

**COURT OF APPEAL FOR ONTARIO**

**ROULEAU J.A. (IN CHAMBERS)**

**IN THE MATTER** of an Application for Interim Judicial Release Pending the Applicant’s Extradition hearing pursuant to section 20 of the *Extradition Act*.

<b>B E T W E E N :</b>	)	
	)	
<b>THE UNITED STATES OF AMERICA</b>	)	<b>Nick Devlin for the respondent</b>
	)	<b>Attorney General of Canada</b>
	)	
<b>(Respondent)</b>	)	
	)	
<b>- and -</b>	)	
	)	
<b>JOSEPH C. PANNELL, A.K.A. JOSEPH</b>	)	<b>Julian N. Falconer and John Norris,</b>
<b>COLEMAN PANNELL; JOSEPH</b>	)	<b>for the applicant Joseph Pannell</b>
<b>CHAPMAN PANNELL; YUSUF</b>	)	
<b>PANNEL; YUSUF; JOE NATHAN</b>	)	
<b>CHAPMAN; DOUGLAS NORBERG;</b>	)	
<b>DOUGLAS GARY FREEMAN</b>	)	
	)	
	)	
<b>(Applicant)</b>	)	
	)	<b>Heard: May 5 and 11, 2006</b>

**INTRODUCTION**

[1] Mr. Pannell brings this application for his judicial interim release. The United States of America (the “United States”) seeks his extradition so that he can be tried for attempted second-degree murder, aggravated battery and bail jumping. Mr. Pannell requests that he be released from custody pending his appeal to this court from the order for his committal into custody. He also requests that he be released from custody pending the Minister of Justice’s decision respecting his surrender. Mr. Pannell has been in custody since his arrest on July 27, 2004.

[2] The United States alleges that, some thirty-seven years ago, Mr. Pannell shot a uniformed police officer. Mr. Pannell was released on bail twice after his arrest for the shooting. He failed to appear in court both times. Sometime after he breached the second bail, Mr. Pannell entered Canada under the name Douglas Gary Freeman. Since then, he has lived and raised a family in Canada and has been an active member of the community. The American Authorities discovered Mr. Pannell's presence in Canada in 2004. He was then arrested and the United States sought his extradition.

[3] This is not the first time that Mr. Pannell has requested a judicial interim release. He has twice been before Nordheimer J., seeking first a judicial interim release and later a review of that first decision. Both times the court denied his request. He also unsuccessfully appealed Nordheimer J.'s second decision to this court.

[4] For the reasons that follow, I decline to grant Mr. Pannell's request for bail. I have concluded that the proposed plan of supervision does not adequately compensate for the risk of flight present in this case.

## **BACKGROUND**

### **Facts**

[5] It is the United States' position that on March 7, 1969, Mr. Pannell shot a police officer in the City of Chicago. The officer, Mr. Terrence Knox, was on uniformed patrol in a marked police cruiser. He stopped Mr. Pannell and inquired why he was not in school. Mr. Pannell allegedly responded by producing a 9-millimeter handgun and shooting into the police cruiser multiple times. The officer returned fire. One of the bullets shot by Mr. Pannell severed an artery in Mr. Knox's right arm. He suffered serious and permanent injuries. Mr. Pannell was arrested after a foot chase.

[6] Mr. Pannell was brought to Mr. Knox at hospital where he positively identified Mr. Pannell as the shooter. Three eyewitnesses also identified him as the shooter. Further, a handgun that Mr. Pannell was seen dropping after the shooting was recovered and subsequent ballistic tests matched that handgun with the cartridges found at the scene of the shooting.

[7] Mr. Pannell was released on bail on November 23, 1970, almost a year and a half after his arrest. On June 19, 1972, he was arrested by the Chicago police for his failure to appear on the attempt murder charges.

[8] Mr. Pannell was granted bail a second time. Again, he failed to appear in court two years later on July 23, 1974. Although an arrest warrant was issued, Mr. Pannell remained at large until his recent arrest in Canada.

