

IN THE UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF NORTH CAROLINA
 WESTERN DIVISION
 No. 5:16-HC-2066-BO

INOCENTE ORLANDO MONTANO)
 MORALES,)
)
 Petitioner,)
)
 v.)
)
 NEIL ELKS, *Sheriff of Pitt County, North*)
Carolina;)
)
 SCOTT J. PARKER, *United States Marshal*)
for the Eastern District of North Carolina;)
)
 LORETTA E. LYNCH, *Attorney General, U.S.*)
Department of Justice, in her Official Capacity)
and her successor and assigns; and)
)
 THE UNITED STATES OF AMERICA,)
)
 Respondents.)

ORDER

This matter is before the Court on petitioner’s application for writ of habeas corpus under 28 U.S.C. § 2241 [DE 1] and federal respondent’s motion to dismiss. [DE 6, 22]. A hearing was held before the undersigned in Raleigh, North Carolina, on November 17, 2016. The matters are fully briefed and ripe for adjudication. For the following reasons, respondent’s motion to dismiss is granted and petitioner’s application is dismissed.

BACKGROUND

In October of 2008, an American non-profit organization based in San Francisco, the Center for Justice and Accountability (“CJA”), along with its Spanish counterpart, filed a criminal complaint in the Kingdom of Spain (“Spain”), acting as private “popular prosecutors.” The CJA charged 20 government and military officials from El Salvador with crimes against

humanity and the terrorist murder of six Jesuit priests, their housekeeper, and her daughter on November 16, 1989. The CJA named Alfredo Cristiani, the Salvadoran President in 1989, members of his cabinet, and several other military officers and enlisted personnel as defendants. The named defendants included the petitioner, Inocente Orlando Montano Morales, a former Colonel who served in President Cristiani's cabinet as Vice-Minister of Public Safety at that time. These individuals were all members of the El Salvador Armed Forces ("ESAF").

On November 4, 2011, the Spanish prosecutor issued an order requesting that the Spanish government seek petitioner's extradition from the United States. When the prosecutor issued the Spanish arrest warrant for petitioner, he was residing in Everett, Massachusetts.

The United States Justice Department, through the United States Attorney for the District of Massachusetts, undertook an investigation of the petitioner's status in the United States. While he had been living in the United States without any inquiry from the government at this point, he was charged by the United States Justice Department with making a false statement in his application for a temporary protective status. *United States v. Montano*, No. 12-CR-10044-DPW (D. Mass. 2013). Petitioner remained on release during those criminal proceedings. Eventually he entered a plea of guilty, and was allowed to self-report to the federal prison facility at Butner in 2013 to serve his sentence of 21 months.

In 2014 the Spanish government submitted a diplomatic note stating that changes to Spain's universal jurisdiction statute required removal of the crimes against humanity charges and specified that Spain now only sought extradition of petitioner based on "terrorist murder." In addition, Spain stated that the remaining charges of the extradition request only applied to the killings of the five Spanish-born priests.

Petitioner completed his sentence at Rivers Correctional Institute in Winton, North Carolina in 2015, and on April 8, 2015, the United States Attorney's Office in the Eastern District of North Carolina filed an extradition complaint on behalf of the United States government and the government of Spain. *See In re: Request by Spain for the Extradition of Inocente Montano Morales*, No. 2:15-MJ-1021-KS (E.D.N.C 2016).

The Magistrate conducted such hearings and proceedings as the record will indicate, and subsequently ordered the extradition of the petitioner. Petitioner then filed the instant application for a writ of habeas corpus with this Court on April 1, 2016. [DE 1]. In his application, petitioner challenges the extradition order and seeks to be released. *Id.* The federal respondents filed a motion to dismiss on April 26. [DE 6, 7]. Petitioner responded, [DE 9], and the respondents replied, [DE 11]. Petitioner also submitted a supplement to his application, [DE 12], to which respondents filed a response. [DE 13]. A hearing was set for November, 2016, and petitioner filed a pre-hearing memorandum, [DE 16]. Following the hearing, the Court issued an order which directed the parties to rebrief the motion to dismiss to address whether Spain's exercise of extraterritorial jurisdiction satisfies the Treaty's provision governing offenses committed outside the territory of the party requesting extradition, and whether application here of that provision of the Treaty comports with due process. [DE 19]. Following that order, respondents submitted an amended motion to dismiss, [DE 22], to which respondent filed an amended response, [DE 31]. Respondents filed their amended reply on May 19, 2017, [DE 36], which completed the briefing on this matter.

DISCUSSION

Extradition involves the process "by which a person charged with or convicted of a crime under the law of one state is arrested in another state and returned for trial or punishment."

Restatement (Third) of the Foreign Relations Law of the United States ch. 7B, introductory cmt., at 556–57 (1987). The process is triggered when the Department of State receives a request from a foreign country. *See Zhenli Ye Gon v. Hold*, 774 F.3d 207, 210 (4th Cir. 2014) (“The process of extraditing a non-United States citizen to a foreign nation is conducted largely by the United States Department of State, which receives any requests for extradition from foreign nations and determines whether those requests are governed by a treaty.”). “The United States Attorney then files a complaint before a federal justice, judge, or magistrate, seeking a warrant for the fugitive’s arrest and a certification that he may be extradited.” *Ye Gon*, 774 F.3d at 210; *see* 18 U.S.C. § 3184.

There is no direct appeal available after an extradition hearing; a fugitive’s sole remedy from an order certifying that he is extraditable is to seek review of the order through a petition for a writ of habeas corpus under 28 U.S.C. § 2241. *Ordinola v. Hackman*, 478 F.3d 588, 598 (4th Cir. 2007) (“[T]here is no direct appeal for an individual found to be extraditable by a magistrate Rather, a writ of habeas corpus is the only available means to challenge the magistrate’s findings.”). Habeas review of an extradition certification is narrow, limited to consideration of whether the extradition judge properly exercised jurisdiction, whether the crime for which extradition is sought is encompassed by the relevant treaty, and whether the record contains any evidence to support the extradition judge’s probable cause determination. *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *Haxhiaj v. Hackman*, 528 F.3d 282, 287 (4th Cir. 2008). The court reviews findings of law de novo, and findings of fact for clear error. *Ordinola*, 478 F.3d at 667.

Under this standard and in reviewing the record, the Court concludes that the extradition followed accepted practice and does not appear to be infirm. There is no direct review of an

extradition order, and the Court finds no irregularity in the extradition proceedings upon this collateral review of the order. The Treaty in the case provides for the extradition of a defendant charged with murder when committed outside the territory of the requesting nation, so long as the requesting nation's laws allow for such a prosecution and so long as the laws of the requested nation would allow for a prosecution in similar circumstances. These requirements have been met here.

Therefore, there is no basis upon which the Court can grant petitioner's request for release. The government's motion to dismiss will be granted and petitioner's application for a writ of habeas corpus will be dismissed.

CONCLUSION

For the foregoing reasons, respondent's motion to dismiss [DE 6, 22] is GRANTED and petitioner's application for writ of habeas corpus [DE 1] is DISMISSED. Respondent's motion to SEAL [DE 33] is GRANTED. The Clerk is DIRECTED to close the case.

SO ORDERED, this 21 day of August, 2017.


TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE