UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:15-HC-2101-D

INNOCENTE ORLANDO MONTANO MORALES, Petitioner, v. NEIL ELKS, et al., Respondents.	)	**MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS**

The petitioner in this matter, Innocente Orlando Montano Morales ("Montano"), is the subject of extradition proceedings currently pending before Magistrate Judge Swank. The government of Spain has requested, pursuant to its Extradition Treaty with the United States, that Montano be extradited to Spain to stand trial for murder.

Following a detention hearing on May 14, 2015, Magistrate Judge Swank found that "Montano has not presented clear and convincing evidence of special circumstances that overcome the strong presumption of detention that arises due to the overriding national interest in complying [with] our treaty obligations." Order [D.E. #27] at 3.[1] The Court further found that Montano poses an increased risk of flight because of the serious charges he faces in Spain. *Id.* Accordingly, Judge Swank ordered that Montano be held without bond pending his extradition hearing. *Id*. at 4. At Montano's request, the extradition hearing was continued from May 14, 2015, to August 12, 2015.

[1] Unless otherwise specified, all docket entries cited below are from the extradition matter pending before Judge Swank, Case No. 2:15-MJ-1021-KS.

Montano now seeks through this habeas corpus proceeding to reverse Judge Swank's detention order, but there is no factual or legal basis to do so. It is well established that, except in extraordinary circumstances, international fugitives must be detained during the pendency of their extradition proceedings, due to the obvious risk of flight that such cases present and the United States' need to comply with its Treaty obligations. Montano, like the majority of international fugitives, is a serious flight risk, and there are no extraordinary circumstances that would warrant his release.

Montano cannot show the detention order below was clearly erroneous, and this Court should therefore dismiss the petition. *See Ordinola v. Hackman*, 478 F.3d 588, 610 (4th Cir. 2007) (Traxler, J., concurring) (reviewing court bound by facts as determined by the magistrate as long as factual findings are not clearly erroneous).

PROCEDURAL BACKGROUND

On January 4, 2012, the Embassy of Spain in Washington, D.C. issued a formal request to the Department of State for the extradition of Montano. *See Diplomatic Note No. 2/12* [D.E. 3-2]. The request included copies of an arrest warrant and an indictment charging Montano and 19 others with murder, terrorism, and crimes against humanity for their roles in the November 16, 1989 murders in El Salvador of five Spanish Jesuit priests. Spain submitted supplementary materials in support of its extradition request on August 21, 2014 [D.E. #3-4] and March 23, 2015 [D.E. #19-1].

On April 8, 2015, acting pursuant to the Extradition Treaty and 18 U.S.C. § 3184, the United States filed an extradition complaint as to Montano [D.E. #1]. The complaint was filed in the Eastern District of North Carolina because Montano was incarcerated at Rivers Correctional

Institute in Winton, North Carolina, serving a 21-month federal sentence imposed in the District of Massachusetts for visa fraud and perjury.

On April 15, 2015, Montano completed his sentence and was taken into custody pursuant to the arrest warrant issued in connection with the extradition complaint. On that date the United States also filed (1) a certified copy of the Extradition Treaty and materials submitted by Spain in support of its extradition request [D.E. #3]; (2) a motion and supporting memorandum to certify extradition [D.E. #4 & #5]; and (3) a motion for detention [D.E. #6].

On April 16, 2015, Montano had an initial appearance before Magistrate Judge Swank. Montano was informed of the charges pending in Spain and the maximum penalties, and the Federal Public Defender was appointed to represent him in the extradition proceedings.

On April 23, 2015, Magistrate Judge Swank conducted a telephone status conference with counsel, scheduling the extradition hearing for May 7, 2015.

Prior to the May 7 hearing, Montano filed a motion, opposed by the government, to continue the extradition hearing for at least eight weeks. Montano also requested a detention hearing which the government did not oppose. *See* D.E. #20 & #21.