[9] Sometime in 1974, Mr. Pannell left the United States and moved to the province of Quebec. He adopted the name Douglas Gary Freeman. He settled in Quebec and married Ms. Dasilva-Coelho. Prior to their marriage, he told her his real name and that he had shot a police officer in Chicago in self-defence.

[10] In 1987, Mr. Pannell and his family – he has two children with his current wife and two from a previous relationship – moved to Mississauga. They bought a house there. Both Mr. Pannell and his wife worked for the Toronto Library. He was a law-abiding citizen, with the exception of a single customs violation, relating to a camera, for which he received a \$300 fine in 1983. None of Mr. Pannell's friends or co-workers knew of his past until his arrest.

[11] As part of an audit by the court administration to ensure that all outstanding warrants were in the computer system, an arrest warrant for Mr. Pannell was reissued on October 29, 2002. In a "cold case" investigation in April 2004, Interpol Washington sent Pannell's fingerprints to the RCMP. They matched Mr. Pannell's prints to those taken in relation to his customs violation. Pannell was arrested on July 27, 2004 and the United States sought his extradition.

### **Procedural History**

[12] On August 25, 2004, Mr. Pannell applied for bail pending his extradition hearing. Justice Nordheimer denied his application and ordered Mr. Pannell detained. Central to Nordheimer J.'s determination was his conclusion that Mr. Pannell posed a flight risk. He found that, despite the several sureties put forward by Mr. Pannell, he had failed to provide an effective plan of supervision.

[13] Mr. Pannell did not appeal this decision. Instead, he applied for a review of the August 25, 2004 detention order in early November 2004. At that review, counsel for Mr. Pannell submitted a modified plan of supervision. The first change was that the duties of four of the sureties had been enhanced. Specifically, Mr. Pannell's mother-in-law was prepared to move from her home in Laval, Quebec to live with Mr. Pannell and her daughter in their home in Mississauga. This would enable her to maintain a constant supervision of Mr. Pannell. Also, the other three sureties said that they would coordinate with each other to ensure that Mr. Pannell was directly supervised within his residence at all times. The second change was that Mr. Pannell had made private arrangements for the electronic monitoring of his movements. These two changes, he argued, constituted a material change in circumstances that warranted his interim release from custody.

[14] On November 8, 2004, Nordheimer J. dismissed the application. On the first proposed change, he found that he had no basis upon which to conclude that Mr. Pannell would be amenable to the supervision of his mother-in-law. Although they had a close

relationship, he observed that the relationship was based on a fundamental deception as to his true identity. Further, Nordheimer J. noted that Mr. Pannell had not given any evidence on the application; he had not said that he would be respectful and obedient of his mother-in-law's directions. The application judge therefore continued to have serious doubts that Mr. Pannell would subjugate his own interests to those of his in-laws. On the second change, the application judge considered the electronic monitoring system to be of limited value. He did so for two key reasons. First, the system in no way restricted a subject's movements. Second, if a subject moved outside of the designated area, the monitoring system did not assist in locating the person. Thus, if there existed concerns of Mr. Pannell's risk of flight, the monitoring system did not alleviate those concerns.

[15] Nordheimer J. again weighed the plan of supervision against the risk that Mr. Pannell might leave the jurisdiction. He repeated that it was not difficult to envision a scenario where Mr. Pannell and his wife would decide to flee to another jurisdiction rather than allow Mr. Pannell to be extradited to the United States. Also, Mr. Pannell had twice failed to appear before the courts in the United States. Finally, the application judge noted that Mr. Pannell's ability to live in Canada illegally for about thirty years without detection demonstrated that he had the capability and resourcefulness to make a further escape if he wished to do so. He accepted that Mr. Pannell was a law-abiding citizen for the last thirty years. However, that was discounted somewhat by the reality that a person living in a country illegally has a strong incentive to keep his activities far from the attention of the authorities. Nordheimer J. concluded that these factors created a risk of flight that was not overcome by the modified plan of supervision.

