IN THE CITY OF WESTMINSTER MAGISTRATES COURT BETWEEN:

THE GOVERNMENT OF THE UNITED STATES OF AMERICA

-v-

JULIAN PAUL ASSANGE

AFFIDAVIT OF THOMAS ANTHONY DURKIN

STATE OF ILLINOIS :

:

COUNTY OF COOK :

THOMAS ANTHONY DURKIN, an attorney duly admitted to practice law before the Courts of the States of Illinois, California, New York, and Indiana, affirms the following to be true upon information and belief:

1. I am an attorney licensed to practice law in the states of Illinois, California, New York and Indiana, and admitted to practice in a number of United States federal District Courts, Circuit Courts of Appeals, as well as the United States Supreme Court. I have been practicing federal criminal law continuously since my admission to the Illinois Bar in 1974, and my practice has always been concentrated in that field. I make this affidavit on behalf of Julian Paul Assange.

2. This expert report is submitted in recognition of and compliance with United Kingdom Criminal Procedure Rules 33.2 and 33.3. I understand my duty to the Court under those Rules, and am in compliance (as is this report) with them, and will continue such compliance.

I. Professional Credentials

3. I practice criminal defense law in the state and federal courts, primarily in Illinois, but also in criminal cases across the United States. Throughout my career, my practice has included a wide range of matters, including white collar fraud, public corruption, narcotics, and terrorism cases, both domestic and international. I have served as Law Clerk to the Honorable James B. Parsons, United States District Court Judge for the Northern District of Illinois from 1973 to 1974. I then practiced federal criminal defense law, primarily as a Court Appointed Panel Attorney for the Federal Defender Program of the Northern District of Illinois from 1974 to 1978. From March of 1978 to April 1984, I served as Assistant United States Attorney for the Northern District of Illinois in Chicago, where I prosecuted a wide variety of federal criminal cases, including fraud and public corruption. From 1984 to the present I have limited my private practice largely to the defense of federal criminal cases at the Chicago law firm I founded with my wife and law partner, Janis D. Roberts, under the name Durkin & Roberts.

4. I am a Distinguished Practitioner in Residence at the Loyola University Chicago School of Law where I teach National Security Law, and serve as the co-director of its National Security & Civil Liberties Program. I am also a Senior Research Fellow at the Fordham University Law School's Center on National Security. I have appeared as a speaker and panelist at legal, academic, and other functions on a wide variety of subjects related to criminal defense and national security law. I am also a member of the National Security Committee of the National Association of Criminal Defense Lawyers, and also served on its Select Committee on Military Tribunals.

5. I am also a member of the American College of Trial Lawyers. In 2007, along with other lawyers representing Guantanamo Bay detainees, I received the Frederick Douglass Human Rights Award from the Southern Center for Human Rights. In 2008, I received the

Constitutional Rights Foundation of Chicago Bill of Rights in Action Award. More recently, in 2019, I received the Illinois Association of Criminal Defense Lawyer's Lifetime Achievement Award. I am a 1968 graduate of the University of Notre Dame (A.B.), and a 1973 graduate of the University of San Francisco (J.D.). A more complete biography listing my professional credentials and experience can be found on our firm's website at: www.durkinroberts.com.

II. Relevant Professional Experience

6. In the course of my career, I have been involved as defense counsel, either at the trial or appellate level, and also as a consultant, in a significant number of other cases in various federal courts across the United States, as well as in an expert and/or consulting capacity (on matters of U.S. federal criminal law) for cases in the United Kingdom.

III. Description of Materials Reviewed

7. In preparing this Affirmation, I have reviewed materials provided me by Mr. Assange's solicitors in the United Kingdom. Those materials included: the indictment and superseding indictment; the affidavits of Special Agent Megan Brown of the FBI, the affidavit of Kellen Dwyer; the Opening Note on Behalf of the United States of America. I have also reviewed relevant statutes, regulations, and research materials (including case law) related to the issues involving U.S. law and practice discussed in this Affirmation. I also rely on my forty years of experience practicing criminal defense law in the U.S. federal courts, as well as my six years as a federal prosecutor. I am also instructed that other factual issues currently the subject of investigation might impact upon each of the areas outlined here in rather summary form. If that should be the case, I would ask leave to reserve the right to supplement or amend my opinion and responses set forth below.