On May 7, 2015, Magistrate Judge Swank held a detention hearing, at the conclusion of which she made oral findings and conclusions and ordered that Montano be detained. Magistrate Judge Swank also issued a written order containing the following findings:

> The court finds that Montano has not presented clear and convincing evidence of special circumstances that overcome the strong presumption of detention that arises due to the overriding national interest in complying [with] our treaty obligations. Although Montano has presented evidence of serious health conditions, the evidence does not demonstrate that these conditions are life threatening at this time. Moreover, the charges that Montano faces, if extradited, are much more serious than the charges he faced in Massachusetts, thereby increasing the risk of flight. While it is troubling that such a long period of time has transpired since the murders allegedly occurred, the lapse of time does not

> appear relevant to the detention issue presently before the court. Nor does the court foresee that these proceedings will be of an unusually prolonged nature.

Order [D.E. 27] at 3-4.

Judge Swank granted Montano's motion to continue the extradition hearing, re-scheduling it for August 12, 2015. [D.E. #23]. The scope of this hearing will be limited to determining: "(1) whether there is probable cause to believe that there has been a violation of the laws of the foreign country requesting extradition, (2) whether such conduct would have been criminal if committed in the United States, and (3) whether the fugitive is the person sought by the foreign country for violating its laws." *Nezirovic v. Holt*, 779 F.3d 233, 236 (4th Cir. 2015) (quoting *Gon v. Holt*, 774 F.3d 207, 210 (4th Cir. 2014)) (internal quotation marks omitted).

Upon finding that these requirements have been met and that the applicable treaty does not otherwise bar extradition, a magistrate judge issues to the Secretary of State a certification of extradition. 18 U.S.C. § 3184; *Nezirovic*, 779 F.3d at 236. The magistrate's certification may be challenged by filing a petition for a writ of habeas corpus. *Nezirovic*, 779 F.3d at 237. The burden is on the fugitive to demonstrate the illegality of his detention pursuant to the certification and committal under Section 3184.

The final decision to surrender a fugitive to the requesting country rests with the Secretary of State, who may consider "factors affecting both the individual defendant as well as foreign relations-factors that may be beyond the scope of the judge's review." *Nezirovic*, 779 F.3d at 237 (quoting *Mironescu v. Costner*, 480 F.3d 664, 666 (4th Cir. 2007)).[2]

[2] For a full discussion of the legal principles governing extradition proceedings, the government respectfully refers the Court to the Memorandum in Support of United States' Motion to Certify Extradition [D.E. #5].

FACTUAL BACKGROUND

The 20 individuals charged in the Spanish indictment, including Montano, were members of the El Salvador Armed Forces (ESAF) at the time of the charged offenses in 1989. Montano was an Army colonel and served also as the Vice Minister of Public Security. [D.E. #3-2 at 129].

As described in the indictment and other materials submitted by Spain, in 1989, the ESAF had been engaged in a long-term civil war with a rebel movement, the Farabundo Marti Liberation Front (FMLN). Father Ignacio Ellacuria Beascoechea ("Father Ellacuria"), a Jesuit priest and rector of the University of Central America in San Salvador, had played a prominent role in seeking to negotiate a resolution of the conflict. [D.E. #3-2 at 5, 8-9]. He and other Jesuits were targeted by the ESAF for being supporters and intellectual leaders of the FMLN. [D.E. #3-2 at 9-10]. Montano himself accused Father Ellacuria of being "fully identified with subversive movements" [D.E. #3-4 at 12]; Montano exercised oversight responsibility over the ESAF radio station that denounced Father Ellacuria and the other Jesuit priests as terrorists and the "brains of the FMLN" and broadcast death threats against them [D.E. #3-2 at 24-26, 89]; and he provided "crucial intelligence" concerning Father Ellacuria's presence at the University in the days leading up to the murders [D.E. #3-4 at 17].

On November 15, 1989, Montano participated in several key meetings concerning the military's response to a major FMLN offensive. [D.E. #3-2 at 45-54]. At the last of these meetings, one of Montano's fellow subordinate officers, in Montano's presence, gave the order to kill Father Ellacuria and to leave no survivors. [D.E. #3-2 at 54].

