

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

Case No. _____

INOCENTE ORLANDO MONTANO
MORALES,
Petitioner-Relator

v.

NEIL ELKS, Sheriff
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 successors and assigns; and

THE UNITED STATES OF AMERICA

Respondents

APPLICATION FOR A WRIT OF HABEAS
CORPUS PURSUANT TO 28 U.S.C. § 2241,
ET SEQ.

Now comes Petitioner-Relator, Inocente Orlando Montano Morales (“Mr. Montano”), by and through undersigned counsel, to appeal the order of detention issued by U.S. Magistrate Judge Kimberly Swank, on May 7, 2015. Mr. Montano respectfully applies to the District Court, pursuant to 28 U.S.C. § 2241, *et seq.*, for a writ of habeas corpus compelling Respondents to release Mr. Montano during the pendency of the extradition proceedings, conducted pursuant to 18 U.S.C. § 3184, in Case No. 2:15-MJ-1021-KS. Mr. Montano further requests a hearing on

this petition, and the opportunity to submit a supplemental memorandum prior to such hearing.¹

In support of his application, Mr. Montano states the following:

I. PROCEDURAL BACKGROUND

On April 8, 2015, the United States Attorney, Eastern District of North Carolina, on behalf of the government of Spain (collectively, the “Government”), filed an extradition complaint seeking certification of Spain’s request to extradite Mr. Montano to face criminal charges for his alleged conspiratorial responsibility for the killing of five Jesuit priests over twenty-five years ago on November 16, 1989, in the war-torn country of El Salvador. Docket Entry (D.E.) 1.

Mr. Montano had his initial appearance on April 16, 2015.² The Court appointed undersigned counsel to represent Mr. Montano, and then remanded Mr. Montano to the custody of the United States Marshals, at the Pitt County Detention Center, where he remains incarcerated.

Initially, after a telephone conference with the parties, the Court set the extradition hearing for May 7, 2015. However, upon review of the voluminous records submitted in this case between April 15 and May 1, 2015 (D.E. 3, 19), undersigned counsel realized he needed significantly more time in order to effectively represent Mr. Montano and, consistent with due process, to provide him with a meaningful opportunity to respond to Spain’s extradition request. Accordingly, Mr. Montano filed a motion to continue the extradition hearing for at least eight (8)

¹ Counsel just today received notice the transcript of the detention hearing has been completed, and that the Court issued a written order, filed today. Counsel anticipates filing a supplemental memorandum to incorporate both the transcript and the Court’s order.

² On April 15, 2015, Mr. Montano completed a 21-month imprisonment term for immigration fraud at Rivers Correctional Institution, Winton, North Carolina, within the Eastern District of North Carolina. *See generally, United States v. Inocente Orlando Montano Morales*, 1:12-CR-10044-DPW (D. Mass.), and the transcript of the September 27, 2013 Sentencing Hearing from that case. Attach. 1.

weeks. (D.E. 20, 23). On May 7, 2015, the Court granted this motion and set that hearing for August 12, 2015. That same day, the Court conducted a detention hearing, and ultimately denied Mr. Montano's request to be released on conditions during the pendency of the extradition proceedings.

II. FACTUAL SUMMARY

On November 13, 2008, acting as "popular prosecutors,"³ the Center for Justice & Accountability ("CJA"), a U.S. based human rights organization, and its Spanish counterpart, the Spanish Association for Human Rights ("APDHE"), jointly filed criminal charges in Spain, related to the killing of Jesuit priests and their housekeepers on November 16, 1989, in El Salvador. Relying on unattributed hearsay reports of high-level government and military meetings between November 13 and 15, 1989, the criminal complaint alleged Alfredo Cristiani, El Salvador's President from 1989 to 1994, several members of his Cabinet, and other high-ranking government and military officials, including Mr. Montano, collectively conspired to commit what the CJA alleged were the "terrorist murders" of the priests.

The case was assigned to Judge Eloy Velasco, of the Spanish National Court. On May 30, 2011, Judge Velasco returned a 90-plus page indictment which adopted the allegations of CJA's criminal complaint. The indictment included Mr. Montano as one of the accused, and was accompanied by international arrest warrants for all defendants. DE-3-2, pp. 2-107.

In August of 2011, with the help of a private detective, the CJA located Mr. Montano in Everett, Massachusetts, where he had lived and worked in a candy factory since coming to the United States in 2001. *See* "War Crime Suspect Found in Everett," Boston Globe, Aug. 17, 2011. Attach. 2. On August 22, 2011, the United States filed criminal a criminal complaint in the

³ Spain permits private associations to file criminal charges as "popular prosecutors." *See* D.E. 3-4, p.5.

District of Massachusetts, charging Mr. Montano with making materially false statements on immigration forms. *United States v. Inocente Montano*, 1:12-CR-10044-DPW (D. Mass), DE-1. The charges stemmed from false information in Mr. Montano's application for Temporary Protected Status. Following his initial appearance on those charges, Mr. Montano was released on conditions. He remained on pre-trial release for the next two years. *Id.*, DE-4, 41, 96. Even following the entry of a guilty plea on September 11, 2012, and after sentencing Mr. Montano on August 27, 2013, the Court permitted Mr. Montano to remain on release, and allowed him to self-report to the Bureau of Prisons (BOP) on October 13, 2013. DE 41, 96. Mr. Montano reported to the BOP as directed, and completed his 21-month imprisonment term on April 15, 2015.