[16] Mr. Pannell appealed this decision to the Ontario Court of Appeal, requesting an order vacating the detention order made on November 8, 2004. On January 6, 2005, MacPherson J.A. dismissed the appeal from Nordheimer J.'s order. He found there to be no error in principle in the application judge's reasons.

[17] The extradition hearing proceeded on November 25, 2005 before Justice Watt. He determined that the United States had presented sufficient evidence to warrant committal, and ordered Mr. Pannell committed into custody to await surrender to the United States.

[18] Mr. Pannell has appealed Watt J.'s decision to this court. Counsel for Mr. Pannell has advised the court that the Minister of Justice's decision to surrender will be rendered on or before August 22, 2006.

### **The present application**

[19] On this application, Mr. Pannell has filed all of the evidence that was before Nordheimer J. and proposes all of the same sureties and conditions that were proposed before Nordheimer J. Mr. Pannell is now fifty-seven years old. The record and proposal before me has, however, been supplemented in several ways. First, an additional surety,

Claudio Cester has been added. Mr. Cester has indicated that he is willing to sign a surety in the amount of \$75,000 and that he will work in concert with the other sureties to ensure the supervision of Mr. Pannell. Second, Mr. Pannell has filed an affidavit in which he says that his failure to appear in court, as required by the terms of his bail in the United States, was a result of his fearing for his life. Mr. Pannell has also addressed one of Nordheimer J.'s concerns by confirming in his affidavit that his relationship with his in-laws is extremely close and loving and that he would do nothing to betray their love and trust. In addition, Mr. Pannell has explained that he understands the trust that has been put in him by his in-laws and the sureties and that he would do nothing to compromise the substantial surety proposed by them.

### **PRELIMINARY MATTER**

[20] On the second day of the hearing of the application, the Crown sought to file a recent newspaper article that contained quotes from Mr. Knox. The filing was opposed by the applicant.

[21] In my view, this article is of marginal relevance to the issues I am called upon to deal with and comes too late in the proceeding to be responded to. As a result, I am not allowing it to be filed and will not consider it in reaching my decision.

### **THE LAW**

[22] The present application is made pursuant to s. 20 of the *Extradition Act*, S.C. 1999, c. 18, which reads as follows:

**20.** Section 679 of the *Criminal Code* applies, with any modifications that the circumstances require, to the judicial interim release of a person pending

(a) a determination of an appeal from an order of committal made under section 29;

(b) the Minister's decision under section 40 respecting the surrender of the person; or

(c) a determination of a judicial review of the Minister's decision under section 40 to order the surrender of the person.

**20.** Pour décider de la mise en liberté provisoire d'une personne, l'article 679 du *Code criminel* s'applique, avec les adaptations nécessaires, jusqu'à, selon le cas:

a) décision définitive sur l'appel de son incarcération au titre de l'article 29;

b) décision du ministre de prendre ou non un arrêté d'extradition la concernant au titre de l'article 40;

c) décision définitive sur la révision judiciaire de cet arrêté.

[23] Section 20 directs the court to apply the provisions of s. 679 of the *Criminal Code* with any modifications that circumstances require. Section 679(3) is the applicable subsection. It provides as follows:

**679(3)** In the case of an appeal referred to in paragraph (1)(a) or (c), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that

- (a) the appeal or application for leave to appeal is not frivolous;
- (b) he will surrender himself into custody in accordance with the terms of the order; and
- (c) his detention is not necessary in the public interest.

**679(3)** Dans le cas d'un appel mentionné à l'alinéa (1)a) ou c), le juge de la cour d'appel peut ordonner que l'appellant soit mis en liberté en attendant la décision de son appel, si l'appellant établit à la fois:

- a) que l'appel ou la demande d'autorisation d'appel n'est pas futile;
- b) qu'il se livrera en conformité avec les termes de l'ordonnance;
- c) que sa détention n'est pas nécessaire dans l'intérêt public.

