance. The detainee is entitled to counsel and may be appointed a public defender if he or she cannot afford an attorney. There is a right to demand a trial by jury. A finding that the respondent is a sexually violent predator must be supported by clear and convincing evidence. If the determination is made by a jury, then the decision must be unanimous. The state attorney may request a new trial if the jury does not reach a unanimous verdict, but a majority of the jurors conclude that the detainee is a sexually violent predator. When classified as a sexually violent predator, the detainee is committed to the care of the Department of Children and Family Services (DCFS). The DCFS must maintain sexually violent predators in a secure facility segregated from civilly committed patients who were not committed under the *Jimmy Ryce Act*.

48. An inmate who is committed civilly must be examined at least once annually to determine whether the dangerous condition has changed. A court hearing is held to evaluate whether probable cause exists "to believe that the person's condition has so changed that it is safe for the person to be at large and that the person will not engage in acts of sexual violence if discharged." Although the inmate does not have a right to be present at this court hearing, the inmate does have a right to counsel. A bench trial for the annual review will be set if the court finds probable cause. The state must prove by clear and convincing evidence that the inmate's mental condition "remains such that it is not safe for the person to be at large and that, if released, the person is likely to engage in acts of sexual violence". An inmate may petition the court for release subject to an annual review at any time. However, if a previous annual review petition filed within the same year was unsuccessful, the court may deny subsequent annual review petitions filed within the same year if it determines the subsequent petition does not contain any new or additional facts warranting a probable cause hearing. In other words, if the inmate filed an annual review petition in January of 2011 and release was denied following a hearing, the inmate may still file another annual review petition during 2011, but if there are no additional facts supporting release, the court may deny the second annual review petition without a hearing.

49. In summary, the Jimmy Ryce Act is specifically designed to address repeat offenders and violent sexual offenders. The facts of this case make it unlikely that he would be designated a sexually violent predator warranting civil commitment. Mr. Martin's argument to the contrary is unfounded."

7.7 Mr. Gaynor also addresses the assertion made by the respondent that in the event of conviction and sentence "*he will be subject to registration as a sex offender in the state of Florida, … which requires that his photograph and personal details including his address be published and generally available*." He confirms that Mr. Martin is correct to say that if he is convicted on the charged offences he would be subject to sexual offender registration within the United States. He then goes on to describe what that involves at paragraphs 51 to 53 inclusive of his affidavit, while also pointing out at paragraph 54 that the Supreme Court of Florida has upheld the constitutionality of the Florida Sexual Predators Act and its registration requirements. Paragraphs 51 to 53 just referred to are in the following terms:

"51. The Florida Sexual Predators Act lists certain offenses (and combinations of offenses) and mandates that a person convicted of any enumerated offense be designated a 'sexual predator.' F.S. § 775.21(4)(a)(1) (sexual predator criteria); F.S. 775.21(5) (designation). Once designated as such, a 'sexual predator' is subject, among other things, to the Act's registration and public notification requirements. F.S. § 775.21(6) (registration); F.S. § 775.21(7) (public notification). See *Milks v. Stale*, 894 So. 2d 924, 925 (Fla 2005). A copy of F.S. § 775.21 is attached to this second supplemental affidavit as a part of Exhibit A.

> 52. The Act neither provides for any predesignation (or preregistration or pre-public notification) hearing on the issue of an offender's actual dangerousness, nor does it provide the trial court with any discretion on the matter. If a person has been convicted of an enumerated offense, he must be designated by the court as a 'sexual predator,' and he is automatically subject to the Act's requirements. See *Id*. at 925. Florida courts have also addressed the issue of whether the Act violates an offender's constitutional right to privacy, and have deemed the Act constitutional. See *Moore v. State*. 880 So. 2d 826 (Fla. 1st DCA 2004) In *Moore* a sexual predator argued that the Act's public notification requirement was a violation of his constitutional right to privacy. *Id*. at 827-28. However, the court found that the information disseminated was "public, not private" and "public information to which the public is entitled to access." *Id*. at 828. The court went further in pointing out that even if the dissemination of the offender's address could be considered a violation of privacy rights, "the stated and patent public purpose of the Act is a sufficiently compelling state interest justifying such an intrusion on privacy." *Id*.
>
> 53. The Florida Department of Law Enforcement (FDLE) is required by state law to post on the internet registered sexual predators who qualify under the Florida Public Safety Information Act (FPSI). FDLE is authorized to post registered sexual offenders via its public website. As such, both registered sexual predators and offenders are posted via the public website. Sexual offender and predator flyers include a photograph, a physical description, information regarding the crime, a registered address for each subject, and additional information. Florida courts have held that the public dissemination of an offender's status does not violate the offender's constitutional right to privacy."

7.8 The Court also has a further affidavit from the respondent sworn by him on the 7th December, 2011 for the purpose of addressing, by way of rejoinder the criticisms of his case contained in the Second Supplemental Affidavit of Khary Oliver Gaynor which the Court has just reviewed.

7.9 In this further affidavit, the respondent criticises Mr. Gaynor's reference to various statistics disclosing the number of inmates within the Floridian prison system for the purpose of suggestion that steps have been taken in recent times to relieve or alleviate overcrowding. The respondent comments that "it is notable that no material is referred to which would allow the Court to consider whether or not there has been any material improvement on foot of the various steps taken." He also remarks that "Mr. Gaynor chooses not to deal with the suggestion that those operating the prison have simply chosen to pay a daily fine rather than deal with the substantive issue of prison overcrowding."

7.10 At paragraph 5 of this affidavit, the respondent comments that:

> "…there would appear to be an acceptance on the part of the United States that the issue of overcrowding remains an issue. As previously deposed to, I was incarcerated in the Duval County Jail in December, 2004. I say that in the absence of any contrary evidence forthcoming from the applicant, there is no basis for supposing that matters have improved since that time."

7.11 At paragraph 9 of this affidavit, the respondent introduces a new issue that was not initially pleaded in his Points of Objection, namely the issue of chemical castration. Despite this, the court has allowed the respondent to rely upon the new matter in circumstances where there is no formal requirement that a respondent should file Points of Objection in the Rules of the Superior Courts. The applicant has been on notice since December, 2011 of the fact that this matter was being raised and accordingly has had adequate time to respond to it. The respondent makes the following averments in the said paragraph 9:

> "9. I say that it has also come to your deponent's attention that in addition to deprivation of liberty the Floridian courts are empowered to order that any person convicted of certain sexual offences may be subjected to mandatory chemical castration. In that regard I beg to refer to an article entitled 'Florida's 1997 Chemical Castration Law: A return to the Dark Ages' by Larry Helm Spalding as published in the Florida State University Law Review upon which marked with the letter "B" I have signed my name prior to the swearing hereof. I say that as appears from same chemical castration is in fact mandatory in the event of second or subsequent offences. I say and believe that involuntary and mandatory chemical castration amounts to a gross interference by the state with the bodily integrity of the person and in substance amounts to a form of mutilation."

7.12 It is appropriate at this point to refer to the article exhibited with the letter 'B' to which the respondent has referred. In part III of the article in question, the author states:

> "The new Florida statute [Chapter 97-184 Florida Laws] authorizes a trial judge to sentence *any* defendant who is convicted of sexual battery to receive MPA [medroxyprogesterone acetate - a synthetic progesterone more commonly known as Depo-Provera and which is otherwise marketed worldwide as a female contraceptive]. If the defendant is convicted of sexual battery *and* has a prior conviction for sexual battery, the trial court is *required* to impose a sentence of MPA administration. The administration of MPA is, however, *contingent* upon a determination by a court-appointed medical expert that the defendant is an appropriate candidate for the weekly drug injections. Likewise, the continued use of MPA is not required when a determination is made that it is not medically appropriate. The trial judge must specify the duration of the treatment that, in the discretion of the court, may be for life.
>
> The Florida Department of Corrections (DOC) will provide the services necessary to administer the MPA. Once the defendant begins receiving court-ordered MPA injections, the failure to continue to use the drug, without authorization by the court, is both a violation of probation *and* the commission of a separate and distinct second degree felony. The defendant does, however, have a choice: he may choose surgical castration in lieu of chemical castration."

7.13 Finally, on registration as a sexual offender, the respondent, while characterizing Mr. Gaynor's response as agreement with "much of what I deposed to in my earlier affidavit," goes on to assert in paragraph 11 that:

> "…the residency restrictions in Florida are so severe that in some areas, notably Miami-Dade County, it is essentially impossible for those convicted of sex offences to obtain accommodation. This has resulted in such persons being subjected to forced homelessness. In that regard I beg to refer to an article from the website of the American Civil Liberties Union of Florida relating to same upon which marked with letter "C" I have signed my name prior to the swearing hereof. I say that the article describes a colony of sex offenders forced to live under the Julia Tuttle Causeway Bridge as a result of the restrictive registration requirements."

7.14 The Court also has received on behalf of the respondent an affidavit of Ms. Cassandra Capobianco, a lawyer with Florida Institutional Legal Services Inc., together with a number of exhibits thereto. The Court has considered the contents of this affidavit

and its accompanying exhibits, which do not seem to be centrally relevant to the issues with which the Court is now concerned in this case and it is not proposed to review these documents in the course of this judgment. This affidavit and its exhibits were filed in support of issues initially raised, but which are not now being proceeded with such as complaints about isolation, close management and conditions in the Florida State prison system as opposed to county jails such as Duval County jail.

7.15 The Court also has a third supplemental affidavit from Khary Oliver Gaynor sworn on the 10th May, 2012 in which the deponent primarily seeks to engage with the issues raised in the affidavit of Ms. Capobianco. Again, as this relates to issues that are not now being proceeded with, it is not necessary to review this affidavit in any detail either. It is sufficient to allude to one additional matter which is contained in paragraphs 13 and 14 where the deponent, properly and pursuant to his duty of candour with the Court, updates the Court with respect to the number of inmates in Duval County Jail. He states:

> "13. This affiant hereby swears and affirms personal knowledge that if Mr. Martin is surrendered, convicted and sentenced, Mr. Martin would be transferred from the Duval County Jail to the Florida State Prison System, which is run by the Florida Department of Corrections (FDC) as outlined in paragraph 14 of the Second Supplemental Affidavit.
>
> 14. In the July 6, 2011, affidavit this affiant accurately reported to the High Court that the inmate population was 2,919 as of May 2011. However, it is this affiant's duty as a court officer to report that as of March 2012, the jail population is at 3,990. This affiant will point out however, that the inmate population is an ever fluctuating number. Contributing to this increase are subjects incarcerated for delinquent child support payments, federal and state prisoners transferred to the jail to testify pending cases, and defendants who have pled to their charges and are waiting to testify against co-defendants in other cases."

