IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA66/2024
[2025] NZCA 436

BETWEEN	MILES JOHN MCKELVY Appellant
AND	UNITED STATES OF AMERICA Respondent

CA67/2024

BETWEEN	MILES JOHN MCKELVY Appellant
AND	UNITED STATES OF AMERICA First Respondent
	DISTRICT COURT AT AUCKLAND Second Respondent

Hearing:	12 May 2025
Court:	Woolford, Jagose and Powell JJ
Counsel:	R M Mansfield KC for Appellant B J Thompson for Respondent in CA66/2024 and First Respondent in CA67/2024 No appearance for Second Respondent in CA67/2024
Judgment:	1 September 2025 at 11 am

JUDGMENT OF THE COURT

A **The application for leave to bring a second appeal against the extradition eligibility decision is declined.**

B **The appeal against dismissal of the judicial review application is dismissed.**

REASONS OF THE COURT

(Given by Woolford J)

[1] Miles John McKelvy has been indicted in the United States of America on a charge of conspiring with others to knowingly and intentionally:

(a) import cocaine into the United States from Peru;

(b) export cocaine from the United States to Romania and New Zealand; and

(c) manufacture and distribute cocaine intending, knowing and with reason to believe that it would be unlawfully imported into the United States.

[2] Mr McKelvy was arrested by New Zealand Police on 19 November 2020 on a provisional warrant issued under the Extradition Act 1999 (the Act). Following Mr McKelvy's arrest, the United States requested his surrender under the Treaty on Extradition between New Zealand and the United States of America (the Treaty) and the Act.[1]

[3] On 31 May 2023, following an adjourned hearing in the District Court at Auckland, Judge Winter determined that Mr McKelvy was eligible for surrender.[2]

[4] Mr McKelvy appealed to the High Court. Shortly after he filed an application for judicial review of Judge Winter's decision.

[5] After a hearing on 1 December 2023, Gordon J issued a judgment on 15 December 2023 in which she confirmed Judge Winter's decision that Mr McKelvy was eligible for surrender to the United States.[3] Gordon J accordingly dismissed the appeal and declined the application for judicial review.

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1 Treaty on Extradition between New Zealand and the United States of America 791 UNTS 253 (signed 12 January 1970, entered into force 8 December 1970).

2 *United States of America v McKelvy* [2023] NZDC 10632 [District Court decision].

3 *McKelvy v United States of America* [2023] NZHC 3698 [High Court decision].

[6] Mr McKelvy now applies for leave to bring a second appeal against the extradition eligibility decision. He also brings a first appeal against the dismissal of his claim for judicial review.

Appeal jurisdiction

[7] In the District Court, Judge Winter found Mr McKelvy eligible for surrender under s 24 of the Act. Mr McKelvy appealed to the High Court under s 68 of the Act, which provides for appeals on questions of law only. Section 69(2) provides that subpt 6 of the Criminal Procedure Act 2011 (CPA) applies to such appeals. A second appeal may only be brought with the leave of the second appeal court, which in this case is this Court.[4] Leave must not be granted unless the Court is satisfied that:[5]

(a) the appeal involves a matter of general or public importance; or

(b) a miscarriage of justice may have occurred or may occur unless the appeal is heard.

The test is a high one.[6]

[8] Mr McKelvy's appeal against the dismissal of his claim for judicial review is brought as a first appeal. Section 20 of the Judicial Review Procedure Act 2016 provides that any party who is dissatisfied with any order made in respect of an application may appeal to the Court of Appeal in accordance with s 56 of the Senior Courts Act 2016.

Eligibility for surrender

[9] As found by this Court in *Ortmann v United States of America (Ortmann)*, eligibility for surrender under s 24 of the Act is determined by a four-step process:[7]

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4 Criminal Procedure Act 2011, ss 303(1) and 304(b).
5 Section 303(2).
6 *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764 at [36].
7 *Ortmann v United States of America* [2018] NZCA 233, [2018] 3 NZLR 475 [*Ortmann* CA] at [42].