[24] The application is for conditional release under both s. 20(a), pending the resolution of the appeal of Watt J.'s decision and, s. 20(b), pending the Minister of Justice's decision on surrender.

[25] The applicant argues that, pursuant to the interpretation of s. 20 made by this court in *Canada (Attorney General) v. Ragoonan* (2003), 173 C.C.C. (3d) 249, I can grant conditional release of Mr. Pannell under either subsection a) or b) and would simply adjourn the application brought under the other. The Crown disagrees with the interpretation of this section made in *Ragoonan* but submits that I need not deal with this issue if I dismiss the application in its entirety. In light of the conclusion I have reached, I need not deal with this issue.

## **POSITION OF THE PARTIES**

[26] The applicant maintains that a comprehensive plan of supervision has been put forward and the application should, therefore, be granted. Neither the appeal of Watt J.'s order nor the submission to the Minister as to why Mr. Pannell should not be surrendered is frivolous.

[27] As to the flight risk, the applicant submits that the proposal being made is superior to the one considered by Nordheimer J. and addresses the concerns that led Nordheimer J. to refuse conditional release in 2004. Specifically, the surety being posted has been improved by raising the amount from \$150,000 to \$225,000. There is now a fourth

person who will assist Mr. Pannell's mother-in-law in ensuring that Mr. Pannell abides by the terms and conditions of release, including the condition that he remain within his residence at all times except for court and medical appointments. More significantly, however, is the fact that Mr. Pannell has now filed an affidavit in which he confirms that he has an extremely close and loving relationship with his mother-in-law and father-in-law, that he would do nothing to betray their love and trust, and that he would do nothing to compromise the surety that has been posted by them and by his four friends. This directly addresses one of the concerns expressed by Nordheimer J. where in his November 8, 2004 decision he stated:

I would note that the applicant himself has not given any evidence on this application. He has not said that he would be respectful of and be obedient to, the directions of his mother-in-law. As a consequence, I have serious doubts as to how willing the applicant would be to subjugate his own interests to those of his in-laws in these circumstances.

[28] The affidavit of Mr. Pannell also explains that he breached his bail terms in the United States because he feared for his life. He describes the circumstances of African Americans in Chicago during the early 1970s and relates the threats made to him as well as the injury he suffered when shot while on bail. Counsel for the applicant submits that the circumstances that caused Mr. Pannell to breach the conditions of his release in the 1970s are no longer present. This explanation together with all the other material filed should now provide a sufficient foundation to conclude that Mr. Pannell will respect the conditions of release imposed by a Canadian court.

[29] The applicant submits that it is not in the public interest for his detention to continue. He remains presumed innocent of the charges in the United States and, in the applicant's view, there are significant problems with the American government's case on the outstanding charges. Further, I should take into account the fact that Mr. Pannell has spent nearly two years in custody here in Canada pending the final decision on his surrender.

[30] The Crown acknowledges that this is a new application and that I need not accept Nordheimer J.'s findings. The Crown also recognizes that the proposal being made here is superior to the one proposed in 2004. However, the Crown submits that there have been changes in circumstances that have strengthened the case for continued detention. Central to this submission is the fact that Watt J. has now ordered committal, and Mr. Pannell is now much closer to being returned to the United States than he was in 2004.

[31] Nothing in the materials suggests that Mr. Pannell's view of the American justice system and his perceived chances of receiving a fair trial have changed. Although Mr.

Pannell has the right to appeal court rulings and resist surrender, the Crown considers the appeal and submission to the Minister to be without merit and submits that Mr. Pannell is simply taking full advantage of the delays available to him in the system. This, the Crown says, suggests that Mr. Pannell has no intention of returning to the United States to face charges. The closer he gets to the final decision, the more likely he is to breach his bail terms in the same way that he has done twice before.