7.16 The court has also received yet another affidavit from the respondent sworn on the 21st May, 2012 in which the respondent seeks to join issue with various matters referred to by Mr. Gaynor in his third supplemental affidavit (mistakenly referred to by Mr. Martin as the second supplemental affidavit). Referring to Mr. Gaynor's averment as to the increase in the number of prisoners in Duval County jail, he remarks that: "*he omits, however, the rated capacity of the jail which is 2,189 inmates*." In support of that the respondent exhibits the most recently available annual report of the Jacksonville Sheriff's Office Department of Corrections (2010). He then adds:

> "I say that Mr. Gaynor goes on to note some of the reasons for the increase in the jail population as being '*subjects incarcerated for delinquent child support payments, federal and state prisoners transferred to the jail to testify in pending cases, and defendants who have pled to their charges and are waiting to testify against co-defendants in their cases*.' I say that it is somewhat surprising that no reference is made to the role of his own office, the State Attorney for the Fourth Judicial Circuit, in connection with the issue of overcrowding. I say that it is a somewhat notorious fact that the population of Duval County Jail has continued to increase notwithstanding a significant drop in the overall crime rate and that much of this increase is attributable to a robust policy of prosecution on the part of the State Attorney's Office."

In support of this assertion he exhibits a number of documents, i.e. a recent study published by Dr. Michael Hallett and Dr. Dan Pontzer of the University of North Florida entitled "No Peace Dividend for Duval? Posing Questions about Jacksonville's Punitive Civic Infrastructure" (Spring, 2012); and a further article by the said Dr. Michael Hallett published by Metro Jacksonville on the 5th April, 2012 in which he notes that as far back as November, 2009 the Chief Circuit Judge responsible for conditions in Duval County Jail expressed concern to the office of the State Attorney that much of the overcrowding was a direct result of prosecution policy. The respondent expressed surprise that Mr. Gaynor failed to inform the Court of "*public judicial and academic comment citing his office as being one of the main causes of overcrowding in the jail in question*."

7.17 The final affidavit of relevance is an affidavit entitled Fourth Supplemental Affidavit in Support of Request for Extradition of Emmett J. Martin sworn by Khary Oliver Gaynor on the 16th July, 2012. This affidavit addresses the chemical castration argument put forward by the respondent and in particular focuses on what constitutes sexual battery under Floridian law. Mr. Gaynor states the following at paragraphs 5 and 6 of this affidavit:

> "5. Under Chapter 794 of the Florida Statutes, sexual battery is defined in section 794.011(1)(h) as "oral, anal or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any object; however, sexual battery does not include an act done for a bona fide medical purpose. Attached is a photo copy of the relevant statute.
>
> 6. Mr. Emmett Martin is charged under Chapter 800 of the Florida Statutes for lewd and lascivious molestation which does not include penetration of the sexual organs of the victim. Section 800.04(5) only requires touching, which is what is alleged to have occurred in this case."

As indicated in paragraph 5 of his affidavit, Mr. Gaynor exhibits a copy of Chapter 794 of the Florida statutes.

**8. The Respondent's Submissions**

*Overcrowding*

8.1 The respondent avers that the use of boat beds, a means of temporary accommodation as a result of overcrowding, is a violation of the applicable state or federal law and that prison authorities in Florida consider it cheaper to continue paying the fine imposed in respect of same rather than deal with overcrowding.

8.2 The respondent specifically points to the difference in the reported prisoner population as outlined in Mr. Gaynor's affidavit dated the 6th July, 2011 in which he states that the prisoner population of Duval County Jail is 2, 919 detainees and his affidavit dated the 9th May, 2012 in which he states that the number has increased to 3,990 detainees. The respondent argues that any reasons given for this increase is irrelevant and that the fact of overcrowding itself is the relevant issue.

8.3 The respondent relies on *Minister for Justice and Law Reform v. Rettinger* [2010] IESC 45, [2010] 3 I.R. 783, which in turn cited extensively from the European Court of Human Rights (hereinafter "ECtHR") judgment in *Orchowski v. Poland* (Application No. 17885/04, 22nd October, 2009). Counsel for the respondent referred specifically to the lengthy passage from *Orchowski v. Poland* as quoted by Denham J. at paragraph 18 of the judgment. He submitted that the degree of overcrowding under consideration in *Orchowski v. Poland* was modest in comparison with overcrowding apparent in Duval County Jail. At paragraph 17 of the judgment in *Orchowski v. Poland* the court recited the extent of the problem contended for by the applicant in that case as follows:

> "17. The official statistics obtained by the applicant's lawyer from the head of the Press and Communication Unit in the Office of the General Director of the Prison Service (*Kierownik Zespo³u Prasowego i Komunikacji Spo³ecznej w Biurze Dyrektora Generalnego S³u¿by Wiêziennej*) reveal the following data. The overcrowding (the degree by which the number of prisoners exceeds the maximum allowed capacity of a particular detention facility) at S³upsk Remand Centre during the applicants first detention was nearly 11%, during his second detention – 3%, during his third detention – 14% and during his fourth detention – nearly 4%."

The court ultimately concluded that the degree of overcrowding amounted to a clear breach of applicant's rights. Counsel for the respondent has submitted that the evidence in the present case paints a picture that is considerably starker. Not only is the degree of overcrowding significantly worse but it also seems to be dis-improving with time.

*Civil Commitment and the Jimmy Ryce Act*

8.4 The respondent submits that although there may be an issue as to whether the *Jimmy Ryce Act* is likely to apply to the respondent, the procedure contemplated under the Act is a form of preventative detention that would be entirely unconstitutional by Irish standards.

8.5 The respondent outlines the procedure of civil commitment under the *Jimmy Ryce Act* as described in an article from the Florida State University Law Review:

> "The Florida Legislature passed the Jimmy Ryce Act on May 1, 1998. The Act directs the Secretary of Children and Family Services to create a multidisciplinary team that will determine whether an inmate is a 'sexually violent predator.' The only statutory guideline for the team's composition is that it must include 'two licensed psychiatrists or psychologists, or one licensed psychiatrist and one licensed psychologist.' One hundred and eighty days prior to releasing an inmate convicted of a sexually violent crime, the agency controlling the inmate must notify both the multidisciplinary team and the relevant state attorney of the inmates impending release. The team then determines whether the inmate is a 'sexually violent predator.' A 'sexually violent predator' is defined as a person who: (a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.
>
> Upon receipt of the team's report and recommendation, the state attorney may elect to file a petition requesting the inmate's commitment. After the petition for commitment has been filed, the judge must determine if probable cause exists to believe the inmate is a 'sexually violent predator' within meaning of the Act. If so, the inmate must be taken into custody and held in "an appropriate secure facility" until resolution of the commitment proceedings. The state attorney may petition for an adversarial probable cause hearing, and if one is granted, the respondent has a right to introduce evidence, be represented by counsel, cross-examine witnesses, and view and copy all reports and petitions in this file. The respondent, however, is not entitled to petition the court for adversarial hearing; only the state attorney has this right.
>
> The trial for commitment is in many respects similar to a criminal proceeding. It must occur within thirty days after the determination of probable cause, unless either party shows good cause for a continuance. The respondent is entitled to counsel and may be appointed a public defender upon the requisite showing of indigence. Also; the respondent has a right to demand a trial by jury. A court or jury determination that the respondent is a sexually violent predator must be supported by clear and convincing evidence, and in the event of a jury trial, the decision must be unanimous. If the unanimous verdict is not forthcoming, but a majority of the jurors would classify the respondent as a sexually violent predator, the state attorney may request a new trial.
>
> Upon classification as a sexually violent predator, the respondent is committed to the care of the Department of Children and Family Services (Department). The Department must maintain sexually violent predators in a secure facility segregated from civilly committed patients who were not committed under the Jimmy Ryce Act."

The same article sets out the process in respect of release from such committal:

> "During commitment, the inmate must be examined at least once annually to determine whether the inmate's dangerous condition has changed. The court must hold a limited probable cause hearing to determine whether probable cause exists to believe that the person's condition has so changed that it is safe for a person to be at large and that the person will not engage in acts of sexual violence if discharged. The inmate has a right to have counsel at the hearing but does not have the right to be present.
>
> A determination of probable cause warrants the court to set a trial. At this stage in the proceedings, however, the inmate has no right to demand a jury trial. The inmate will remain committed if the state proves its burden by clear and convincing evidence, that the person's mental condition remains such that it is not safe for the person to be at large and that, if released, the person is likely to engage in acts of sexual violence. Although an inmate may petition the court for release at any time, if the petitioner has previously filed an unsuccessful petition, the court may deny the petition if the court deems that the petition does not contain facts warranting a probable cause hearing."

8.6 The constitutional prohibition of preventative detention is outlined by Murray C.J. in delivering the judgment of the Court in *Lynch and Whelan v. Minister for Justice, Equality and Law Reform and Others* [2010] IESC 34, (Unreported, Supreme Court, 14th May, 2010) and summarised by Fennelly J. in *Caffrey v. Governor of Portlaoise Prison* [2012] IESC 4, [2012] 2 I.L.R.M. 88 at 107 as follows:

> "Any convicted person on whom a sentence comprising a preventative element was imposed would be entitled to successfully appeal his sentence on that ground to the Court of Criminal Appeal or any such person who claimed that he was being detained in prison, by the executive or otherwise, as a form of preventative detention rather than punishment would be entitled to seek review of the lawfulness of that detention pursuant to Article 40 of the Constitution."

8.7 In *Minister for Justice, Equality and Law Reform v. Murphy* [2010] IESC 17, [2010] 3 I.R. 77, the Supreme Court considered the meaning of a "detention order" and whether or not a "detention order" for the purpose of inpatient treatment proposed in consequence of a criminal conviction could be properly regarded as a "detention order" within the meaning of s. 10 of the European Arrest Warrant Act 2003. Ultimately the Court concluded that:

> "[60]. I would define a detention order under s. 10(d) of the Act of 2003 as any order involving deprivation of liberty which has been made by a criminal court in addition to or instead of a prison sentence. In this case the detention order was made by a criminal court after conviction, or the extraditable offences of rape and assault occasioning bodily harm,

instead of a prison sentence. Thus I am satisfied that s. 10 (d) of the Act of 2003 applies to the detention order in this case. Consequently, for the reasons given, I would affirm the order of the High Court."

The respondent highlights that the Court considered the causative relationship as between conviction for an offence and the imposition of the order brought it within the concept of a detention order as contemplated by s. 10. The respondent argues that the judgment is persuasive authority for the proposition that a committal which is predicated upon the existence of a criminal conviction cannot be regarded as unrelated to that conviction and as such any committal in the nature of that contemplated by the *Jimmy Ryce Act* must be regarded as amounting to a breach of the rule of specialty.

8.8 Finally, with regard to this issue, the respondent submits that the Court should adopt a similar approach as the one taken by Peart J. in *Attorney General v. Doyle* [2010] IEHC 212, (Unreported, High Court, Peart J., 21st January, 2010) concerning whether the court should speculate as to a likely scenario that might occur in the future. Peart J. refused to place any reliance on the view, submitted by counsel for the applicant in that case, that the respondent was *"unlikely to become the subject of detention at the end of his term of imprisonment if one was to be imposed"* because the *"Act speaks in the present tense as far as whether at the end of the term of imprisonment, the person 'suffers' from a mental illness or abnormality such as to make it likely that he will re-offend*."

*Sex Offender Registration*

8.9 The respondent argues that the designation of the respondent as a sexual predator under the Florida Sexual Predators Act will unnecessarily expose him to violence from the public and unduly interfere with his entitlement to private life and rehabilitation.

8.10 The respondent submitted printouts of the profiles of other sex offenders and submits that one of the apparent principle purposes of registration is to render the individual immediately recognisable to the general public. Furthermore, the stated aims of the Florida Sexual Predators Act (Exhibit C to the respondent's affidavit of 15th December, 2010) are:

> "3. Requiring the registration of sexual predators, with a requirement that complete and accurate information be maintained and assessable for use by law enforcement authorities, community and the public.
>
> 4. Providing for community and public notification concerning the presence of sexual predators."

8.11 The respondent further submits that restrictions placed on persons convicted of sexual offences identified by the American Civil Liberties Union of Florida, including the restriction of the entitlement of such persons to live within specified distances of schools, playgrounds, etc. renders those affected as functionally homeless.

8.12 Under Irish law, the Sex Offenders Act 2001 makes provision for the registration of sex offenders and while the Act is silent as to whether the information contained in the register of sex offenders is intended to be confidential, the customary, and to date invariable, practice has been to treat it as such. In fact the courts have considered the wrongful disclosure of information in respect of sex offenders to be actionable. See *Gray v. Minister for Justice and Others* [2007] IEHC 52, [2007] 2 I.R. 654.

*Chemical Castration*

8.13 The respondent believes that if he is extradited to the USA and is convicted in the Florida courts of the offences to which the extradition request in this case relates, he will be at risk of being subjected to chemical castration. According to counsel for the respondent, there is little or no Irish authority as to the lawfulness or otherwise of involuntary chemical castration. He submits that the absence of authority is indicative of the extreme nature of the practice and that it would not be tolerated in this country, but rather would be seen as an unjustifiable interference with an accused's constitutional rights to bodily integrity and respect for family life.

**9.0 The Applicant's Submissions**

*General Principles Applicable*

9.1 The applicant accepts that where, as is alleged here, a respondent demonstrates a real substantial risk that, if surrendered, there would be a violation of his/her Constitutional rights or rights under the European Convention of Human Rights, then this Court should refuse to extradite. However, it is well settled law that where, as here, a respondent seeks to resist extradition on the grounds that his/her constitutional rights would be infringed upon, it is the respondent who at all times bears the burden of showing that there is a real and substantial risk that the respondent's rights would be violated if so extradited. The applicant avers that the respondent has failed to do so in this case.

9.2 The applicant submits that requests for extradition made on foot of arrangements entered into between the issuing state and the requesting state must, in the absence of any evidence to the contrary, be presumed to have been made in good faith and on the assumption that a person surrendered will not have his or her fundamental personal rights whether guaranteed under the Constitution, or otherwise, impaired in the requesting state. The Supreme Court set out this approach in *Ellis v. O'Dea* (No. 2) [1991] 1 I.R. 251 where McCarthy J. states at 262:

> "The making of the extradition arrangement presupposes that the Government and the Oireachtas are satisfied, amongst other things, that, an ***Irish Citizen*** being extradited to the United Kingdom, as in this instance, or to any other State, will not have his constitutional rights impaired" (emphasis added by the applicant).

9.3 The principle was recently re-stated by Murray C.J. in *Attorney General v. Skripakova* [2006] IESC 68, (Unreported, ex tempore, Supreme Court, 24th April, 2006). The Supreme Court held that, once the conditions under the Act of 1965, concerning a request for extradition, had been met, the courts operated on the basis that extradition should be ordered unless the person seeking to resist that order satisfies the Court that, as explained at paragraph 5, "*there are substantial grounds to justify the Court refusing an Order for extradition in spite of the conditions in question being otherwise met*."

9.4 The applicant acknowledges that the "*concepts of mutual cooperation and mutual trust*," as stated by Denham J. at paragraph 24 in *Attorney General v. Pratkunas* [2009] IESC 34, (Unreported, Supreme Court, 2nd April, 2009), which are at the root of the European arrest warrant system do not apply in the same manner to requests made under the Act of 1965. However, the applicant cites *Minister for Justice, Equality and Law Reform v. Stapleton* [2007] IESC 30, [2008] 1 I.R. 669 where Fennelly J. states at 688:

> "It is true that the principle of mutual trust and confidence must have been at the heart of former bilateral or multilateral

> extradition arrangements. Such arrangements were (and still are so far as extradition arrangements with states outside the European Union are concerned) an expression of the sovereign power of the respective states. They implied at least some level of mutual political trust, and at the judicial level, confidence in the legal systems of the cooperating states."

9.5 Furthermore, the applicant cites *Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] IESC 23, [2006] 3 I.R. 148 where Murray C.J. states at 159:

> "Generally speaking extradition arrangements and the like are based on reciprocity and mutuality. Each country enters into such arrangements on the presumption that the other country will comply with their requirements and apply them in good faith."

9.6 The applicant goes on to refute the respondent's submissions that he would, if convicted, be subjected to a different sentencing regime in the State of Florida. In *Minister for Justice, Equality and Law Reform v. Brennan* [2007] IESC 21, [2007] 3 I.R. 732, Murray C.J. made it clear that surrender to another State would not be refused solely on the grounds that, as in that case, the sentencing provisions in the requesting State did not conform to the principles of Irish law. It would require the demonstration of truly egregious circumstances, such as (as instanced by Murray C.J., at 744) a "*clearly established and fundamental defect in the system of justice of the requesting state."*

9.7 The applicant accepts that the appropriate test in this regard is that established in *Minister for Justice and Law Reform v. Rettinger* [2010] IESC 45, [2010] 3 I.R. 783, as framed with respect to extradition requests outside the realm of the European arrest warrant scheme, as propounded by this Court in *Attorney General v. O'Gara* [2012] IEHC 179, (Unreported, High Court, Edwards J., 1st May, 2012). It was respectfully submitted, however, that in applying the *Rettinger* principles account must be taken of the decision of the ECtHR in the *Harkins and Edwards v. the United Kingdom* (2012) 55 E.H.R.R. 19.

9.8 In that case the ECtHR sought to resolve an apparent tension between two earlier judgments of the Court, identified and discussed at some length by the UK House of Lords in the case of *R. (Wellington) v. Secretary of State for the Home Department* [2008] UKHL 72, [2009] 1 A.C. 335. Central to the appeal before the House of Lords in that case was paragraph 89 of the ECtHR's judgment in *Soering v. the United Kingdom* (1989) 11 E.H.R.R. 439, where the court stated that considerations in favour of extradition:

> "must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases."

A majority of the House of Lords in *R. (Wellington) v. Secretary of State for the Home Department* [2008] UKHL 72, as summarised by the ECtHR at paragraph 37 in *Harkins and Edwards v. the United Kingdom* (2012) 55 E.H.R.R. 19, had found that:

> "on the basis of this paragraph, in the extradition context, a distinction had to be drawn between torture and lesser forms of ill-treatment. When there was a real risk of torture, the prohibition on extradition was absolute and left no room for a balancing exercise. However, insofar as Article 3 applied to inhuman and degrading treatment and not to torture, it was applicable only in a relativist form to extradition cases."

However, the ECtHR had also said in *Chahal v. the United Kingdom* (1997) 23 E.H.R.R. 413 at 414, that:

> "[i]t should not be inferred from the Court's remarks [at paragraph 89 of Soering] that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged."

In his judgment in *R. (Wellington) v. Secretary of State for the Home Department* [2008] UKHL 72, Hoffman L., seeking to reconcile the two ostensibly conflicting statements from *Soering* and *Chahal* respectively, stated at 346:

"In the context of *Chahal*, I read this remark as affirming that there can be no room for a balancing of risk against reasons for expulsion when it comes to subjecting someone to the risk of torture. I do not however think that the Court was intending to depart from the relativist approach to what counted as inhuman and degrading treatment which was laid down in Soering and which is paralleled in the cases on other articles of the Convention in a foreign context. If such a radical departure from precedent had been intended, I am sure that the court would have said so."