IV. Relevant Issues

8. This expert report addresses a number of questions about United States law and practice with respect to its criminal justice system:

(1) Constraints on the ability of a defendant and/or his lawyers to be informed of all the evidence underpinning the prosecution's case;
(2) Constraints on the ability of a defendant to have access to classified material and to present these classified materials in his defense case-in-chief;
(3) Constraints upon the reality of proper defense scrutiny where the materials provided in discovery by the prosecutors involve an unprecedented volume of material;
(4) Constraints upon a defendant's right to proceed to trial in light of the Federal Sentencing Guidelines and what has become commonly known in the federal courts as a "trial penalty" or "trial tax"; and,
(5) Whether an extradited defendant can be sentenced for conduct for which he was not extradited, or extradition was refused.

A. U.S. Law Relating to Classified Evidence and Application to Mr. Assange's Particular Circumstances

9. I have reviewed the sworn statement of Eric L. Lewis dated October 18, 2019, regarding the restrictions on access to classified information set forth in Paragraphs 24 to 35. In that I concur with the statements, conclusions and opinions Mr. Lewis sets forth in those paragraphs, I will adopt and incorporate those statements, conclusions and opinions in this affidavit as if fully set forth herein. I would like to expand on those issues however, particularly insofar as how in my opinion these procedures unfairly impact the ability to mount a vigorous defense.

10. As set forth in Paragraph 24 of Mr. Lewis' sworn statement, classified evidence cannot be viewed on public servers unless that information is declassified. More particularly, this means that as a practical matter these classified materials can only be reviewed by those lawyers granted a security clearance by the government; and that the classified materials themselves cannot be viewed anywhere other than in what is known as a "SCIF", an acronym for a "Secured Compartmentalized Information Facility." This typically is a hermetically sealed, soundproofed and electronically regulated special room in the federal courthouse with intricate

security features limiting access both to the room itself and the file cabinets in which the materials must be stored. Since these materials cannot be viewed in the lawyer's offices, or on any of the lawyer's computers, the lawyer must travel to the courthouse to review the materials and,, normally, only during times when the courthouse is open during regular business hours. Not only is this an extreme inconvenience, it dramatically increases the cost of representation since the attorney cannot review the materials at his convenience.

11. In addition to the practical problems involved in having to view the materials in the SCIF, any and all court pleadings the lawyer might wish to file involving classified materials must also be drafted in the SCIF itself on specially designated computers supplied by the government and which can only be kept in the SCIF. These computers, in my professional opinion, are not of the quality used in our practice and are quite cumbersome to operate and use in drafting pleadings. Further, having to draft pleadings in the SCIF without the benefit of the attorney's staff such as secretaries or paralegals normally used in the formatting and drafting of pleadings creates an undue burden on the attorney having to draft the pleading; and, like having to review the materials in the SCIF rather than his or her office, drafting pleadings in the SCIF greatly increases the cost of the representation which is a serious factor any criminal defendant faces in defending a case of the nature of Mr. Assange's. More importantly, in my opinion, the difficulty in drafting pleadings in the SCIF creates a chilling effect on the attorney's ability even to consider the very filing of pleadings under these circumstances.

12. Also, with respect to having to review the materials in a SCIF, it is also necessary to have all communications with cleared co-counsel in the SCIF itself; or, in the case of co-counsel being in another city or country which is likely here, on a specially secured telephone line from SCIF to SCIF. Whether it is even possible to set up a SCIF in another country is unknown to me. However, in my experience, I can attest to the fact that I have had to participate in calls with co-counsel in SCIFs in other cities in the U.S., and that these calls were extremely complicated and often failed due to mechanical or logistical problems. This, too, vastly increases the cost of the representation and can become so frustrating and costly that frequently it was decided to forego these calls which again, in my opinion, creates a chilling affect on the defendant's right to the effective assistance of counsel.

13. In addition to these serious practical problems with respect to the use and handling of classified materials, it must also be understood that the classified materials themselves, or information derived therefrom, cannot be shared by counsel with the defendant himself. Thus, unlike any other federal criminal proceeding in the United States, materials that ordinarily would be considered materials required to be produced in discovery as material to the preparation of the defense pursuant to Rule 16 of the Federal Rules of Criminal Procedure cannot be shared with the defendant himself. Accordingly, Mr. Assange will not know what his lawyers have learned from the classified evidence, nor will his lawyers be able to ask Mr. Assange what he might know about the materials which they have been granted access. This leads, in my opinion, to a serious deprivation of a defendant's ability to mount a defense in any case involving classified materials. In that Mr. Assange's case involves virtually nothing but classified evidence, leads me to question in my professional opinion how it is that he will ever be able to mount a meaningful defense under these circumstances.

B. The reality of proper defense scrutiny where the unclassified discovery materials provided by the prosecutors involve an unprecedented volume of material is greatly exacerbated by the fact that Mr. Assange will most certainly not be afforded release on bail should he be extradited, and will he detained throughout the pre-trial proceedings.

14. In addition to problems created by the vast amount of classified evidence as set forth above, it is my understanding that the U.S. prosecutors have described Mr. Assange's case as involving "an unprecedented volume" of discovery materials."[1]

15. This, in my opinion, only exacerbates the aforementioned problems created by the extensive use of classified evidence, and will further create a considerable chilling effect on the ability of counsel to adequately prepare Mr. Assange's defense. The sheer volume of discovery, coupled with the fact that Mr. Assange will most certainly be detained pre-trial at the William G.

[1] See Opening Note on Behalf of the United States of America, July 30th 2019

Truesdale Detention Center in Alexandria, Virginia, will make it next to impossible for him to review the discovery materials with his attorney. I have represented many defendants detained pre-trial in the federal system throughout the U.S. and the pre-trial detention, in my opinion, severely compromises an attorney's ability to meaningfully review the discovery with his or her client. This problem is all the more exacerbated and compromised by the very likelihood that Mr. Assange will be placed in Administrative Segregation or the Attorney General will impose "Special Administrative Measures ("SAMs") on Mr. Assange while he is detained pre-trial.[2]

16. I have also represented a pre-trial detainee defendant at the Truesdale Detention Center in Alexandria, Virginia, and can attest that the attorney visiting hours themselves make it extremely difficult to review the discovery materials with the client, if for no other reason than jail security and administrative practices requires the visits with the inmate to be limited to three hours windows. That is, six days a week an attorney can visit; but the visits can only take place during the hours of 8:00 to 10:45 AM, 1:00 to 4:00 PM, and 7:00 to 10:00 PM. On Tuesdays visiting is limited only to 1:00 to 4:00 PM nor can the visiting rooms be reserved beforehand, which sometimes means no rooms are available at a given time. These limited time periods make discovery review with the client very difficult as it often is the case that staffing issues cause the prisoner not to be delivered on time, and that the attorney must take the materials out of the visiting room when leaving. This can be extremely cumbersome and time consuming, and also exacerbates the cost of the legal representation.

C. The Plea Bargaining System in the U.S. Federal Courts and its Impact on Mr. Assange's Ability to Exercise His Sixth Amendment Right to Trial

17. A Task Force of the National Association of Criminal Defense Lawyers in Washington, D.C., the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with crimes in the United States, recently issued a scathing report entitled: The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save it (2018).[3] This thorough

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[2] See, the aforementioned sworn statement of Eric L. Lewis, ¶¶ 18-23.
[3] Available at: www.nacdl.org/trialpenaltyreport

sixty-five page report put together by a Task Force of eleven nationally prominent U.S. criminal defense practitioners bluntly sets forth its conclusion that due to the extent of the plea bargaining system in the federal federal courts "there is ample evidence that federal criminal defendants are being coerced to plead guilty because the penalty for exercising their constitutional rights is simply too high to risk." (Report, p. 5.) As the report also points out, over the past fifty years "trial by jury has declined to an ever-increasing rate to the point that [jury trials] now occur in less than 3% of state and federal criminal cases." Id.

