

11 APR 1994 DB/51/94

FROM: SIMON ROGERS
PS/SECRETARY OF STATE (L)
6 APRIL 1994

cc: PS/Secretary of State (L&B) - B
PS/Sir John Wheeler (L&B) - B
PS/PUS (L&B) - B
Mr Thomas - B
Mr Legge 133/4 - B
Mr Steele - B
Mr Watkins - B
Mr Shannon - B
Mr Wood (L&B) - B
Mr Leach - B
Mr Marsh - B
Mr Rickard - B
Mr Daniell - B
Mr Powell, Washington - T
Mr Conn, CSO - T
D.I Hamlin, RUC - T
Mr White, DPPNI - T
Mr Ridout, LSLO - T
Mr Bentley, HOLAB - T
Mr Zanides, San Francisco - T
Ms Criscitelli, Washington - T
Mr Archer, RID - B
Mr Harrison, MOD - T

- B

TERENCE KIRBY: MAZE ESCAPER - EXTRADITION OFFENCES

The Secretary of State was grateful for your submission of 28 March 1994 which he felt had been very carefully prepared.

2. The Secretary of State is content for Terence Kirby to be extradited on the offences recommended; that is the seven active ones, and not on the 5 charges arising from the escape

SIGNED

SIMON ROGERS
PS/Secretary of State (L)
OAB Ext 6461
6 April 1994

SOFS/DEH/21845

FROM : [REDACTED]
SECURITY AND EXTRADITION UNIT
SIL DIVISION
28 MARCH 1994

28 MAR 1994 DB/432/94

AMENDED VERSION
(CHANGE TO
PAGE 7)

1. *hm* *12/3/94*
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cc	PS/Sir John Wheeler (L&B)	- B
	PS/PUS (L&B)	- B
	Mr Thomas	-B
	Mr Legge	- B
	Mr Steele	- B
	Mr Watkins	- B
	Mr Shannon	- B
	Mr Wood (L&B)	- B
	Mr Leach	- B
	Mr Marsh	- B
	Mr Rickard	- B
	Mr Daniell	- B
	Mr Powell, Washington	- F
	Mr Conn, CSO	- F
	D.I Hamlin, RUC	- F
	Mr White, DPPNI	- F
	Mr Ridout, LSLO	- F
	Mr Bentley, HOLAB	- F
	Mr Zanides, San Francisco	- F
	Ms Criscitelli, Washington	- F
	Mr Archer, RID	- B
	Mr Harrison, MOD	- F
	(without enclosure)	

1291/3

PS/SECRETARY OF STATE (L&B)

TERENCE KIRBY : MAZE ESCAPER : EXTRADITION OFFENCES

This submission recommends the offences upon which Mr Kirby's extradition is to be sought. These will form the basis of the full extradition request, which needs to reach the US authorities by 23 April. In view of the length of time needed to prepare the request and accompanying documents, it is requested - with apologies - that a response is given to the recommendations contained in this submission before the Secretary of State departs for Easter. I, of course, stand ready (with others) to discuss the submission, or provide further information, should the Secretary of State so request.

- 1 -

BM/SIL/23280

Background

2. Terence Damian Kirby was arrested by the FBI at his home in Concord, near San Francisco, on 23 February this year. A provisional warrant for his extradition, prepared in Summer 1992, was served upon him. His case has been allotted to Judge Jensen, a District Court Judge in San Francisco. Judge Jensen will deal with the extradition proceedings. Unlike Smyth, Artt and Brennan, it is not expected that Mr Kirby will face any criminal charges such as passport violations, although Mr Kirby was known as 'Paul Kerr' at the time of his arrest.

3. The circumstances of the offences for which Mr Kirby was sentenced to imprisonment in HMP The Maze in 1978 are set out in detail in the Annex to this submission (not to all). This is a lengthy document which sets out the relevant domestic and international law and the legal issues which now present themselves. It was prepared by [REDACTED] of the Crown Solicitor's Office. Briefly, Mr Kirby was convicted of eight separate offences arising out of two separate incidents which were tried separately.

The first set of offences

4. The first trial concentrated on the events of 25 August 1976. At about 9.15am the RUC gave chase to a car and a van which had been hijacked earlier that morning by five or six men in Belfast. After pursuit, both vehicles were stopped. Inside the car, gloves and masks were discovered. The van was found to contain a bomb. Officers found two large packages in the rear and there was a strong smell of marzipan (indicative of high explosive). The ATO was called in and at 11.08am an explosion occurred which disintegrated the van and caused serious damage to neighbouring property. Fortunately, no one was injured. In the

meantime, the occupants of the vehicles had fled. At 10.15am, a [REDACTED] was outside her house (in Cranmore Park, Belfast) when she was confronted by a group of five or six men. One, armed with a revolver, demanded her car. Despite the fact that she was handicapped, [REDACTED] car was taken and one man drove off in it. The remainder of the group went to a house at the end of Mrs [REDACTED] back garden. This was [REDACTED] Osborne Gardens. Three men burst into the house and took the elderly gardener upstairs and held him captive in a room there. An elderly lady was also in the house : there is no doubt that both were threatened. The house was then surrounded by the RUC. Instructions to surrender produced threats that the gardener - Mr Skates - would be shot and that fire would be directed at the police. A priest intervened; after considerable discussion, he came down at 2.31pm (4 hours after the confrontation with [REDACTED]) with a .38 revolver and a Thompson sub-machine gun. Both weapons were loaded and the revolver was in the firing position. The priest was followed by Mr Skates and his three captors, who included Mr Kirby - a member of the Provisional IRA.

The Second Set of Offences

5. These occurred on 19 August, six days before the first offences, but were tried subsequently. This was a mission undertaken by four PIRA members against Creighton's garage in Co Antrim. In Mr Kirby's own words - his police statement:

"I took a bomb and the other fellow took one and we ran into the garage. There was a whole lot of people outside at the front and the other two guys covered them with the guns. When I got inside I went round the back of the counter with my bomb and the other guy was just in at the door. There were three people in the shop and two of them were already lying down because they must have seen us coming. The other guy had already his bomb down and he told the old man to go back, that he had nothing to worry about and that there was plenty of time....."

"The old guy" was William Creighton, the 70 year old garage proprietor. He was subsequently shot in the leg by Mr Kirby's accomplice in the garage. Mr Creighton died from the trauma associated with a ruptured or severed artery in his leg. Mr Creighton's son, Niall, deposed to the fact that the day's takings had been taken from the garage till, a sum estimated at £150. Kirby then fled, leaving his primed bomb at the garage, which exploded causing damage to the premises.

The Sentences

6. In respect of the first set of offences, Mr Kirby was convicted of possession of explosives with intent, possession of firearms with intent, unlawful imprisonment with assault on Mr Skates and membership of the IRA. For these offences he received sentences of 18, 18, 8 and 5 years imprisonment respectively. All ran concurrently except for the 8 years imprisonment for unlawful imprisonment with assault, which was to run consecutively. This amounted to a total of 26 years imprisonment.

7. In respect of the second offences, Kirby was convicted of murder, robbery, possession of firearms with intent and causing an explosion. As well as life imprisonment for the murder, Mr Kirby received three sentences of 16 years imprisonment for each of the other offences, all to run currently with each other and the first set of offences.

8. At the time of Mr Kirby's escape in September 1983, only the offence of IRA membership was spent. The other seven remain active.

The Relevant Law

9. This is set out at pages 4 to 7 of the Annex to this submission. In each case it is necessary to determine whether the offence is extraditable under the Principal UK-US Extradition

Treaty of 1972 and, if so, whether it is exempted from the political offence exception under the Supplementary Treaty of 1986. Awkward questions would be liable to arise in the event of an offence which is extraditable but nevertheless capable of benefiting under the political offences exception. This exception poses a bar to extradition in respect of an offence which is "regarded by the requested party [the USA] as one of a political character" under Article V (1) (c) of the Principal Treaty.

10. In order to be extraditable under the Principal Treaty, an offence must be

- (a) punishable by more than one year's imprisonment in the UK and USA;
- (b) extraditable under UK law; and
- (c) a felony under US law.

(Article III (1) of the Principal Treaty).

11. Under the Principal Treaty, none of the following offences (inter alia) is regarded as being of a political character:

- (a) ...
- (b) murder, voluntary manslaughter and assault causing grievous bodily harm;
- (c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;
- (d) an offence involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person; and

- (e) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit any such offence.

(Article 1 of the Supplementary Treaty).

Extraditability of the Individual Offences

12. The first offence to consider is possession of explosives with intent to endanger life or cause serious injury to property on 25 August. This offence is extraditable under the Principal Treaty. There was some doubt as to whether it fell within Article 1 (d) of the Supplementary Treaty (paragraph 11 above) since it could arguably not be proved that Mr Kirby intended the bomb in the van to endanger life - as opposed to damage property. We have taken the advice of our American lawyers, who would argue that the bomb in the van was dangerous and did endanger life when the controlled explosion was carried out. This would be sufficient to put the offence within Article 1(d), and thus not a 'political offence'. We therefore recommend extradition for this offence.

13. The next offence is the firearms conviction arising from the events of 25 August. The difficulty in this case is with the Principal Treaty. It is established that the offence is both extraditable under UK law and a felony under US law, as it has to be under sub-paragraphs (b) and (c) of Article III (1) of that Treaty (see paragraph 10 above). We have sought the advice of our American lawyers on whether it is an offence punishable in the US with more than one year's imprisonment. There has been some doubt about the extraditability of firearms charges in the past, given the different approach towards firearms in the US : the right to bear arms in the US Constitution, for example. However, it seems very clear - on both sides of the Atlantic - that the Treaty

concentrates on the actual conduct which caused the offence. There is authority for this proposition - a House of Lords case called McCaffrey [1984] 2 All E R 570. The Americans have no doubt that on this reading and on the facts the "dual criminality" test under Article III (1) (a) of the Principal Treaty is satisfied. The offence is not a political one, by virtue of Article 1 (d) of the Supplementary Treaty, and we recommend extradition.