For Hoffmann L., paragraph 89 of Soering v. the United Kingdom made clear that:

> "...the desirability of extradition is a factor to be taken into account in deciding whether the punishment likely to be imposed in the receiving state attains the 'minimum level of severity' which would make it inhuman and degrading. Punishment which counts as inhuman and degrading in the domestic context will not necessarily be so regarded when the extradition factor has been taken into account."
>
> He went on to state at 345:
>
> "A relativist approach to the scope of article 3 seems to me essential if extradition is to continue to function. For example, the Court of Session has decided in *Napier v Scottish Ministers* (2005) SC 229 that in Scotland the practice of 'slopping out' (requiring a prisoner to use a chamber pot in his cell and empty it in the morning) may cause an infringement of article 3. Whether, even in a domestic context, this attains the necessary level of severity is a point on which I would wish to reserve my opinion. If, however, it were applied in the context of extradition, it would prevent anyone being extradited to many countries, poorer than Scotland, where people who are not in prison often have to make do without flush lavatories."

9.9 The ECtHR was presented with an opportunity in the *Harkins and Edwards v. the United Kingdom* (2012) 55 E.H.R.R. 19 to provide some much needed clarification as to the correct approach to be adopted in cases involving inhuman and degrading treatment that did not involve torture. The Court stated:

> "124. The Court now turns to whether a distinction can be drawn between the assessment of the minimum level of severity required in the domestic context and the same assessment in the extra-territorial context. The Court recalls its statement in *Chahal*, cited above, § 81 that it was not to be inferred from paragraph 89 of Soering that there was any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility

under Article 3 was engaged. It also recalls that this statement was reaffirmed in *Saadi v. Italy*, cited above, § 138, where the Court rejected the argument advanced by the United Kingdom Government that the risk of ill-treatment if a person is returned should be balanced against the danger he or she posed. In *Saadi* the Court also found that the concepts of risk and dangerousness did not lend themselves to a balancing test because they were "notions that [could] only be assessed independently of each other" (ibid. § 139). The Court finds that the same approach must be taken to the assessment of whether the minimum level of severity has been met for the purposes of Article 3: this too can only be assessed independently of the reasons for removal or extradition.

125. The Court considers that its case-law since Soering confirms this approach. Even in extradition cases, such as where there has been an Article 3 complaint concerning the risk of life imprisonment without parole, the Court has focused on whether that risk was a real one, or whether it was alleviated by diplomatic and prosecutorial assurances given by the requesting State (see *Olaechea Cahuas v. Spain*, no. 24668/03, §§ 43 and 44, 10 August 2006; *Youb Saoudi v. Spain* (dec.), no. 22871/06, 18 September 2006*; Salem v. Portugal* (dec.), no. 26844/04, 9 May 2006; and *Nivette v. France* (dec.), no. 44190/98, ECHR 2001 VII). In those cases, the Court did not seek to determine whether the Article 3 threshold has been met with reference to the factors set out in paragraph 89 of the *Soering* judgment. By the same token, in cases where such assurances have not been given or have been found to be inadequate, the Court has not had recourse to the extradition context to determine whether there would be a violation of Article 3 if the surrender were to take place (see, for example, *Soldatenko v. Ukraine*, no. 2440/07, §§ 66-75, 23 October 2008). Indeed in the twenty-two years since the *Soering* judgment, in an Article 3 case the Court has never undertaken an examination of the proportionality of a proposed extradition or other form of removal from a Contracting State. To this extent, the Court must be taken to have departed from the approach contemplated by paragraphs 89 and 110 of the *Soering* judgment."

9.10 The applicant therefore urges upon the Court that the *Rettinger* principles should be applied in the light of the clarification provided in *Harkins and Edwards v. U.K* (2012) 55 E.H.R.R. 19.

*Overcrowding*

9.11 The applicant submits that where, as here, a respondent alleges that he would be exposed to a risk to his life or bodily integrity if surrendered to a state with which Ireland has an extradition agreement, the onus rests on such respondent to demonstrate that there is a real risk to his health or life if so surrendered. The applicant refers the Court to the judgment of Finlay C.J. in *Russell v. Fanning* [1988] I.R. 505 and wherein it was stated (at 531):

> "I would accept that if a court upon the hearing of an application to set aside an Order for delivery under the Extradition Act, 1965, was satisfied as a matter of probability that the plaintiff would, if delivered into another jurisdiction, be subjected to assault, torture or ill-treatment, that it would, in order to protect the fundamental constitutional rights of the plaintiff, be obliged to release him from detention and to refuse to deliver him out of the jurisdiction of these courts."

9.12 The applicant submits that the respondent must show that there is a real risk to his life or health if surrendered and that the respondent has wholly failed to do so in the present case. The applicant refers the Court to the comments of Peart J. in *Attorney General v. Russell* [2006] IEHC 164, (Unreported, High Court, Peart J., 23rd May, 2006). In that case, as here, the respondent had, *inter alia*, alleged that there was a real risk that he would be exposed to inhumane and degrading punishment in breach of his constitutional rights and rights guaranteed under the Convention if surrendered to the State of Washington. In that case, a consultant engaged by the respondent had claimed that the respondent would be targeted by inmates in prison because of the notoriety of his case and his home area. It was claimed that such respondent would be exposed to risk of attack and male rape and that such occurrence is practised in prisons of the United States. Reference was also made to the fact that, were he to be held in a segregated area of the prison, he would be deprived of reading material, radio, human contact, and would be confined for up to 23 hours per day.

9.13 In rejecting the claims by the respondent in *Attorney General v. Russell* [2006] IEHC 164, Peart J. referred to the following passage from the judgment of Laws L.J. in *R. (Bermingham and Others) v. Director of Serious Fraud Office* [2006] EWHC 200 (Admin), [2007] Q.B. 727 at 768:

> "While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment; *Soering,* paragraph 91; *Cruz Varas*, paragraph 69; *Vilvaragh*, paragraph 103. In *Dehwari*, paragraph 61 … the Commission doubted whether real risk was enough to resist removal under article 2, suggesting that loss of life must be shown to be in 'near certainty'. "

9.14 Likewise, in *Attorney General v. Doyle* [2010] IEHC 212, (Unreported, High Court, Peart J., 21st January, 2010), the respondent submitted that his extradition should be refused on the basis of, *inter alia*, the prison authorities in Florida and that, because of the nature of the sexual offences with which he was charged, he was at serious risk of violence from both fellow inmates and staff and to extradite him would be to breach his constitutional rights to bodily integrity. Peart J. stated:

> "It must be borne in mind that there is no evidence of what prison or other correctional centre the respondent would be placed if convicted and sentenced. Cases such as *Attorney General v. POC, and Finucane v. McMahon* [1990] 1 I.R. 165 where extradition was refused, are cases where there was cogent and convincing evidence of future probability that constitutional rights would be breached upon extradition. That is in stark contrast to what has to be regarded as mere generalised speculation … It is sufficient to discharge the heavy onus upon the respondent in this regard. In that regard, I refer to what I stated in *Attorney General v. Russell* … as to the heavy onus on a respondent to establish a real risk of a threat to life, bodily integrity and safety."

9.15 It was submitted that the position in terms of a challenge to extradition on the basis of rights pursuant to Article 3 of the Convention was most recently considered by the ECtHR in the conjoined cases of *Babar Ahmad and Others v. the United Kingdom* (Application Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, April 10th 2012). The ECtHR (Fourth Section) delivered a judgment in those cases, which is not yet final, on the 10th April, 2012. It contained the following statements of general principle:

> "a. General principles
>
> i. Article 3 and detention
>
> 200. As the Court has frequently stated, Article 3 of the Convention enshrines one of the most fundamental values of

democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, among other authorities, *Labita v. Italy* [GC], no 26772/95, § 119, ECHR 2000-IV; *A.B. v. Russia*, no. 1439/06, § 99, 14 October 2010).

201. In order to fall under Article 3, ill-treatment must attain a minimum level of severity. The assessment of this minimum level is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the state of health of the victim (see *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25, and *Gäfgen v. Germany* [GC], no 22978/05, § 88, ECHR 2010- …). Although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see *Peers*, cited above, § 74).

202. For a violation of Article 3 to arise from an applicant's conditions of detention, the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Enea v. Italy* [GC], no 74912/01, § 56, ECHR 2009-…). Measures depriving a person of his liberty may often involve an element of suffering or humiliation. However, the State must ensure that a person is detained under conditions which are compatible with respects for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secure (see *Kudla v. Poland* [GC], no. 30210/96, §§ 92-94158, ECHR-XI, and *Cenbauer v. Croatia*, no. 73786/01, § 44, EHCR 2006-III; *A.B. v. Russia*, cited above, § 100).

203. When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant (see *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II). The length of the period during which a person is detained in the particular conditions also has to be considered (see, among other authorities, Ciorap v. Moldova, 12066/02, § 64, 19 June 2007; *Alver v. Estonia*, no. 64812/01, 8 November 2005; *Ostrovar v. Moldova*, no. 35207/03, § 79, 13 September 2005)."

9.16 It was submitted that the evidence adduced by the respondent in this case goes nowhere near establishing that there is a real risk that he would be exposed to a threat to his life and personal safety such as to prevent his extradition to the United States of America.

*Jimmy Ryce Act*

9.17 The Court's attention was drawn to the terms of s. 20(1) of the Act of 1965, which provides:

"… extradition shall not be granted unless provision is made by the law of the requesting country or by the extradition agreement—

(a) that the person claimed shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order, or otherwise restricted in his personal freedom, for any offence committed prior to his surrender other than that for which his extradition is requested, excepted in the following cases—

(i) with the consent of the Minister, or

(ii) where that person, having had an opportunity to leave the territory of that country, has not done so within forty-five days of his final discharge in respect of the offence for which he was extradited or has returned to the territory of that country after leaving it…"

9.18 The Court's attention was further drawn to Article XI(1) of the E.U.–U.S. Treaty (entitled "Rule of Specialty"), which provides:

"A person extradited under this Treaty shall not be proceeded against, sentenced, punished, detained or otherwise restricted in his or her personal freedom in the Requesting State for an offence other than that for which extradition has been granted … unless:

(a) the person has left the Requesting state after extradition and has voluntarily returned to it;

(b) the person, having had an opportunity to leave the Requesting State, has not done so within forty-five days of final discharge in respect of the offence for which that person was extradited, or

(c) the Requested State has consented."