In the early hours of November 16, 1989, members of the Salvadoran military murdered Father Ellacuria and five other Jesuit priests, their housekeeper, and the housekeeper's

16-year-old daughter at their University compound. [D.E. #3-2 at 55-57]. Five of the priests, including Father Ellacuria, were Spanish nationals; the three other victims were Salvadoran. [D.E. #3-2 at 74].

ARGUMENT

A. Standard of Review

As the Fourth Circuit has stated in the context of reviewing a magistrate's certification of extradition: "On habeas review, we must grant a magistrate's factual findings great deference and affirm the decision unless it is 'palpably erroneous in law' . . . ." *Ordinola*, 478 F.3d at 598 (quoting *Ornelas v. Ruiz*, 161 U.S. 502, 509 (1896)). Judge Traxler elaborated on this point in a concurring opinion as follows:

> [T]he standard of review applied to the decision of a magistrate judge to issue a certificate of extradition is *at least* as deferential, if not more so, than that applied to a magistrate judge's decision to issue a search warrant. . . . It is well-established that a reviewing court is not permitted to substitute its own view of the facts for the findings of the magistrate judge.
>
> In no sense does a habeas action for the review of an extradition decision afford the reviewing court an opportunity to weigh the evidence or serve in a fact-finding capacity. Just as the magistrate judge's underlying determination is not a mini-trial on the guilt or innocence of the fugitive, the district court's habeas review should not duplicate the extradition hearing-habeas review "is not a means for rehearing the magistrate's findings." . . . . As long as the factual findings that support the magistrate judge's legal conclusions are not clearly erroneous, the reviewing court is bound by the facts as determined by the magistrate. The reviewing court may not substitute its own assessment of the facts for that of the magistrate judge nor may it make additional, new findings of fact that the extradition court did not make.

Ordinola, 478 F.3d at 609-10 (Traxler, J., concurring) (emphasis in original; citations omitted).

To be sure, the present case involves review of an order of detention, not a certification of extradition. But both determinations are reviewable through the filing of a habeas corpus petition, and it would make no sense to review *de novo* the preliminary issue of detention when

the ultimate question of extraditability is subject to a highly deferential standard of review. *Cf. In re Extradition of Hamilton-Byrne*, 831 F. Supp. 287, 288 (S.D.N.Y. 1993) (affirming magistrate judge's factual findings in support of detention pending completion of extradition proceedings because they were not "clearly erroneous"). At a minimum, Magistrate Judge Swank's decision is based on "reasonable grounds" and therefore should not be reversed. *See Matter of Russell*, 647 F. Supp. 1044, 1046-47 (S.D. Tex. 1986), *aff'd*, 805 F.2d 1215 (5th Cir. 1986) (standard of review of magistrate's detention order is "very narrow," limited to whether magistrate had "reasonable grounds" for denial of bail); *Koskotas v. Roche*, 740 F. Supp. 904, 918 (D. Mass. 1990), *aff'd*, 931 F.2d 169 (1st Cir. 1991) ("reasonable grounds" standard applies).[3]

B. The Bail Reform Act Does Not Apply, and There Is A Strong Presumption Against Release in International Extradition Proceedings.

The federal statute governing extradition from the United States to foreign countries, 18 U.S.C. §§ 3181 *et seq*., does not provide for bail. Nor is bail authorized in extradition matters by the Bail Reform Act, 18 U.S.C. §§ 3141 *et seq*., which applies only to defendants charged with a criminal offense "which is in violation of an Act of Congress and is triable in any court established by Act of Congress." 18 U.S.C. § 3156(a)(2). Because Montano is charged with crimes under Spanish law, the provisions of the Bail Reform Act do not apply. *See Kamrin v. United States*, 725 F.2d 1225, 1227-1228 (9th Cir. 1984); *Nezirovic v. Holt*, 990 F. Supp. 2d 594,

[3] Montano cites *Borodin v. Ashcroft*, 136 F. Supp. 2d 125, 128 (E.D.N.Y. 2001), which states that a magistrate's bail determination in extradition matters is reviewed de novo. *Borodin* itself cites several cases for this proposition, but only one of them involved the unique context of extradition, and that case did not say anything about the applicable standard of review. *See United States v. Leitner*, 784 F.2d 159 (2d Cir. 1986). In any event, *Borodin* is inconsistent with Fourth Circuit law as set forth in Ordinola and should not be followed here.