## **ANALYSIS**

[32] At the outset I have to determine whether Mr. Pannell's applications under ss. 20a) and 20b) should be considered separately or together. On the facts before me, the central issue is whether the applicant has met the 679(3)(b) requirement and established that he would surrender himself into custody in accordance with the terms of any release order. The flight risk is essentially the same whether the surrender issue is considered in the judicial interim release pending appeal application context, the judicial interim release pending the Minister's decision context, or in the context of both applications being considered together. The merits and public interest considerations of both applications are quite similar and, as I will explain, insufficient to overcome the concerns respecting flight.

[33] Before turning to the issue of whether the applicant has established that he would surrender himself into custody in accordance with the terms of the proposed order, I will briefly deal with the s. 679(3)(a) issue. The issue is whether the appeal and submissions to the Minister opposing surrender are "frivolous".

### **Consideration of s. 679(3)(a)**

[34] The applicant acknowledges that the success of his appeal from Watt J.'s decision rests almost exclusively on his expected outcome of the Supreme Court of Canada's decisions in two cases now under reserve, *United States of America v. Ferras*, [2004] S.C.C.A. No. 244 and *United States of America v. Latty*, [2004] S.C.C.A. No. 160. He relies on the court declaring portions of the *Extradition Act* unconstitutional or, at a minimum, imposing changes in the way that the *Extradition Act* is interpreted and applied.

[35] Since Watt J. applied the law as it currently exists without the benefit of the *Ferras* and *Latty* decisions, the applicant submits that Watt J.'s decision may well have to be set aside by the Court of Appeal following the Supreme Court of Canada's release of these decisions.

[36] The Crown points out that in *Germany v. Schreiber* (2006), 68 W.C.B. (2d) 686, this court refused an appellant's request to keep a judgment under reserve pending the release of the Supreme Court of Canada's decisions in *Latty* and *Ferras* because they

might bring about changes to the law. That is not this case. I was not directed to any case that stands for the proposition that the applicant's argument cannot be considered under s. 679(3)(a).

[37] As to the submissions made to the Minister, the applicant listed several reasons in support of his position that surrender should be refused. In oral submissions the applicant focused on two points: that the surrender would be unjust and oppressive under all of the circumstances and that the applicant's position in the American proceedings may be prejudiced because of his race. The essence of the applicant's submission to the Minister is that, he, as an African American, will not receive a fair trial in Illinois.

[38] I am not prepared to find that the appeal or the submissions to the Minister respecting surrender are frivolous. Given that both have yet to be heard and dealt with on their merits, I will refrain from speculating on the ultimate decision. It is, however, fair to say that absent a change in the jurisprudence as a result of the two decision under reserve at the Supreme Court of Canada level, and absent the use by the Minister by an infrequently exercised discretion, the applicant is likely to be returned to Illinois to face trial.

#### **Consideration of s. 679(3)(b)**

[39] On the basis of the record before me, the applicant submits that he has met the requirements of s. 679(3)(b), in that he has established that he will surrender himself into custody in accordance with the terms of the order. Specifically, the applicant submits that:

- 1) with the exception of the one customs incident, Mr. Pannell has resided in Canada for over thirty years without committing any offence;
- 2) there is a plan of supervision in place that ensures twenty-four hour supervision by Mr. Pannell's seventy-seven year old mother-in-law assisted by four other sureties;
- 3) Mr. Pannell has sworn that he will do nothing to betray the love and trust he has for his in-laws nor will he do anything to compromise the very substantial surety that has been proposed; and
- 4) Mr. Pannell has provided a reasonable explanation of why he breached the terms of his bail in the past and has given assurances that he will not, if his application is granted, breach the terms again.