9.19 The applicant makes the point that the constitutionality of the *Jimmy Ryce Act* was upheld by the Supreme Court of the United States in *Kansas v. Hendricks* 521 U.S. 346 (1996). It was suggested that the Court there held that a similar statute in the State of Kansas was civil in character and not criminal and that detention thereunder did not offend the constitutional protections of the *ex post facto* and double jeopardy clauses.

9.20 In analysing the Kansas law, the Supreme Court of the United States noted that the State legislature (as in Florida) unambiguously categorised the statute as civil. The Court would not challenge that state's designation of the statute as civil unless the party challenging the statute proved the statute to be so punitive as to negate the state's express intent. The Court distinguished the civil commitment statute from criminal punishment because the statute, according to the Court, did not implicate the primary purposes of criminal punishment – deterrence and retribution. The Court said that the Kansas law was not retributive because prior criminal conduct (as in the Florida law) was only relevant in the committal proceedings to the extent that it might establish a 'mental abnormality' or prove the requisite level of dangerousness of the inmate.

9.21 The United States Supreme Court also reasoned that the Kansas law was not a deterrent as sexually violent predators were defined as persons who lack volitional control over their own actions. According to the Court it was axiomatic that unintentional behaviour cannot be deterred and therefore the punishment of sexually violent predators cannot be deterred. The Supreme Court also said that the detention conditions under Kansas law were more akin to civil commitment rather than criminal detention and stated (at 361-362):

"As a threshold matter, commitment under the Act does not implicate either of the two primary objectives of criminal

> punishment: retribution or deterrence. The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes, either to demonstrate that a "mental abnormality" exists or to support a finding of future dangerousness. We have previously concluded that an Illinois statute was non-punitive even though it was triggered by the commission of a sexual assault, explaining that evidence of the prior criminal product was 'received not to punish past misdeeds, but primarily to show the accused's mental condition and to predict future behaviour'."

9.22 The applicant submits that the respondent is sought to stand trial in respect of defined offences as set out in the extradition request from the United States. There is no question, and indeed it has not been suggested by the respondent, that he will be prosecuted or punished for any offences other than those set out in the respondent's request in the United States following surrender and therefore no claim that the United States intends to breach the rule of specialty, which is a term of the E.U.–U.S. Treaty at Article XI, can arise in the circumstances.

9.23 Furthermore, the applicant submits that whether or not the respondent will be subject to the *Jimmy Ryce Act* is not a matter for this Court to decide. The civil commitment of a person in Florida under the *Jimmy Ryce Act* occurs not because of conviction for any offence (although it is a precondition to the exercise by the Courts of the Act) but rather by reason of a decision taken by a civil court in entirely separate proceedings. The purpose of an order under the *Jimmy Ryce Act* is not criminal in nature—it is not designed to punish the subject of the order but rather to ensure his or her care and treatment in a civil facility.

9.24 It was submitted, first, that the committal of a person on foot of such an order does not offend the principle of double jeopardy. The subject of such an order is not being punished or convicted a second time for the sexual offences, which originally led to the process being invoked. The subject of the inquiry will only be detained civilly following a determination that he or she suffers from a mental abnormality or personality disorder of the kind set out in the Act. There is no question of his or her being tried again for the same offences in question. Similarly the consequences of being found to be a "sexually violent predator" are civil orders directed to treatment rather than criminal orders directed to punishment.

9.25 Secondly, it was submitted that the form of committal provided for under the *Jimmy Ryce Act* does not amount to a form of preventative detention such as would be prohibited under Irish law. It is a general constitutional principle that the Irish courts do not have the power to order the detention of a person to prevent the commission of anticipated future crimes. In *Re Article 26 and ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360, the Supreme Court pointed out that this only applies in the context of criminal law and that it is not the case that there is a constitutional impediment to all forms of preventative detention.

9.26 It was further submitted that the Supreme Court referred to legitimate forms of preventative detention under Irish Law including detention under the then Mental Treatment Act 1945 (now Mental Health Act 2001). The Supreme Court accepted the Attorney General's argument that there was no general rule against such detention and that the same depended on the circumstances and nature of the detention. It should also be noted that under Article 5 of the Convention, the detention of persons suffering from mental illness is authorised.

9.27 It was submitted that the form of detention provided for under the *Jimmy Ryce Act* is not criminal in character and is not a form of preventative criminal detention. Indeed, the respondent, at paragraph 3 of his Points of Objection, accepts that detention pursuant to the *Jimmy Ryce Act* is detention "other than pursuant to a criminal conviction." The respondent has not demonstrated that the civil commitment order of which complaint is made is a form of criminal preventative detention as would be outlawed under the Irish Constitution.

9.28 Indeed, in Attorney General v. Doyle [2010] IEHC 212, (Unreported, High Court, Peart J., 21st January 2010), Peart J. was satisfied that the *Jimmy Ryce Act* provided a *"civil commitment procedure for the long-term care and treatment of sexually violent predators."* In rejecting the respondent's claim that this form of civil commitment violated the Constitution as being a form of preventative detention, Peart J. held (at 20 of his unreported judgment):

> "I am entirely satisfied that the existence of a possibility that at the conclusion of any sentence which may be imposed on the respondent the *Jimmy Ryce* procedure may be invoked and a determination made as to whether or not he should be further detained for the purposes of the Act is not a regime which amounts to a double jeopardy or even a breach of the rule of specialty. I cannot regard a procedure which aims to assist a qualifying person, albeit that it serves a preventative purpose in the interest of the wider community, as one which breaches any constitutional right of the respondent.
>
> One must take into account the nature of the assessment, its adversarial nature, the right to appeal, the right to apply for release, and the requirement that a review take place at least once in every twelve months. There are reasonable mechanisms in place to ensure that a person's rights to fair procedures and right to liberty are safeguarded…"

9.29 Anticipating that the respondent might seek to rely upon *Minister for Justice, Equality and Law Reform v. Murphy* [2010] IESC 17, [2010] 3 I.R. 77, the applicant seeks to distinguish the present case from the circumstances in that case, on the following basis:

> "(a) the Supreme Court was concerned with a situation where the appellant had been sentenced to a hospital order: he had been convicted of rape and assault occasioning actually bodily harm and following conviction he was sentenced by a criminal court to the hospital order pursuant to section 37 and 41 of the Mental Health Act, 1983, which provides for the making of such by the criminal court following such conviction;
>
> (b) in interpreting 10(d) of the EAW Act, 2003, insofar as it provides that the person whose surrender is sought must be one "on whom a sentence of imprisonment or detention has been imposed in that state …", the Supreme Court considered recital 5 to the Framework Decision which provides that the pre-existing extradition arrangements "… should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions …" (at p. 87)
>
> (c) Most significantly, the Supreme Court considered section 10(d) of the 2003 Act by reference to Article 2(1) of the Framework Decision and it is respectfully submitted was clear in its conclusion that it was concerned with a sentence or detention order made in the context of a criminal case (which the Jimmy Ryce Act is not) when it stated:
>
> > 'Article 2(1) is helpful. It states:-

> A European arrest warrant may be issued for acts punishable by the law of the issuing Member state by a *custodial sentence or detention order* for a maximum period of at least 12 months or, where a sentence has been passed or a *detention order* has been passed or a detention order has been made, for sentences of at least four months' (emphasis added).

> [41] Again there is the duality – a European arrest warrant may be sought for a prosecution or it may be sought where sentence has been passed i.e. within a criminal process. When referring to the situation where sentence has been passed there is reference to "where a sentence has been passed or a detention order has been made" both are qualified by the phrase "for sentences of at least four months". Thus, there is a belt and braces approach to the description, in that reference is made to a situation where a sentence has been passed or a detention order made, for a sentence of at least four months… (at p. 88)

> [44] The Framework Decision envisages that a European arrest warrant may issue where a detention order has been made within the context of a criminal conviction… (at p. 89)

> [47] A detention order arising outside the criminal process… could not be the subject of a detention order enforceable under the [2003 Act]. I would affirm the statement of the High Court Judge that a person who has been made the subject of a detention order solely in a mental health context, and who escapes from that detention, could not be sought to be surrendered by means of a European arrest warrant.

> [49] …In this case the law of the United Kingdom enables a sentence to be one of detention by way of hospital order. Such a detention order apparently involves elements of protection for society… (at p. 90)

> [52] … The word "sentence" [in s. 10(d)] governs the phrase and applies to both "imprisonment" and "detention". Thus it clearly arises in criminal proceedings and covers a sentence of detention. There is no ambiguity. (at pp. 90-91)

9.30 In the present case, the applicant submits that we are concerned with the E.U.–U.S. Treaty and the Act of 1965. Section 8 of the Act of 1965 is concerned, *inter alia*, with the surrender of a person "*who is being proceeded against in that country for an offence*". "Imprisonment" is defined as "in relation to the State, [including] penal servitude and detention in Saint Patrick's Institution and, in relation to any other country, included deprivation of liberty under a detention order." "Detention Order" is defined "in relation to another country means any order involving deprivation of liberty which has been made by a criminal court in that country in addition to or instead of a prison sentence." "Sentence" is defined as including a "detention order." Moreover, the obligation to extradite under Article I of the E.U.–U.S. Treaty is phrased in terms of persons "who are wanted for prosecution or the imposition or enforcement of a sentence in the Requesting State for an extraditable offence."

**Sex Offender Registration**

9.31 The applicant accepts that, as averred in Mr. Khary Oliver Gaynor's second supplemental affidavit, in the event of the respondent's conviction for the offences for which his extradition is sought he would be subject to sexual offender registration within the United States.

9.32 It is also apparent from the copy of the Florida Sexual Predators Act that is exhibited to the respondent's affidavit that provision is made for a person to whom it applies to make an application for removal of the sexual predator designation. It provides that, a sexual predator, who was so designated by a court on or after 1st September, 2005, who has been lawfully released from confinement, supervision, or sanction, which is later, for at least 30 years, and who has not been arrested for any felony or misdemeanour offence since release may petition the criminal division of the circuit court in the circuit in which s/he resides for the purpose of removing the sexual predator designation.

9.33 The applicant further accepts that Article 8 of the Convention provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety of the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

9.34 The applicant submits that the effect of the respondent's submissions is that he is entitled to a right to privacy in respect of any conviction that may be imposed upon him in Florida. This, it appears, is being asserted as an absolute right, without any recognition of the provisions of Article 8(2) of the Convention.