597 (W.D. Va. 2013); *In re Extradition of Mironescu*, 296 F. Supp. 2d 632, 634 (M.D.N.C. 2003).

The Supreme Court has long held that bail should not ordinarily be granted in international extradition proceedings. Rather, bail should be granted only under the most unusual circumstances, due to the United States' obligation under its extradition treaties to deliver the fugitive to the requesting country. *See Wright v. Henkel*, 190 U.S. 40 (1903) (affirming detention without bail of a fugitive sought by Great Britain for defrauding a corporation of which he was a director). As the Supreme Court explained in *Wright*:

> The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment.

Id. at 62.

Thus, there is a strong presumption against release in international extradition cases. *See United States v. Kin-Hong*, 83 F.3d 523, 524 (1st Cir. 1996); *Martin v. Warden*, 993 F.2d 824, 827 (11th Cir. 1993); *In re Extradition of Russell*, 805 F.2d 1215, 1216 (5th Cir. 1986). This presumption may be rebutted only if the fugitive presents clear and convincing evidence demonstrating "(1) that he is not a risk of flight nor a danger to any person or the community, and (2) 'special circumstances' warranting his release." *United States v. Castaneda-Castillo*, 739 F. Supp. 2d 49, 56 (D. Mass 2010) (quoting *United States v. Taitz*, 130 F.R.D. 442, 444 (S.D. Cal. 1990)). *See also Salerno v. United States*, 878 F.2d 317 (9th Cir. 1989); *Sahagian v. United States*, 864 F.2d 509, 514 n.6 (7th Cir. 1988); *Beaulieu v. Hartigan*, 554 F.2d 1 (1st Cir. 1977); *Nezirovic*, 990 F. Supp. 2d at 598.

The reasons for the presumption against release in extradition cases are obvious and compelling. A person sought for extradition is an international fugitive from justice. The fact that he faces extradition to a foreign state where criminal charges are pending is, by itself, a strong incentive for him to flee. Where, as here, the person sought is not a citizen or permanent resident of the United States, the risk of flight is even greater.

Moreover, when the United States has a treaty obligation to apprehend and surrender a fugitive for crimes encompassed by the treaty, it has a duty to take the necessary legal steps to meet that obligation, which include maintaining custody of the fugitive during proceedings so that he is available for surrender. This serves not just the interests of the requesting nation, but also the interests of the United States. As one court has explained:

> [E]xtradition cases involve an overriding national interest in complying with treaty obligations. If the United States were to release a foreign fugitive pending extradition and the defendant absconded, the resulting diplomatic embarrassment would have an effect on foreign relations and the ability of the United States to obtain extradition of its fugitives.

In re Extradition of Molnar, 182 F. Supp. 2d 684, 687 (N.D. Ill. 2002).

C. Montano Poses A Serious Risk Of Flight

Montano has been charged in Spain with especially serious criminal offenses punishable by up to 30 years imprisonment. He is 71 years old and facing an effective life sentence if convicted in Spain. He has no reason to remain in the United States and allow himself to be turned over to the Spanish authorities. To the contrary, Montano has every incentive to flee to El Salvador at the first opportunity should he be released. He is a citizen of that country, he has family there, and he would be safe from prosecution given El Salvador's refusal to extradite to Spain any of the other 29 defendants charged in the Jesuit massacre. As Montano's attorney told the sentencing judge in Massachusetts:

> This man will be deported immediately, and by agreement with the Government he is not going to fight it. He is going back to El Salvador where he does have family members who are supportive and waiting for him, and, again, your Honor, where he does not face prosecution, danger or the likelihood of extradition to Spain, given what's happened with others who have been named in that court proceeding. They are still there, they are safe there, he is safe there, and there's no danger to him.

Attachment 1 to Application for Writ of Habeas Corpus [D.E. # 1-1] at 56.

Indeed, Montano's very presence in the United States is the result of visa fraud and perjury, for which he has been convicted.[4] As a result, Montano has no legal status in the United States and he is subject to an Order of Stipulated Judicial Removal [D.E. 6-1] requiring his immediate removal to El Salvador, but for the pendency of the extradition proceeding.

Montano argues that he is not a flight risk because he remained on release during his criminal case in Massachusetts and self-reported to the Bureau of Prisons for his 21-month sentence. Habeas Application [D.E. 1] at 6. But the circumstances have now changed dramatically. As Magistrate Judge Swank noted, "the charges that Montano faces, if extradited, are much more serious than the charges he faced in Massachusetts, thereby increasing the risk of flight." [D.E. #27 at 4].

Montano further asserts that he "was aware of the possibility of extradition proceedings ever since 2011." [5] Habeas Application [D.E. 1] at 6. However, whereas extradition

[4] On numerous occasions between 2002 and 2010, Montano applied for and received Temporary Protective Status ("TPS"), a benefit available to foreign nationals who satisfy certain eligibility criteria. One such criterion with respect to Montano's TPS applications was that he entered the United States no later than February 13, 2001. In fact, Montano entered the country after that date, on July 2, 2001, and was thus ineligible for TPS. With the intent to deceive and with full knowledge that disclosure of his actual entry date would disqualify him from TPS, Montano attested, under penalty of perjury, that he in fact entered the United States on September 30, 2000.

[5] Although, as Montano notes, Spain initiated its extradition request during the pendency of the criminal action in Massachusetts (*see* Habeas Application [D.E. #1] at 4), the Spanish

proceedings previously were a mere "possibility," they are now a reality: the United States has filed an extradition complaint and is seeking actively to certify Montano's extraditability under the Treaty.[6] While the Secretary of State ultimately will decide whether Montano should be surrendered to Spain if he is found to be extraditable, the prospect of having to answer the charges there is much more immediate and likely and no longer a speculative possibility. As a result, Montano has a much greater incentive to flee to El Salvador than he did during the pendency of the criminal case in Massachusetts, and he is a much greater flight risk.

This Court therefore should not disturb Magistrate Judge's Swank's determination that Montano has failed to establish that he will not flee if released on bail. As discussed above, that determination was not clearly erroneous and was based on reasonable grounds.[7]

D. Montano Cannot Establish "Special Circumstances" Justifying Release.

Montano also failed to meet his burden of showing by clear and convincing evidence "special circumstances" that would justify his release pending the extradition proceedings.

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request was not a matter of public record until the United States filed the extradition complaint on April 8, 2015, and was therefore not known to Montano during the criminal action. *See* Attachment 1 to Application for Writ of Habeas Corpus [D.E. # 1-1] at 9 (statement by sentencing judge in Massachusetts that, as of the date sentence was imposed, "there ha[d] been no formal action taken by the United States Government in respect to extradition of this defendant under the Spanish charges. . . .").

[6] Prior to the filing of the extradition complaint, Montano had reason to believe that the possibility of extradition was remote. As reported in the August 17, 2011 Boston Globe article attached to Montano's habeas petition: "Whether any of the defendants [charged in the Spanish indictment] will ever appear in a Spanish courtroom is an open question. 'Sometime I expect little from these cases but at the same time I have to be optimistic,' said [attorney Almudena] Berabeu [of the human rights organization The Center for Justice and Accountability]. She hoped the US Department of Justice would arrest and extradite suspects in the United States, but three months after the indictments, no arrests have been made. Because of that, she said, 'I'm a little more pessimistic. But you never, ever know.'" Attachment 2 to Application for Writ of Habeas Corpus [D.E. # 1-2] at 2.

[7] *See* discussion of standard of review, *supra*, at 6-7.

The "special circumstances" standard "is a more demanding standard than for ordinary accused criminals awaiting trial." *Yau-Leung v. Soscia*, 649 F.2d 914, 920 (2d Cir. 1981). Such circumstances "must be extraordinary and not factors applicable to all defendants facing extradition." *Nezirovic*, 990 F. Supp. 2d at 599 (citing *In re Extradition of Smyth*, 976 F.2d, 1535, 1535-36 (9th Cir. 1992)). Mindful of the overriding foreign relations interest in extradition matters, federal courts take a very limited view of what constitutes sufficient "special circumstances" to overcome the presumption against release. *See Molnar*, 182 F. Supp. 2d at 687 (listing factors that the courts have found *not* to be "special circumstances," including a significant bond and an unblemished record; the need to consult with counsel and assist in gathering evidence to support defense; the discomfort of sitting in jail; severe financial and emotional hardships; and advanced age or infirmity). The rare cases where special circumstances have been found include the fugitive having been officially exonerated of the crime underlying the extradition warrant; the raising of substantial claims upon which the fugitive has a high probability of success; an unusual delay in the appeal process; and the absence of suitable holding facilities for a juvenile – none of which are present here. *See Salerno*, 878 F.2d at 317 (citing cases); *Hu Yau-Leung v. Soscia*, 649 F.2d 914, 920 (2d Cir. 1981); *United States v. Zarate*, 492 F. Supp. 2d 514, 515 (D. Md. 2007).

Montano's argument purports to identify three special circumstances allegedly warranting his release: (1) his health problems; (2) the length of time since the charged offense conduct; and (3) the potential for protracted extradition proceedings. The government briefly addresses each of these claims below.

1. Health problems

Montano asserts, without explanation or evidence, that "[a] county jail is just not suited for the continued care he will need." Habeas Application [D.E. #1] at 6. In fact, as this Court is well aware, federal prisoners with serious health conditions are housed routinely in county jails in this district under contract with the Marshal's Service. When medical needs arise that cannot be met at a particular jail, the prisoner may be transferred to a hospital or to another jail facility that can provide more extensive medical services, such as Piedmont Regional Jail in Virginia.

Montano has been in the Marshal's custody since April 15. There is no suggestion that his medical condition has deteriorated in that time, let alone to the point that it is "life threatening, or so complex as to be beyond the capacity of federal authorities to manage while he is in their custody." *Nezirovic*, 990 F. Supp. at 602 (quoting *In re Extradition of Heriberto Garcia*, 761 F. Supp.2d 468, 481-82 (S.D. Tex. 2010)). S*ee also Bolanos v. Avila*, 2009 WL 3151328, at *4 (D.N.J. Sept. 24, 2009) ("The mere availability of a better, private form of medical treatment is not sufficient to overcome the presumption against bail."); *In re Extradition of Huerta*, 2008 WL 2557514, at *2 ("While Huerta's medical conditions are unquestionably serious, they are not life-threatening, nor are they so novel or complex as to be beyond the capacity of federal authorities to manage while he is in their custody."); *In re Extradition of Kim*, 2004 WL 5782517, at *5 ("Kim's condition is not a 'health emergency' which can only be addressed while on bail."); *In re Extradition of Hamilton-Byrne*, 831 F. Supp. 287, 290-91 (S.D.N.Y. 1993) ("Nothing convinces me that the Byrnes' health problems are unique or cannot be dealt with while in custody.").

As in the cases cited above, Montano's medical condition can be treated while he is in custody. His health is therefore not a special circumstance warranting release.

2. Delay

Montano asserts that Spain's 20-year delay in charging him with the 1989 murders constitutes a special circumstance favoring release. Habeas Application [D.E. #1] at 7. He cites *In re Extradition of Chapman*, 459 F. Supp.2d 1024 (D. Haw. 2006), but that case does not support his position. In *Chapman* the court found that Mexico's three-year delay in seeking the extradition of three American citizens, after they were charged in Mexico with false imprisonment, was a special circumstance favoring bail.