[40] In my view, the risk that Mr. Pannell will not surrender himself into custody in accordance with any court order is a continuing serious concern. The fundamental underlying facts that concerned Nordheimer J. in his two decisions remain. They include the following:

- 1) Mr. Pannell has twice breached his bail in the United States by failing to appear in court as required. After his first breach, he was found and arrested. After the second, he fled to Canada;
- 2) Mr. Pannell has lived in Canada under a false name for some thirty years and has maintained that deception in respect of the government, his friends, his co-workers and most of his family;
- 3) Mr. Pannell faces very serious charges in Chicago and, although I do not propose to carry out a detailed analysis of the strength of the case in the American proceedings, I can say that the victim's identification of Mr. Pannell and the evidence of an independent witness outlined in the record of the case and supplemental record of the case suggest that there is a real possibility of conviction; and
- 4) Mr. Pannell and his spouse have demonstrated considerable resourcefulness during their stay in Canada in maintaining, for all of these years a life under false pretenses. They have deceived authorities both here in Canada and in the United States during their several visits there.

[41] In addition to those factors, I note that a final decision on the applicant's return to the United States is far closer than it was at the time of his application for interim release in 2004. Watt J. has ordered committal. The success of the outstanding appeal of this decision is largely dependent on two Supreme Court of Canada decisions that have been under reserve for over six months. The Minister's decision on surrender is expected within about three months.

[42] As to the merits of Mr. Pannell's plan of supervision, I see some value in the electronic monitoring component of Mr. Pannell's proposal. I agree, however, with Nordheimer J.'s view that electronic monitoring does not ensure the attendance of an accused person in court, it "merely informs of the breach in much the same way that a capable surety would."

[43] Regarding Mr. Pannell's explanation of his previous breaches of bail and flight to Canada, I note that, based on his affidavit and what has been set out in his submissions to the Minister, it is apparent that he does not want to return to Chicago and does not believe that he will receive a fair trial there. Mr. Pannell's explanation that he did not appear in court as required and fled the United States out of fear for his life does little to alleviate the concern that his distrust of the American system will lead him to flee in the same manner. It also provides no explanation as to why, if this fear for his life has now receded, he has not returned to face the charges in Illinois. Given the seriousness of the charges, I can only conclude that his flight risk remains a concern and becomes more so as his surrender order approaches. I say this recognizing that Mr. Pannell's concerns respecting the likelihood of a fair trial in the United States and the failure to respect his

commitments to the United States justice system to appear in court do not necessarily mean that Mr. Pannell does not respect the Canadian justice system and would breach a commitment to appear given to a Canadian court.

[44] With respect to Mr. Pannell's family ties, Mr. Pannell's children are all adults. His mother-in-law is no doubt committed to assisting Mr. Pannell. I do not doubt her sincerity, but I note that the relationship they developed was based on a fundamental deception as to his true identity. Other than his wife, who has been a party to the deception, there is little tying him to Canada. Rather than face a trial he believes will be unfair and a potentially significant period of incarceration in the United States, it is, as Nordheimer J. stated, not "difficult to see a scenario where Mr. Pannell and his wife might decide that life in another jurisdiction might be better than the prospect of Mr. Pannell being extradited to the United States." History demonstrates that the applicant has the ability and resourcefulness to make good a further escape is if he is of a mind to do so.

[45] For all of the foregoing reasons, I find that Mr. Pannell's risk of flight is significant. On this record and taking into account the proposed plan of supervision, the applicant has not established that Mr. Pannell will, if he is released, surrender himself into custody in accordance with the terms of any order. This conclusion applies whether I carry out the s. 679(3)(b) analysis separately for each of the application pending appeal and the application pending the decision on surrender or both applications together.

[46] Factoring in the s. 679(3)(c) public interest considerations does not alter this conclusion. Although, the presumption of innocence and lengthy period of incarceration pending the surrender decision weigh in favour of release, these are counterbalanced by the seriousness of the underlying charges and Canada's responsibility to our treaty partners; they do not overcome the flight concerns.

[47] In conclusion, I dismiss the application without prejudice to Mr. Pannell bringing a new application once the Supreme Court of Canada releases its decisions in *Ferras* and *Latty* and without prejudice to Mr. Pannell seeking relief under s. 20(c) of the *Extradition Act* once the Minister issues his decision on surrender.

"Paul S. Rouleau J.A."

**RELEASED: May 24, 2006**