9.35 A convicted person does not have a right to privacy in respect of a conviction acquired in the State. Indeed, while many persons who are convicted of sexual offences in the State are not named publicly, the legislation in this regard is only concerned with protecting the anonymity of the complainant unless s/he wishes to waive that anonymity and the real prohibition upon naming a convicted sex offender arises where naming the offender would inevitably give rise to identifying the complainant.

9.36 The applicant further submitted that the Florida Sexual Predators Act, which has been found to be constitutional by the U.S. Courts, does not violate any right to privacy that the respondent may have, whether deriving from the Irish Constitution or under the European Convention on Human Rights. It was submitted that information that a person has been convicted of a sexual offence is public information rather than private information, but that even if it is private information, the stated and patent public purpose of the Florida Sexual Predators Act represents a sufficiently compelling state interest to justify such an intrusion on privacy.

9.37 Counsel for the applicant contends that it is clearly established in our own jurisprudence that a right to privacy does not arise just solely by virtue of the fact that one would rather that the relevant information was not disseminated. In *M. v. Drury* [1994] 2 I.R. 8, the plaintiff wife and her husband had been involved in litigation which resulted in the making of an order for judicial separation. A number of articles appeared in various newspapers published by the defendants reporting the husband's view that the marriage had broken down by reason of an alleged adulterous relationship between his wife and a priest. The plaintiff applied to the High Court for an interlocutory injunction restraining the defendants from publishing any fact pertaining to her family life. She submitted that the proposed publications would disclose matters relating to the intimate family life of herself and her husband and that this constituted an invasion of her right to privacy under Article 41. O'Hanlon J. held, however, that the proposed publications did not concern the intimacies of married life or marital communications, but allegations of adultery made by a husband against a wife. It was noted by the

court that, had the truth of the allegations been contested by the plaintiff, the injunction could have been granted and the law of defamation could have been invoked in aid of the plaintiff's case. The court went on to hold that whilst in certain cases the right to privacy, which right was an unspecified right deriving from the Constitution, demanded intervention by the courts, in general it was desirable that the legislature and not the courts should prescribe the exceptions to freedom of speech. In the course of his judgment, O'Hanlon J. stated*, inter alia,* at 17:

> "… the court is asked to intervene to restrain the publication of material, the truth of which has not yet been disputed, in order to save from the distress that such publication is sure to cause, the children of the marriage who are all minors. This would represent a new departure in our law, for which, in my opinion, no precedent has been shown, and for which I can find no basis in the Irish Constitution, having regard, in particular, to the strongly expressed guarantees in favour of freedom of expression in that document."

9.38 In counsel for the applicant's submission, that the right to privacy may have to give way to a competing interest is well established law in the State. In *Herrity v. Associated Newspapers (Ireland) Ltd*. [2008] IEHC 249, [2009] 1 I.R. 316, Dunne J. distilled following principles from the existing case law (including *M. v. Drury*) at 337:

> "(1) There is a constitutional right to privacy;
>
> (2) The right to privacy is not an unqualified right;
>
> (3) The right to privacy may have to be balanced against other competing rights and interests
>
> (4) The right to privacy may be derived from the nature of the information at issue – that is, matters which are entirely private to an individual and which it may be validly contended that there is no proper basis for disclosure either to third parties or the public generally;
>
> (5) There may be circumstances in which an individual may not be able to maintain that the information concerned must always be kept private, having regard to the competing interests which may be involved but may make complaint in relation to the manner in which the information was obtained;"

9.39 As previously stated, the Court's attention has been drawn to the cases of *R. (Wellington) v. Secretary of State for the Home Department* [2008] UKHL 72, [2009] 1 A.C. 335 and *Harkins and Edwards v. the United Kingdom* (2012) 55 E.H.R.R. 19. In particular, this Court has quoted paragraphs 124 and 125 of the *Harkins and Edwards v. the United Kingdom* judgment. The applicant has further referred the Court with particularity to the following passages which are contained in paragraphs 128 to 131, inclusive, of the judgment.

> "128. The Court therefore concludes that the *Chahal* ruling (as reaffirmed in *Saadi*) should be regarded as applying equally to extradition and other types of removal from the territory of a Contracting State and should apply without distinction between the various forms of ill-treatment which are proscribed by Article 3.
>
> 129. However, in reaching this conclusion, the Court would underline that it agrees with Lord Brown's observation in *Wellington* that the absolute nature of Article 3 does not mean that any form of ill-treatment will act as a bar to removal from a Contracting State. As Lord Brown observed, this Court has repeatedly stated that the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States (see, as a recent authority, *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 141, 7 July 2011). This being so, treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case. For example, a Contracting State's negligence in providing appropriate medical care within its jurisdiction has, on occasion, led the Court to find a violation of Article 3 but such violations have not been so readily established in the extra-territorial context (compare the denial of prompt and appropriate medical treatment for HIV/AIDS in *Aleksanyan v. Russia*, no. 46468/06, §§ 145–158, 22 December 2008 with *N. v. the United Kingdom* [GC], no. 26565/05, 27 May 2008).
>
> 130. Equally, in the context of ill-treatment of prisoners, the following factors, among others, have been decisive in the Court's conclusion that there has been a violation of Article 3:
>
> - the presence of premeditation (*Ireland v. the United Kingdom*, cited above, § 167);
>
> - that the measure may have been calculated to break the applicant's resistance or will (ibid, § 167; *Ila°cu and Others v. Moldova and Russia* [GC], no. 48787/99, § 446, ECHR 2004 VII);
>
> - an intention to debase or humiliate an applicant, or, if there was no such intention, the fact that the measure was implemented in a manner which nonetheless caused feelings of fear, anguish or inferiority (*Jalloh v. Germany* [GC], no. 54810/00, § 82, ECHR 2006 IX; *Peers v. Greece*, no. 28524/95, § 75, ECHR 2001 III);
>
> - the absence of any specific justification for the measure imposed (*Van der Ven v. the Netherlands*, no. 50901/99, §§ 61-62, ECHR 2003 II; *Iwañczuk v. Poland*, no. 25196/94, § 58, 15 November 2001);
>
> - the arbitrary punitive nature of the measure (see *Yankov*, cited above, § 117);
>
> - the length of time for which the measure was imposed (*Ireland v. the United Kingdom*, cited above, § 92); and
>
> - the fact that there has been a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention (*Mathew v. the Netherlands*, no. 24919/03, §§ 197-205, ECHR 2005 IX).
>
> The Court would observe that all of these elements depend closely upon the facts of the case and so will not be readily established prospectively in an extradition or expulsion context.
>
> 131. Finally, the Court reiterates that, as was observed by Lord Brown, it has been very cautious in finding that removal from the territory of a Contracting State would be contrary to Article 3 of the Convention. It has only rarely reached such a conclusion since adopting the *Chahal* judgment (see *Saadi*, cited above § 142). The Court would further add that, save for cases involving the death penalty, it has even more rarely found that there would be a violation of Article 3 if an

applicant were to be removed to a State which had a long history of respect for democracy, human rights and the rule of law."

9.40 The applicant submitted in conclusion that in considering a claim that extradition would give rise to a breach of a Convention right, the desirability of extradition is a factor to be taken into account by the State and the fact that it is in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Such considerations must be included among the factors that require consideration in the interpretation and application of rights to privacy asserted in extradition cases. In this regard, it is respectfully submitted that this Court is entitled to balance any right to privacy that the respondent may assert against the right of the State to surrender a requested person and the right of a requesting State to try him for alleged offences. It is submitted that the right of the State to extradite and the right of the requesting State to prosecute an alleged offender represent substantial public interests (and corresponding duties) and that same should not be trumped by an assertion of an alleged right to privacy that the requesting State has deemed appropriate to modify in accordance with its law.

**10. The Court's Decision**

*Alleged risk of inhuman and degrading treatment*

*during pre-trial detention in Duval County Jail*

10.1 The Court accepts that *Russell v. Fanning* [1998] I.R. 505; *Attorney General v. Russell* [2006] IEHC 164, (Unreported, High Court, Peart J., 23rd May, 2006) and *Attorney General v. Doyle* [2010] IEHC 212 (Unreported, High Court, Peart J., 21st January, 2010) are the leading relevant authorities specifically from the extradition context.

10.2 However, the decision of the Supreme Court in *Minister for Justice and Equality v. Rettinger* [2010] IESC 45, [2010] 3 I.R. 783, albeit a case from the European arrest warrant context, is also highly relevant. I have already stated in *Attorney General v. O'Gara* [2012] IEHC 179, (Unreported, High Court, Edwards J., 1st May, 2012) that I consider that the *Rettinger* principles can be applied, with appropriate modifications, to the extradition context.