18. This conclusion is one I share based upon my experience as a former federal prosecutor and criminal defense practitioner for over forty-six years. I have personally witnessed in my own practice the steady and sharp decline in the number of jury trials the NACDL report sets forth. Plea bargaining is now the standard practice in federal criminal cases for the very reasons set forth in the Task Force Report; i.e., most defendants cannot and will not risk the draconian sentencing disparities that result in what is now commonly known by practitioners as a "trial penalty" or "trial tax." It is my opinion, therefore, as shared by the NACDL Task Force, that Mr. Assange—in addition to the aforesaid obstacles in receiving a fair trial based upon the classified evidence, pre-trial detention and discovery problems—will face enormous pressure to plead guilty rather than exercise his constitutionally guaranteed right to a jury trial should he be extradited to the U.S. to face these charges.

D. The Rule of Specialty in Light of the Factors That can be Taken Into Account by the Sentencing Judge Upon Conviction in a Federal Criminal Case and the U.S. Federal Sentencing Guidelines as They Might Apply to Mr. Assange.

19. If Mr. Assange is convicted in the U.S., he will be sentenced pursuant to federal law and the United States Sentencing Guidelines, the latter of which, more commonly known as "the guidelines," has been in effect since November of 1987. While these sentencing guidelines are no longer mandatorily binding upon sentencing judges since the 2005 U.S. Supreme Court case of *United States v. Booker*, 543 U.S. 220 (2005), the guidelines are a starting point in the process and the Supreme Court has also held that "within-Guidelines" sentences may be afforded a "presumption of reasonableness" on appeal. *Rita v. United States*, 551 U.S. 339, 347 (2007).

20. In determining the the appropriate sentence, the Federal Criminal Code, 18 U.S.C. § 3661, also provides as follows: "No limitation shall be placed on the information concerning the background, character and conduct of a person convicted on an offense which a court of the United States may receive or consider for the purpose of imposing an appropriate sentence." Courts have held that this section was enacted to clearly authorize trial judge to rely on information of alleged criminal activity for which defendant had not been prosecuted. See, e.g., *Smith v. U.S.*, C.A.10 (Okla.) 1977, 551 F.2d 1193, certiorari denied 98 S.Ct. 113, 434 U.S. 830, 54 L.Ed.2d 90. Subject to very few limitations, a sentencing court has almost unfettered discretion in determining what information it will hear and rely upon in sentencing deliberations. *U.S. v. Baylin*, D.C.Del.1982, 535 F.Supp. 1145

21. Further, a sentencing court may consider conduct of which a criminal defendant has even been acquitted, so long as that conduct has been proved by preponderance of evidence. *U.S. v. Watts*, 117 S.Ct. 633, 519 U.S. 148, 136 L.Ed.2d 554, rehearing denied 117 S.Ct. 1024, 519 U.S. 1144, 136 L.Ed.2d 900 (1997).

22. Thus, in my opinion, should Mr. Assange be extradited to the U.S. and convicted, it is quite likely that he could be sentenced for conduct totally unrelated to the charge for which he was extradited.

23. Furthermore, the eighteen (18) counts with which Mr. Assange is charged in the superseding indictment of May 23, 2019, as previously mentioned by Mr. Lewis carry a total combined statutory maximum term of imprisonment of 175 years.[4] I concur with the opinion of Mr. Lewis that under the circumstances of Mr. Assange's case and its political overtones, especially in light of the initial 35 year sentence of Ms. Manning, Mr. Assange would likely receive a sentence of imprisonment that will constitute the rest of his likely natural lifespan.

[4] See, Paragraph 16 of the aforementioned sworn statement of Eric L. Lewis.

24. Accordingly, for all of the aforesaid reasons, it is my professional opinion that the likelihood of Mr. Assange being able to mount a fulsome and meaningful defense to these charges is, for all intents and purposes, non-existent.

Dated: 17 December 2019
Chicago, Illinois

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Subscribed and Sworn
Before Me This 17th Day
of December, 2019.

Janis D. Roberts, Notary Public

OFFICIAL SEAL
Janis D. Roberts
NOTARY PUBLIC, STATE OF ILLINOIS
My Commission Expires May 21, 2020