14. I turn to the unlawful imprisonment charge. This is both extraditable under the Principal Treaty and is not a political offence by virtue of Article 1(c) of the Supplementary Treaty (see paragraph 11 above). Mr Kirby's involvement in this very serious offence was quite evident, not contested at trial and not subsequently appealed (only the murder conviction was appealed). This seems to us to be possibly the clearest-cut case for extradition. We so recommend.

15. The fourth and final charge against Mr Kirby arising out of 25 August was IRA membership. For this he received five years imprisonment, which he had served by the time he escaped. Extradition is obviously not available.

16. Among the second set of offences, arising out of the events of 19 August, the first for consideration is murder. While Mr Kirby did not shoot Mr Creighton and was not carrying a gun, he was party to the whole operation. In Mr Kirby's full and frank statement to the police about this incident, he stressed that he had been told there was to be no shooting. However, he told one officer that Mr Creighton had been shot because he had tackled his companion and when asked what his reaction would have been if he (Kirby) had been tackled he said he (Kirby) would have shot him (Creighton) if he had had a gun. He also volunteered this view to another officer. In the judge's view (McGonigal L J) this was sufficient to convict Mr Kirby of murder. His subsequent appeal against conviction was

dismissed. In our view the evidence is strong enough to justify extradition for the murder offence and it is plainly not political - see Article 1 (b) of the Supplementary Treaty (see paragraph 11 above).

17. The next offence was robbery, contrary to common law, on 19 August 1976, for which Mr Kirby received 16 years imprisonment. The offence appears to have been mischarged : the correct charge would have been robbery contrary to section 8 of the Theft Act (Northern Ireland) 1969. The ingredients for the offence would not however have been any different had it been properly charged. We put this to the Americans who did not feel it would give the defence any substantial ground for resisting extradition. This was certainly our view. It was also mentioned that the evidence as to the amount taken was rather thin and, indeed, that the offence was rather paltry compared to murder and causing an explosion. On balance, the view is that the offence warrants extradition. Mr Kirby was, after all, duly convicted after not contesting the case and did not lodge an appeal in respect of it. It is not a political offence, in our view, because it falls within Article 1 (d) of the Supplementary Treaty. The use of firearms was part and parcel of the conduct of this offence. We recommend extradition.

18. I turn to the firearms offence on 19 August. The judge convicted Mr Kirby of this offence on largely the same facts as those on which he convicted him of murder, and sentenced him to 16 years imprisonment. The judge held "I am satisfied in the way I have to be Kirby went into the operation voluntarily knowing loaded firearms were being carried and accepting in certain circumstances these firearms would have to be used and would be used if necessary. The use of the firearms and resultant death of Mr Creighton was, therefore, something within the contemplation of those involved in the robbery". (Mr Kirby was not himself armed, but was convicted on the basis that he was a participant in a joint enterprise). The legal issues which arise here are the

same as those that pertain to the offence on 25 August. We are advised that Mr Kirby's conduct would be punishable in the US with more than a year's imprisonment. Article III of the Principal Treaty is therefore satisfied and the offence is not political, by virtue of Article 1 (d) of the Supplementary Treaty. We therefore recommend extradition.

19. The final offence arising out of the events on 19 August is that of causing an explosion, for which Mr Kirby received a sentence of 16 years imprisonment. There is no doubt that Mr Kirby had a bomb. He admitted this in his statement. He used the bomb in that he primed it and caused damage to the garage where it was placed. There is little doubt that the bomb endangered people. Mr Creighton - who died of his wound on the way to hospital - was at risk, as were those in the garage and in close proximity outside. The offence, which is extraditable, is therefore not 'political' by virtue of Article 1 (d) of the Supplementary Treaty. We therefore recommend extradition.

Escape

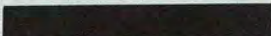
20. The DPP (Northern Ireland) has directed a number of charges arising out of the mass escape from HMP The Maze on 25 September 1983. These consist of five offences of assault and unlawful imprisonment within the Maze. We understand from the Director's office that there is no evidence of Kirby having been identified committing any act of violence. To seek his extradition for the escape offences based simply on the 'joint enterprise' doctrine will, we consider, cause many more difficulties in an already complex case. We therefore recommend against extradition for these five charges.

Conclusion

21. The Secretary of State is invited to authorise the

preparation of a full extradition request for the return of Terence Damian Kirby in respect of the two firearms offences, the two explosive offences, the murder, the wrongful imprisonment and the robbery offences detailed in this submission. As indicated above, I apologise for having to ask for a response this week.

(signed)


SECURITY AND EXTRADITION UNIT
28 MARCH 1994