(a) Step 1: the supporting documents submitted with the request for extradition must be produced, as well as any documents required under a relevant treaty.[8]

(b) Step 2: the Court must decide that the offence is an extradition offence, as defined in s 4 of the Act.[9] This introduces the concept of double criminality. The conduct must constitute an offence both in the country requesting extradition and under New Zealand law, had it occurred here, punishable by at least 12 months' imprisonment.[10]

(c) Step 3: the Court must decide that the evidence produced or given at the eligibility hearing would justify a trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand.[11]

(d) Step 4: the Court assesses whether any mandatory or discretionary restrictions on surrender apply.[12]

Issues

[10] As to the proposed appeal against the extradition eligibility decision, in determining the threshold question whether or not the appeal is one of general or public importance or whether a miscarriage of justice will occur if the appeal is not heard, the merits of the proposed appeal are to be considered.[13] Here the parties are agreed that the following grounds of appeal arise in relation to Mr McKelvy's extradition eligibility:

(a) whether the High Court erred in interpreting the meaning of "import" under the Misuse of Drugs Act 1975 as including any act of bringing controlled drugs within New Zealand's territorial limits, even if New Zealand was not the intended final destination; and

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8 Extradition Act 1999, s 24(2)(a) and (b).
9 Section 24(2)(c).
10 *Ortmann* CA, above n 7, at [30].
11 Extradition Act, s 24(2)(d)(i).
12 Section 24(3) and (4).
13 *McAllister v R*, above n 6, at [38]; and *Jackson v Police* [2017] NZCA 374 at [31].

(b) whether the High Court erred in finding there was a prima facie case against Mr McKelvy for having been involved in a conspiracy to import cocaine into the United States.

[11] As to the appeal against the dismissal of the claim for judicial review, the parties are agreed that the question is whether the High Court erred in dismissing the claim on the basis that there was a complete overlap between the judicial review and the appeal under s 68 of the Act.

Meaning of "import"

[12] Mr McKelvy contends that there is an arguable case that step 2 of the *Ortmann* four-step process has not been complied with because the offence with which he has been charged in the United States, a conspiracy to import cocaine into the United States, is not an offence according to New Zealand law, because the United States was not the final destination of the cocaine. He says that drugs in transit have not been imported. They would only have been imported if the United States was the intended final destination. In the present case, the evidence was that the cocaine was to be sent from Peru to Beaumont in Texas where it would be repackaged in agricultural machinery before being sent on to Romania and then New Zealand.

[13] In the High Court, Gordon J rejected Mr McKelvy's submissions as to the meaning of import. The Judge was of the opinion that the two authorities relied upon by Mr McKelvy, *R v Hancox* and *R v Atias (No 2)*, were of limited assistance as they dealt with the issue of when importation was complete.[14] Instead, the Judge relied upon the case of *R v Barreiro-Teixeira* and a Canadian decision, *R v Geesman*, which referenced the United Nations Single Convention on Narcotic Drugs.[15] The Judge concluded that any act of bringing drugs into New Zealand constituted an importation. An importation was not limited by a requirement that the drugs were intended for use in New Zealand.[16]

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14 High Court decision, above n 3, at [91]–[95] and [98]–[100], referring to *R v Hancox* [1989] 3 NZLR 60 (CA); and *R v Atias (No 2)* HC Auckland T025837, 26 September 2003.

15 *R v Barreiro-Teixeira* HC Auckland CRI-2005-092-4272, 11 May 2006; and *R v Geesman* (1970) 13 CRNS 240 (Que SP).

16 High Court decision, above n 3, at [118].

[14] We agree with the High Court that, for the purposes of the Misuse of Drugs Act, the definition of "import" includes drugs in transit. Mr McKelvy primarily relies on a decision of this Court, *Hancox*, in support of his argument that drugs are only imported into New Zealand if New Zealand is the "final destination" for those drugs.[17] In the High Court, the Judge discussed *Hancox* in some detail. The case concerned an appellant whose only role had been to retrieve a package from a post office box in Auckland.[18] The Judge rightfully distinguished the case on the basis that it concerned the question of when the importation process ended; it did not concern drugs in transit to another destination. *Hancox* simply demonstrates that importation can be a continuing act, which only ends once the drugs have been made available to the intended consignee or addressee. Any act of bringing drugs into New Zealand's territorial limits still constitutes an act of importation.[19]

[15] A second case relied upon by Mr McKelvy, the High Court decision of *R v Atias (No 2)*, was also rightly distinguished by the Judge. Again, it was concerned with actions taken by defendants which took place after the drugs had cleared Customs and focussed on the question whether the process of importation had ended before their actions were undertaken.[20]

[16] The Judge instead relied on *Barreiro-Teixeira* and *Geesman*. In *Barreiro-Teixeira* the defendant had flown into Auckland carrying drugs. He was in transit to his ultimate destination of Japan and his luggage was not intended to clear Customs. The defendant sought a discharge on the basis that there was insufficient evidence that he intended to import the drugs into New Zealand.[21] His argument was rejected by Venning J, who succinctly held that the fact "the accused and the drugs were only in New Zealand in transit is sufficient".[22] Venning J cited four cases in support, including *Geesman*. Although dealing with a different jurisdiction, we agree with Gordon J that *Geesman* is of assistance in assessing the merits of Mr McKelvy's

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17 *R v Hancox*, above n 14, at 62–63.
18 At 61.
19 High Court decision, above n 3, at [118].
20 At [100].
21 *R v Barreiro-Teixeira*, above n 15, at [1]–[2].
22 At [10].

submissions as to the meaning of "import". In *Geesman* the conclusion reached by the Judge was:

> [46] I find that there is no ambiguity nor any [equivocation] in the words "import into Canada" set forth in s 5(1) of the [Narcotic Control Act 1970] concerned and, on applying to them their ordinary and grammatical sense, it is made abundantly clear that the intent of Parliament is to prohibit the illegal bringing in of narcotics to Canada from an external source, no matter under what circumstances the illicit introduction into the country takes place and regardless of the means employed in the transporting across the national frontiers of the forbidden substance.

[17] In *Geesman*, defence counsel had argued that the defendant had brought hashish into Canada for the sole reason of carrying it across the country and crossing the Canadian/United States border in order to sell the hashish in the United States. It was contended that the defendant was merely transporting the hashish in transit and had no intention of importing the drug into Canada.[23] The Court found Mr Geesman had indeed knowingly imported the drug into Canada.[24]

[18] In our view, the above case law correctly concluded that the word "import" in this context clearly includes drugs in transit. The question of the ultimate disposal of the drugs is immaterial.

[19] This interpretation also accords with the purpose of the legislation. The Misuse of Drugs Act takes a supply control approach to drug regulation, whereby the availability of drugs is restricted through measures such as border control and disruption of drug supply chains.[25] Accordingly, Parliament cannot have intended to leave a lacuna in the legislation which depends on an assessment of a drug dealer's intended target market.

Prima facie case?

[20] Mr McKelvy further contends that, as required by step 3 of the *Ortmann* four-step process, the evidence summarised in the record of the case (ROC) was insufficient to establish a prima facie case that he was a party to the conspiracy to

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23 *R v Geesman*, above n 15, at [4].
24 At [3] and [46]–[51].
25 See Law Commission *Controlling and Regulating Drugs: A Review of the Misuse of Drugs Act 1975* (NZLC R122, 2011) at iv and [4.7]–[4.8].

import cocaine into the United States. Counsel submits there was nothing capable of supporting an inference that Mr McKelvy knew the cocaine was to enter United States territory.

[21] Counsel for Mr McKelvy acknowledges that Mr McKelvy was part of a conspiracy to import cocaine into New Zealand, being its final destination, but said he was unaware of the route by which the cocaine would come to New Zealand.

[22] The ROC discloses the following evidence:

(a) The major witness will be an undercover special agent of the United States Drug Enforcement Administration (DEA). He speaks with a clear American accent and was located in Texas at all relevant times, other than when he travelled to Romania to meet the members of the conspiracy other than Mr McKelvy. The undercover agent posed as a large-scale drug trafficker.

(b) Between 31 May 2020 and 16 September 2020, the undercover agent established contact with four men, Mr Wen Hui Cui, Mr Murray Matthews, Mr Marc Patrick Johnson and Mr Marius Lazar. He agreed to supply them with a large quantity of cocaine. On 6 July 2020, a member of the scheme caused NZD 50,000 to be transferred to a United States bank account controlled by the DEA as a down payment for the cocaine. On 24 August 2020, members of the scheme made three additional transfers of money totalling USD 629,182. In addition, the undercover agent personally met Mr Matthews and Mr Johnson at a restaurant at Bucharest, Romania on 21 July 2020. At that meeting, Mr Matthews and Mr Johnson discussed the pending cocaine delivery including the fact that the cocaine would be shipped from Peru, to Beaumont, Texas in the United States and from there to Romania and finally New Zealand. The quantity of cocaine to be shipped was increased to 400 kg. While in Romania, the undercover agent was also contacted by Mr Lazar, an associate of Mr Matthews, living in Romania. Following the meeting in Romania,

negotiations continued regarding the specifics of the 400 kg cocaine shipment.

(c) On 16 September 2020, Mr Matthews contacted the undercover agent and stated he had details to provide about the freight forwarder whose role it would be to accept the cocaine once it arrived in New Zealand via container ship. In a subsequent conversation, Mr Matthews informed the undercover agent that the person who would be accepting the cocaine was Mr McKelvy.

(d) On 21 September 2020, the undercover agent contacted Mr Matthews and provided with him with a password to pass along to Mr McKelvy for the purpose of initiating communication between the undercover agent and Mr McKelvy. Mr McKelvy was instructed to contact the undercover agent directly via Wickr, an encrypted messaging application, and to provide the passcode in order to verify his identity.[26]

(e) On 22 September 2020, after Mr Matthews provided the Wickr username "docnzl" for Mr McKelvy, the undercover agent contacted Mr McKelvy via Wickr. When prompted, Mr McKelvy provided the correct password and confirmed the date in the password was his own birthdate. When asked what he understood about the enterprise in which he was involved, Mr McKelvy stated: "there is a container coming and I'm to arrange a freight forwarder to receive it and [an address] for it to be dropped to … then once it passes clearance I arrange with [Marc Johnson] and Angelo [Matthews] to [pick up]. And when finished I get paid".

(f) The undercover agent then asked Mr McKelvy if he was aware that the shipment that he was receiving constituted 400 kg of cocaine. Mr McKelvy replied: "Yes I'm very clear but this will work if we get the paperwork bang on." The two went on to discuss the purity of the

[26] The application "Wickr" can be installed on smartphones and is used to send and receive text messages, multimedia files and real-time audio calls.

cocaine, its origin and production in Peru and its sales potential in New Zealand.

(g) Emphasising the importance of getting the paperwork done correctly, Mr McKelvy requested certain information from the undercover agent, including the contact information for the freight forwarder who was to facilitate the shipment. During the conversation, the undercover agent addressed Mr McKelvy by the name "McKelvy" multiple times and was never corrected. When asked what he preferred to be called, Mr McKelvy provided his first name, Miles.

(h) On 23 September 2020, the undercover agent again contacted Mr McKelvy via Wickr and asked whether this was Mr McKelvy's "first time doing this", explaining that it was important for him to be confident that his "investment was in good hands". Mr McKelvy replied that he had "brought in lots from China for many years". Mr McKelvy then went on to explain the types of substances he had previously brought in from China, including methamphetamine and certain precursor chemicals which he explained were used to "make crystal".

(i) On 26 September 2020, Mr Matthews sent the undercover agent a photocopy of Mr McKelvy's drivers' licence, bearing a photograph, date of birth and other identifying details.

(j) On 7 October 2020, the undercover agent communicated with Mr Cui, Mr Matthews, Mr Johnson and Mr Lazar regarding the need for another in-person meeting in Romania. According to the narrative created by the undercover agent, the United States bank had frozen the funds from the 24 August transfer and it was necessary for the participants to meet in person to discuss and resolve the issue. The meeting was planned for mid-November.