There was no comparable delay here. Spain made its initial extradition request on January 4, 2012, just eight months after the indictment was issued on May 3, 2011. [D.E. #3-2]. As for the lapse of time between the 1989 murders and the 2011 indictment, this would only have potential relevance if the detention decision were based on danger to the community, which it was not. On the contrary, Magistrate Judge Swank correctly noted that "the lapse of time does not appear relevant to the detention issue presently before the court." [D.E. #27 at 4].

3. Potential for Protracted Proceedings

Montano contends that the extradition proceedings "could well be prolonged and protracted" and that this is a special circumstance warranting release. Habeas Application [D.E. #1] at 8. But there is no reason to believe that the proceedings here will be any lengthier than other contested extradition matters. If anything, the record suggests the opposite. The extradition hearing was set initially for May 7, 2015, and then was continued at Montano's request to August 12, 2015. "[T]he normal passage of time inherent in the litigation process does not constitute a special circumstance." *Nezirovic*, 990 F. Supp.2d at 604 (quoting *United States v. Kin-Hong*, 83 F.3d 523, 525 (1st Cir. 1996)).

Moreover, it is important to note that the litigation process will not involve discovery or a trial. "The extradition hearing is not to serve as a full-blown trial and serves simply to permit a limited inquiry 'into the presence of probable cause to believe that there has been a violation of one or more of the criminal laws of the extraditing country.'" *Haxhiaj v. Hackman*, 528 F.3d 282, 287 (4th Cir. 2008) (quoting *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976)). Beyond criticizing Spain's probable cause evidence as "tenuous" and relying on hearsay, Habeas Application [D.E. #1] at 7-8, Montano does not identify any legal or jurisdictional defect to suggest that he is likely to prevail below.[8]

It will of course be for Magistrate Judge Swank to decide in the first instance whether the evidence establishes probable cause. Montano expresses confidence that he "will successfully challenge the Government's certification request," Habeas Application [D.E. #1] at 9, and if he is correct then that will be the end of the proceedings. But if the proceedings become "prolonged" due to subsequent habeas challenges, appeals, and petitions for review by the Secretary of State, that will be because probable cause was found.

CONCLUSION

Magistrate Judge Swank's finding that Montano failed to present clear and convincing evidence to overcome the strong presumption in favor of detention was not clearly erroneous. The government's motion to dismiss should therefore be granted, and Montano's habeas petition should be denied.

[8] While conceding that five of the murdered priests were Spanish-born, Montano asserts that there are "credible reports that the priests had become Salvadoran nationals well before 1989." Habeas Application [D.E. #1] at 9. However, it is well established that a fugitive's right to challenge the evidence in support of extradition is "limited to testimony which explains rather than contradicts the demanding country's proof." *Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir. 1978). Further, "courts have consistently concluded that hearsay is an acceptable basis for a probable cause determination in the extradition context." *Haxhiaj*, 528 F.3d at 292.

Respectfully submitted this 9th day of June, 2015.

THOMAS G. WALKER
United States Attorney

/s/ Eric D. Goulian
ERIC D. GOULIAN
Assistant United States Attorney
310 New Bern Avenue, Suite 800
Raleigh, NC 27601
Tel: 919-856-4356
Fax: 919-856-4487
Email: Eric.Goulian@usdoj.gov

/s/ John A. Capin
JOHN A. CAPIN
Special Assistant United States Attorney
1 Courthouse Way, Suite 9200
Boston, MA 02210
Tel: 617-748-3264
Fax: 617-748-3664
Email: John.Capin@usdoj.gov

CERTIFICATE OF SERVICE

I certify that on June 9, 2015, I caused a copy of the foregoing to be served by electronic filing on Assistant Federal Public Defender James E. Todd.

/s/ Eric D. Goulian
ERIC D. GOULIAN
Assistant United States Attorney
310 New Bern Avenue, Suite 800
Raleigh, NC 27601
Tel: 919-856-4356
Fax: 919-856-4487
Email: Eric.Goulian@usdoj.gov