10.3 In so far as *Harkins and Edwards v. the United Kingdom* (2012) 55 E.H.R.R. 19 is concerned there is in fact nothing within the judgments in *Rettinger* tending to suggest that it would ever be appropriate to seek to balance the risk of ill-treatment against the public interest in extradition, or that a relativistic approach can be taken in Article 3 cases. I therefore have no difficulty with the suggestion that in applying the *Rettinger* principles in any particular case the Court should also bear in mind the views of the ECtHR as expressed in *Harkins and Edwards v. the United Kingdom*

10.4 In *Attorney General v. O'Gara* [2012] IEHC 179, (Unreported, High Court, Edwards J., 1st May, 2012) I suggested that the *Rettinger* principles, modified for application in the Ireland/USA extradition context, could be expressed as follows:

> - By virtue of the absolute nature of the obligation imposed by Article 3 of the European Convention on Human Rights and Fundamental Freedoms, which provides that *'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'*, the objectives of the [Washington Treaty] cannot be invoked to defeat an established real risk of ill-treatment contrary to Article 3. (See analagous remarks of Fennelly J. at 813 in *Rettinger* regarding the objectives of the system of surrender pursuant to the Council Framework Decision on the European Arrest Warrant);
>
> - The subject matter of the court's enquiry "is the level of danger to which the person is exposed." (per Fennelly J. at 814 in *Rettinger*);
>
> - "it is not necessary to prove that the person will probably suffer inhuman or degrading treatment. It is enough to establish that there is a '*real risk*'." *(per* Fennelly J. at 814 in *Rettinger*) "in a rigorous examination." (*per* Denham J. at 801 in *Rettinger*). However, the mere possibility of ill treatment is not sufficient to establish an applicant's case. (*per* Denham J. at 801 in *Rettinger*);
>
> - A court should consider all the material before it, and if necessary material obtained of its own motion. (*per* Denham J. at 800 in *Rettinger*);
>
> - Although a respondent bears no legal burden of proof as such, a respondent nonetheless bears an evidential burden of adducing cogent "evidence capable of proving that there are substantial grounds for believing that if he (or she) were returned to the requesting country he, or she, would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention." (*per* Denham J. at 800 in *Rettinger*);
>
> - "It is open to a requesting State to dispel any doubts by evidence. This does not mean that the burden has shifted. Thus, if there is information from an applicant as to conditions in the prisons of a requesting State with no replying information, a court may have sufficient evidence to find that there are substantial grounds for believing that if the applicant were returned to the requesting state he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention. On the other hand, the requesting State may present evidence which would, or would not, dispel the view of the court." (*per* Denham J. at 801 in *Rettinger*);
>
> - "The court should examine the foreseeable consequences of sending a person to the requesting State." (*per* Denham J. at 801 in *Rettinger*). In other words the Court must be forward looking in its approach;
>
> - "The court may attach importance to reports of independent international human rights organisations." (*per* Denham J. at 801 in *Rettinger*).

10.5 There are two separate, but interlinked, issues raised by the respondent, i.e. overcrowding and lack of privacy at Duval County Jail. Mr. Gaynor has accepted that the respondent is likely to be incarcerated in pre-trial detention at Duval County Jail in the event of being extradited. Either one has the potential to amount to inhumane or degrading treatment, though it will not necessarily do so. Moreover, even if neither issue amounted to inhumane or degrading treatment by itself, the cumulative effect of both on the respondent could also potentially amount to inhumane or degrading treatment, though, again, it would not necessarily do so.

10.6 The applicant's case in support of his contention that there are substantial grounds for believing that if he were returned to the requesting country he would be exposed to a real risk of being subjected to inhumane and degrading treatment, and specifically

overcrowding and lack of privacy, contrary to Article 3 of the Convention, is based in one part on his personal experience of having spent one night in Duval County Jail in December 2006. He describes at paragraphs 3 to 12 of his first affidavit what he saw and experienced. He described in excess of 30 men being accommodated in a "pod" comprised of six two man cells (with in-cell toilets) with a communal living area containing nothing but 4 or 5 round metal tables. Accordingly, his experience was of 30 men in accommodation which was designed for 12 men. He characterises it as an "extraordinary degree of overcrowding". The extra prisoners were required to sleep in boat beds arranged along one wall of the pod, and had to use a communal toilet facility, and a communal shower. He claimed this shower "had no privacy as it faced the guard station" and that "many of the prisoners showered whilst attempting to preserve their modesty by means of covering their genitals with a free hand." The accommodation pod described was one of a group of such pods which were arranged in a circle around a central guard station. The design incorporated a plexiglass front so that the prison guards could look into it 24 hours a day, ostensibly for ease of supervision. The respondent contends that the lights were never turned off in the pod and that the lights at night-time were strong enough to illuminate the entirety of the pod. In the respondent's view the pod accommodation in Duval County Jail "necessarily deprived all prisoners of even the most basic degree of privacy and was profoundly dehumanizing."

10.7 The first thing to be said about all of this is that the respondent's experience was very short indeed. He was in Duval County Jail for less than 48 hours and only spent one night there. The brevity of the experience begs the question as to whether any significant weight can be attached to characterisations by the respondent, such as that the pod accommodation was "profoundly dehumanizing." It is also relevant in this regard that Mr. Gaynor has deposed that "inmates [are] housed in shared cells or communal areas *depending on the length of their stay*" (the Court's emphasis). The decision to accommodate Mr. Martin in a communal area during his brief stay was therefore likely to have been influenced by an expectation that his stay would be short, which in fact it was.

10.8 Secondly, the respondent's experience was approximately six years ago, and it begs the question as to whether it was representative of the situation in Duval County Jail today.

10.9 Apart from the respondent's own brief experience in 2006, the main additional material that the respondent relies upon is Mr. Gaynor's response to his various complaints, as set out in Mr. Gaynor's second and third supplemental affidavits.

10.10 It cannot be gainsaid that the level of overcrowding described by the respondent as having been experienced by him is serious, and, if representative of the situation today, would be a matter of concern. 30 men accommodated in a pod designed for 12 represents 250% of design capacity. This was certainly serious overcrowding.

10.11 Mr. Gaynor's evidence is that as of May 2011 the jail population in Duval County Jail was at 2,919 and as of March 2012 it was at 3,990. The respondent has asserted, and the applicant has not disputed, that the rated capacity of the jail is 2,189 inmates. The May 2011 figure represents 133% of capacity while the March 2012 figure represents 182% of capacity. While these figures indicate a lower level of overcrowding than the respondent claims to have experienced in 2006, they do nonetheless indicate significant overcrowding.

10.12 However, it does not automatically follow from the fact that a prison unit is overcrowded, or even seriously overcrowded, that the prisoners accommodated therein are necessarily being subjected to inhuman or degrading treatment. They may be uncomfortable, and may even be regarded as being somewhat ill-treated, but in order to amount to inhumane and degrading treatment contrary to Article 3, overcrowding would have to exist at a minimum level of severity.

10.13 As stated in *Babar Ahmad and Others v. U.K.* cited above, the assessment of this minimum level is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the state of health of the victim.

10.14 In *Orchowski v. Poland* (Application No. 17885/04, 22nd October, 2009), which was reviewed in great detail in *Minister for Justice and Equality v. Rettinger* [2010] IESC 45, [2010] 3 I.R. 783, there were several very important circumstances that persuaded the ECtHR that overcrowding existed at a level of severity amounting to inhumane and degrading treatment. First, there was evidence that the prisoner in question was accommodated in a cell which afforded him less than 3m2 of personal space. (It is worth remarking that in the present case the high water mark of what is alleged with regard to personal space is that the effect of accommodating extra prisoners in boat beds in the common area of the pod "was to deprive the prisoners of any meaningful recreation space". No figure is put on it.) Secondly, there was also evidence in *Orchowski v. Poland* that overcrowding was a systemic problem in the prisons in Poland, and the ECtHR had some 160 overcrowding cases emanating from Poland pending before it at the time. Thirdly, for many years the Polish authorities appeared to ignore the existence of overcrowding and inadequate conditions of detention and, instead, chose to legitimise the problem on the basis of a domestic law which was ultimately declared unconstitutional by the Polish Constitutional Court in a judgment of 28 May 2008. Fourthly, the seriousness and the structural nature of the overcrowding in Polish detention facilities had been acknowledged by the Polish Constitutional Court in its judgment of 28th May, 2008 and by all the State authorities involved in the proceedings before the Constitutional Court, namely the Prosecutor General, the Ombudsman and the Speaker of the Sejm, and by the Government of Poland.

10.15 In the present case the respondent has in effect alleged a systemic overcrowding problem at Duval County Jail, and official indifference to that problem. In support of this he has produced some published material by two academics at the University of Florida (there was no objection to the hearsay nature of it) attributing the high incarceration rates in Jacksonville, with consequential overcrowding in Duval County Jail, to a perceived policy by the local State Attorney in Jacksonville to be seen to be "tough on crime". The respondent asserts that "it is a somewhat notorious fact that the population of Duval County Jail has continued to increase notwithstanding a significant drop in the overall crime rate and that much of this increase is attributable to a robust policy of prosecution on the part of the State Attorney's Office." The Court would simply remark in regard to this (a) that Mr. Gaynor has described a series of steps being taken by Duval County officials, prosecutors, defence attorneys, and judges since 2009 to relieve overcrowding concerns, and (b) that it does not automatically follow from the fact that a "get tough on crime" policy may be in operation in the State Attorney's office in Jacksonville that there is official indifference to the overcrowding problem in Duval County Jail.

10.16 It seems to this Court that it is an important point that the detention at issue here is pre-trial detention in a county jail, and not imprisonment as a sentenced prisoner in either a state or federal prison. The evidence of Mr. Gaynor is that the average length of stay for a detainee is 135 days. However, Mr. Gaynor makes an important point that suggests that Mr. Martin's pre-trial detention, in the event that he is extradited, may be shorter than the average. Mr. Martin fled from the State of Florida on the eve of his trial in this case. Because all discovery depositions and pre-trial litigation had been completed at the time of Mr. Martin's flight, Mr. Gaynor opines that it is unlikely that Mr. Martin will be detained for a lengthy period of time before trial.

10.17 Another very important feature to be taken into account is Mr. Gaynor's evidence that Duval County Jail has various

classifications for the male population. He states that "General Population (medium)" is designated for misdemeanor or petty offenders as well as some third degree felonies. "General Population (maximum)" is designated for offenders charged with second degree felonies, first degree felonies or felonies punishable by life imprisonment. As of June 27th, 2011, the population for General Population (maximum) was 1,025 male detainees with 128 vacant beds available. (It will be recalled that as of May 2011 (just a month or so earlier) the total population in Duval County Jail was stated to be 2,919. Accordingly, the General Population (maximum) comprised approximately one third of the total population at that time. Mr. Gaynor has stated that based on Mr. Martin's charges, he would be housed under a General Population (maximum) designation. While the Court was not provided with more up to date figures, the June 27th, 2011 figures suggest that while overcrowding may have been be a feature of detention for some categories of detainee in Duval County Jail, it was not an issue at that time, at any rate, for the approximately one third of the population with a General Population (maximum) designation.

10.18 The Court also takes into account the additional information provided by Mr. Gaynor in his various affidavits concerning the facility itself, the pre-trial detention regime there, and concerning steps being taken to address the over-crowding issue that it is accepted does exist.