(k) On 21 October 2020, the undercover agent requested that Mr McKelvy provide his phone number so that the two could hold a virtual "face-to-face" meeting via video chat. Mr McKelvy provided a New Zealand telephone number in response and the two agreed to speak the following day.

(l) On 22 October 2020, the undercover agent contacted Mr McKelvy via WhatsApp video chat at the phone number Mr McKelvy had provided. The person the undercover agent observed in the video chat was the same person pictured in the drivers' licence previously sent by Mr Matthews. The undercover agent and Mr McKelvy discussed the fact of the upcoming meeting between the undercover agent, Mr Matthews and Mr Johnson. Mr McKelvy expressed his regret that he was unable to attend, explaining he would not be able to travel out of New Zealand until June of the following year.

(m) On 17 November 2020, the undercover agent met with Mr Matthews and Mr Johnson in Bucharest, Romania according to the previously discussed plan. Although they still owed money to the undercover agent for the planned cocaine purchase, Mr Matthews and Mr Johnson had been unable to collect sufficient cash to cover the price and they requested instead to pay using Bitcoin digital currency. The undercover agent agreed and provided Bitcoin "wallet" information they should use to make a transfer. Mr Johnson explained that Mr McKelvy was on standby preparing to facilitate the Bitcoin transfer.

(n) On 18 November 2020, the undercover agent met again with Mr Matthews and Mr Johnson. After a brief discussion on the progress of the criminal scheme, officers of the Romanian National Police entered the location and arrested Mr Matthews and Mr Johnson pursuant to a provisional arrest request from the United States based on the charges in this case.

(o) Following the arrests of Mr Matthews and Mr Johnson, the undercover agent communicated with Mr Cui about their sudden disappearance which — from Mr Cui's perspective — was unexplained. The undercover agent expressed concern that he was still owed money for the cocaine. In response, Mr Cui said that Mr McKelvy would work on getting the money and that Mr McKelvy was in contact with their money-laundering intermediary based in Hong Kong. Mr Cui expressed a reluctance to approach any other persons for the money, explaining: "Our circle is small. Other than me, Rush [Mr Johnson], Angel [Mr Matthews, and] Doc [Mr McKelvy], no other people [know] about what [we are] doing".

[23] We are of the view that there is clearly an inference available that Mr McKelvy knew that the cocaine would be imported into the United States en route to New Zealand. In reaching this conclusion, we have had reference to the following evidence:

(a) Mr McKelvy had a number of audio calls, including a face-to-face call, with the DEA undercover agent.

(b) The undercover agent spoke with a clear American accent.

(c) Mr McKelvy discussed the origin and quantity of the cocaine and its sale potential in New Zealand with the undercover agent.

(d) Mr McKelvy confirmed with the undercover agent that his role was to receive a container coming to New Zealand and to arrange for a freight forwarder to pick it up and drop it at an address.

(e) Mr McKelvy told the undercover agent that the importation would work "if we get the paperwork bang on". Emphasising the importance of getting the paperwork done correctly, Mr McKelvy requested certain information from the undercover agent including contact information for the freight forwarder who was to facilitate the shipment.

(f) Mr McKelvy joined the conspiracy around the time of his first telephone call with the undercover agent on 22 September 2020. Two other members of the conspiracy, Mr Matthews and Mr Johnson, had earlier met with the undercover agent in Romania on 21 July 2020 in which meeting the shipment of cocaine was discussed, including the fact that the cocaine would be shipped from Peru to Beaumont, Texas in the United States and from there to Romania and finally New Zealand.

(g) Mr McKelvy was also involved in the financial arrangements. At a further meeting with the undercover agent in Romania on 17 November 2020, Mr Johnson told the undercover agent that Mr McKelvy was on standby to facilitate a Bitcoin transfer as part payment for the drugs.

(h) Later, after Mr Matthews and Mr Johnson had been arrested, Mr Cui told the undercover agent that Mr McKelvy would work on getting the outstanding money and was in contact with their money-laundering intermediary based in Hong Kong.

[24] It is inconceivable that Mr McKelvy did not know the cocaine would be concealed in some way in other goods in a container. Obviously the nature and origin of the goods would also have to be disclosed in the paperwork sufficient for Customs clearance. Mr McKelvy was obviously an experienced drug importer, telling the undercover agent that he had "brought in lots from China for many years", including methamphetamine and certain precursor chemicals.

[25] The conspiracy was a small one, with Mr Cui telling the undercover agent: "Our circle is small. Other than me, Rush [Mr Johnson], Angel [Mr Matthews, and] Doc [Mr McKelvy], no other people [know] about what [we are] doing". The fact that the cocaine was to be shipped first to Texas for repackaging and then shipped onwards from there was a central part of the overall conspiracy from a very early stage. As a core embedded member of that conspiracy with a particular role of ensuring the paperwork was "bang on" as well as arranging finance, it can be reasonably inferred

that Mr McKelvy must have been aware of the proposed route of the drugs via the United States given its central importance from an import documentation point of view. The fact that Mr McKelvy was confident he could get the shipment safely into New Zealand suggests some awareness of its journey. We acknowledge that other inferences may be available, but the test in *Ortmann* is whether the inference is "reasonably available", rather than deciding what is the most plausible inference.[27] The inference that Mr McKelvy knew the drugs would be shipped first to the United States is, in our view, reasonably available.

[26] We accordingly decline leave to bring a second appeal against the extradition eligibility decision. The proposed appeal does not involve a matter of general or public importance. Nor will a miscarriage of justice occur unless the appeal is heard.

Judicial review application

[27] As originally filed, the statement of claim contained three causes of action. The second and third causes of action related to the District Court decision to adjourn the extradition eligibility hearing part heard and give leave for the United States to file a supplementary ROC. These causes of action were not pursued, which left only the first cause of action.

[28] Gordon J dismissed the application for judicial review on the basis that the first cause of action was entirely duplicative of the appeal.[28] Mr McKelvy accepts that there is extensive overlap but submits that the Judge should still have addressed the grounds of review to determine whether they were truly duplicative rather than dismiss them as such. With respect, this is exactly what the Judge did.

[29] First, she cited the Supreme Court in *Ortmann*:[29]

> [587] We accept that if there were complete overlap between the grounds of appeal and grounds of judicial review then it would be appropriate for the court to dismiss the judicial review claim without undertaking a full review of the duplicative grounds. …

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27 *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 [*Ortmann* SC] at [521].
28 High Court decision, above n 3, at [178].
29 At [174], citing *Ortmann* SC, above n 27.

[30] The Judge then stated:[30]

> [175] The first cause of action is headed "The District Court erred". There are eight paragraphs. The first six paragraphs plead errors of law. Apart from some minor differences in wording which are not material, those six paragraphs mirror the first six grounds of appeal in the notice of appeal brought under s 68 of the Act.
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> [176] The seventh paragraph of the statement of claim mirrors ground seven in the notice of appeal. As already noted, at the commencement of the hearing Ms Stuart confirmed that appeal ground seven (and eight) were not advanced. There was no suggestion that appeal ground seven would be advanced through the statement of claim.
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> [177] The final paragraph in the first cause of action is paragraph eight, which is set out in [173] above. It duplicates the ninth ground of appeal in the notice of appeal.
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> [178] The first cause of action in the statement of claim is entirely duplicative of the appeal under s 68 of the Act and the second and third causes of action are not pursued. Accordingly, I will make an order dismissing the claim for judicial review.

[31] The Judge's approach cannot be faulted. It is entirely in accordance with the process outlined in *Ortmann*. Mr McKelvy has been unable to show any error on the Judge's part.

Result

[32] The application for leave to bring a second appeal against the extradition eligibility decision is declined.

[33] The appeal against dismissal of the judicial review application is dismissed.

Solicitors:
Lateral Lawyers, Auckland for Appellant
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent in CA66/2023 and First Respondent in CA67/2024

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30 Footnote omitted.