10.19 In so far as the privacy issues raised are concerned, Mr. Gaynor does not engage specifically with these assertions, and Court has no specific reason to doubt the respondent's evidence as to what he experienced. In so far as toilets are concerned, the evidence suggests that if Mr. Martin is extradited he is likely to be detained as a General Population (maximum) prisoner in shared cell accommodation rather than in a communal area and if so will have access to an in-cell toilet rather than a communal toilet. However, in so far as showers are concerned, it is certainly not ideal that the showers are communal with no privacy arrangements. There is, however, no evidence that this is designed or intended to humiliate or debase inmates. Rather, the ostensible reason for it, as is acknowledged by the respondent, is to facilitate observation of inmates at all times from the guard station for supervision purposes. It is asserted by the respondent that "the prison authorities appear to have taken the view that the appropriate response to violence from and between prisoners is simply to withdraw prison guards from harm's way by means of such a system rather than take any steps to actually address the issue of prison violence". However, there is simply no evidence to support that assertion.

10.20 To require male prisoners to shower in communal shower facilities, without privacy, does not in this Court's view automatically amount to inhuman and degrading treatment. Whether or not it in fact amounts to inhuman or degrading treatment will depend on the circumstances of the individual case. The potentially relevant circumstances could include, for example, the prisoner's personal attitude to nudity; whether his modesty is likely to be offended; whether he would likely to be seen by a member or members of the opposite sex; whether to be seen undressed would be contrary to his religious beliefs; and what is the reason or motivation for the requirement that there should be communal showering i.e. is there some legitimate reason for the requirement, or is it designed to debase and humiliate. This list is not intended in any way to be exhaustive and it is recognized and accepted that further and other relevant considerations could arise in individual cases.

It must also be acknowledged that communal showering by males in institutional settings other than prisons is a relatively common phenomenon (*e.g.*, by rugby or football players in a sports club dressing room after a match, or by soldiers in an army barracks following a drill or exercise, and [although possibly less common nowadays than was once the case] by boys in an all male boarding school); though obviously in the examples given communal showering is not compulsory, and there is personal choice in the matter, whereas in a prison setting the prisoner may have no choice as to when, where, how or in front of whom he must shower.

In the present case, the court notes that although the respondent has averred that "many of the prisoners showered whilst attempting to preserve their modesty by means of covering their genitals with a free hand", he does not say that he did so himself, or that he personally would find communal showering embarrassing, or difficult to cope with, or humiliating or debasing or degrading.

10.21 The Court, having subjected all of the circumstances of the case to a rigorous examination, has formed the view that the respondent has not adduced evidence of sufficient cogency to establish that there are substantial grounds for believing that if he were returned to the requesting state he would be exposed to a real risk of being subjected to inhuman and degrading treatment contrary to Article 3 of the Convention. There is certainly evidence that Duval County Jail has overcrowding issues, and also some evidence that detainees have a lack of privacy when showering, but even if these factors individually, or cumulatively, could amount to ill-treatment of a prisoner I am not satisfied that in the particular circumstances of this case such ill-treatment would attain the level of severity to justify characterising it as inhuman and degrading.

10.22 The apprehended pre-trial detention is likely to be relatively short. The respondent is likely to be designated General Population (maximum), amongst which group there was significant spare capacity (128 beds) as recently as the June 27th, 2011. The evidence in support of alleged official indifference to overcrowding lacks sufficient cogency, and is in any event hearsay and to be afforded reduced weight on account of that. On the contrary, the applicant has chosen to engage with the overcrowding issue raised by the respondent and any doubts that the Court may have had have been dispelled by the evidence adduced by the applicant's deponents, particularly that adduced by Mr. Gaynor.

10.23 The Court is not therefore disposed to uphold the objection based upon an alleged real risk of inhuman and degrading treatment.

**The Jimmy Ryce Act Objection**

10.24 The respondent has put forward this objection on two alternative bases: namely, that it amounts to a form of preventative detention that would be prohibited under the Irish Constitution, alternatively, that a committal which is predicated upon the existence of a criminal conviction cannot be regarded as unrelated to that conviction and as such any committal in the nature of that contemplated by the Jimmy Ryce Act must be regarded as amounting to a breach of the rule of specialty.

10.25 For the reasons stated below, I am not disposed to uphold the objection under this heading on either of the alternative bases on which it is put forward.

10.26 The Court has recently reviewed the law on preventative detention in a European arrest warrant case entitled *Minister for Justice and Equality v. Nolan* 2012 IEHC 249, (Unreported, High Court, Edwards J., 24th May, 2012). It was clear from this review that the Constitution of Ireland does not outlaw preventative detention in all circumstances, e.g., it is permitted in the mental health context, and in the infectious diseases context. However, the use of preventative detention in the criminal justice sphere is repugnant to the Constitution of Ireland because it offends against the principle that a person should only be punished under the criminal law following a trial in due course of law, an important feature of which is respect for the presumption of innocence.

10.27 The Court has carefully considered the *Jimmy Ryce Act* and has concluded that it provides for the imposition of a mental health measure and not an additional punishment. In that regard I agree with the view expressed by Peart J. in *Attorney General v. Doyle*

[2010] IEHC 212, (Unreported, High Court, Peart J., 21st January 2010), that the *Jimmy Ryce Act* provides a "*civil commitment procedure for the long term care and treatment of sexually violent predators*." Moreover, there is absolutely no indication at the present time that it could apply to the respondent. The evidence is that it can only apply to a sexually violent predator who has been assessed as suffering from a personality disorder or mental abnormality that makes the person likely to engage in sexually violent acts if not confined in a secure facility for long-term control, care, and treatment. As Mr. Gaynor has made clear the *Jimmy Ryce Act* is specifically designed to address repeat offenders and violent sexual offenders. In his opinion the facts of this case make it unlikely that Mr. Martin would be designated a sexually violent predator warranting civil commitment. While it is of course theoretically possible that the respondent could face commitment under the *Jimmy Ryce Act*, to suggest that he will do so is entirely speculative in the absence of anything to suggest either that he is suffering now, or is likely to develop, a personality disorder or mental abnormality making him likely to engage in sexually violent acts if not confined in a secure facility.

10.28 In so far as the respondent relies upon *Minister for Justice, Equality and Law Reform v. Murphy* [2010] IESC 17, [2010] 3 I.R. 77 this court does not agree with the respondent that the judgment is persuasive authority for the proposition that a committal which is predicated upon the existence of a criminal conviction cannot be regarded as unrelated to that conviction. It seems to this Court that case is distinguishable from the present case in that the Supreme Court was specifically engaged in the statutory interpretation of the phrase "detention order" which appears in s. 10(d) of the European Arrest Warrant Act 2003 to see whether a sentence of detention by "hospital order" imposed by a U.K. Court came within the ambit of s.10(d), and that it enunciated no principles intended to be of general application outside of the European arrest warrant context. Moreover, and in any event, as the applicant has rightly pointed out in her submissions it is clear that the Supreme Court was concerned with a sentence or detention order made in the context of a criminal case which a commitment order under the *Jimmy Ryce Act* is not.

10.29 In so far as the claim based upon the rule of specialty is concerned, the rule of specialty prohibits a person being prosecuted or punished for any offences other than those set out in the extradition request. However, the civil commitment of a person in Florida under the *Jimmy Ryce Act* occurs not because of conviction for any offence (although it is a precondition to the exercise by the Floridian Courts of the Act) but rather by reason of a decision taken by a civil court in entirely separate proceedings. Accordingly, a committal order under the *Jimmy Ryce Act,* being neither a prosecution nor a punishment, would not breach the rule of specialty.

*The Objection based on Sex Offender Registration*

10.30 The Court is also not disposed to uphold this objection. To have succeeded under this heading the respondent would have to have demonstrated that the mere fact of his being registered as a sex offender would imperil his rights under Article 2 and/or Article 3 of the Convention, and there is no substantive basis for believing that to be the case.

10.31 The mere fact that registration as a sex offender in Florida imposes different, and probably more onerous, requirements on the offender than would be imposed on a sex offender registering in Ireland is irrelevant. As O'Donnell J. has stated at paragraph 66 in *Nottinghamshire County Council v. B and Others* [2011] IESC 48, (Unreported, Supreme Court, 15th December, 2011) "*it is clear that the Constitution expects the legal systems of friendly nations will differ from that of Ireland" and, at paragraph 65, that "…the Constitution requires the Courts to refuse return only when the foreign procedure is so contrary to the scheme and order envisaged by the Constitution and so proximately connected to the order of the Court, that the Court would be justified, and indeed required, to refuse return*." Similar sentiments were expressed by the former Chief Justice in *Minister for Justice, Equality and Law Reform v. Brennan* [2007] IESC 21, [2007] 3 I.R. 732.

10.32 It is entirely speculative to suggest that the designation of the respondent as a sexual predator under the Florida Sexual Predators Act will unnecessarily expose him to violence from the public and unduly interfere with his entitlement to private life and rehabilitation. No cogent evidence has been adduced tending to support that suggestion. The Court is particularly unimpressed with the suggestion that restrictions placed on persons convicted of sexual offences, including the restriction of the entitlement of such persons to live within specified distances of schools, playgrounds, etc. renders those affected as functionally homeless. There can be many reasons for homelessness including alcohol, drug addiction, mental disorders and so on. It does not necessarily follow that sex offenders in Jacksonville who are homeless, and living under a causeway, are homeless simply because they are registered as sex offenders.

*Chemical Castration*

10.33 The fourth supplemental affidavit of Mr. Gaynor makes clear that sexual battery is defined as "oral, anal or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any object; however, sexual battery does not include an act done for a *bona fide* medical purpose." The respondent is charged under Chapter 800 of the Florida Statutes for lewd and lascivious molestation which does not include penetration of the sexual organs of the victim. Section 800.04(5) only requires touching, which is what is alleged to have occurred in this case. Accordingly, the evidence suggests that the respondent's apprehension that he may be subjected to chemical castration is without foundation, and the Court cannot uphold this objection either.

**11. Conclusion**

11.1 The Court is disposed in all the circumstances to dismiss the objections to the respondent's extradition and will make an order pursuant to s. 29(1) of the Act of 1965 as amended committing the respondent to a prison there to await the order of the Minister for his extradition.

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[1] All of the incidents charged in the Third Amended Information occurred in the State of Florida.