Shortly after the initiation of these criminal proceedings in Massachusetts, on November 4, 2011, Spain initiated the present extradition request. Spain supplemented this request on January 4, 2012, August 21, 2014, and March 18, 2015. *United States v. Inocente Montano Morales*, 2:12-MJ-1021-KS (E.D.N.C.), DE-1.

On April 8, 2015, one week before Mr. Montano completed his 21-month sentence, the Government filed the extradition complaint in this district. *Id.* As previously noted, since April 16, 2015, Mr. Montano has been in the custody of the United States Marshals at the Pitt County Detention Center, in Greenville, North Carolina.

III. GROUNDS FOR RELEASE

A) Standard of Review

“[B]ail decisions in an extradition proceeding [may] only be challenged by a writ of habeas corpus” filed pursuant to 28 U.S.C. § 2241(c)(3). *Kin-Hong v. United States*, 926 F. Supp. 1180, 1184 (D. Mass. 1996), *rev'd on other grounds*, 83 F.3d 523 (1st Cir. 1996). “A

district judge reviews a magistrate judge's detention or release determination *de novo*." *Borodin v. Ashcroft*, 136 F. Supp. 2d 125, 128 (E.D.N.Y. 2001).

B) No Reasonable Grounds Existed for the Decision to Deny Bail

Consistent with due process, a person facing extradition proceedings (the "relator"), should be released on conditions if a court finds, by clear and convincing evidence, that the relator does not pose either a risk of flight or a danger to the community, and finds, at least by a preponderance of evidence, the presence of "special circumstances." See *United States v. Castaneda-Castillo*, 739 F. Supp. 2d 49, 55 (D. Mass. 2010); see also, *Plaster v. United States*, 720 F.2d 340, 348 (4th Cir. 1983) (holding that "the United States government must, in carrying out its treaty obligations, conform its conduct to the requirements of the Constitution, and that treaty obligations cannot justify otherwise unconstitutional governmental conduct"). What constitutes special circumstances is case-specific and "not limited to those previously recognized in published decisions." *In re Extradition of Gonzalez*, 52 F. Supp. 2d 725, 736 (W.D. La. 1999); *Nezirovic v. Holt*, 940 F. Supp. 2d 594, 600 (W.D.Va. 2013) ("[C]ourts are now recognizing that the cumulation of several factors may constitute special circumstances that justify bail pending certification proceedings.") (citation omitted).

Each of these three conditions are manifestly present in this case.

First, clear and convincing evidence demonstrates that Mr. Montano poses neither a flight risk nor danger to the community. Importantly, in the Massachusetts case, Mr. Montano remained on release for over two years, from August 2011 until he self-reported to the BOP in October 2013. Following sentencing and over the Government's objection, United States District Judge Douglas P. Woodlock permitted Mr. Montano to self-report, finding by clear and convincing evidence that Mr. Montano posed neither a flight risk nor a danger to the community.

Attach. 1, pp. 76-79. It also merits emphasis that Judge Velasco's 2009 indictment and international arrest warrants were widely reported in the press, and mentioned during the Massachusetts court proceedings. Thus, Mr. Montano was aware of the possibility of extradition proceedings ever since 2011, yet did not flee to El Salvador which passed an Amnesty Law in 1993, and therefore has refused to extradite any of the named defendants in the Spanish indictment. This demonstrative record of his compliance with release and his proven commitment to face and not flee possible extradition negates the argument advanced by the Government that its extradition complaint should negate a finding by this Court that Mr. Montano poses neither a flight risk nor danger to the community.

In addition to clear and convincing evidence that he does not pose a risk of flight nor danger to the community, several factors, individually and combined, demonstrate sufficiently "special circumstances" warranting release.

First, Mr. Montano's severe health problems were presented and thoroughly documented at the May 7, 2015 Hearing. Attach. 3 (medical records). Specifically, as a result of his bladder cancer surgery, Mr. Montano, a 72-year-old man, has a urine bag attached to his stomach that requires careful maintenance to avoid dangerous infections. One such potentially fatal infection, called C-Diff, occurred in the past and remains a risk of re-occurrence. Additionally, while in BOP custody, Mr. Montano developed Type II Diabetes which increases a person's susceptibility to infection. He also has progressive arthritis in both legs, and requires the use of a walker because he can barely walk on his own. As counsel emphasized at the detention hearing, Judge Woodlock specifically acknowledged Mr. Montano's serious health problems, and allowed him time to self-report so that his counsel could facilitate placement at the FMC Butner Medical

Center. Attach. 1, p.80. Since that time, Mr. Montano's health conditions have worsened, not improved.

Therefore, the need for adequate medical and health-care attention is greater, and warrants release, since Mr. Montano will remain in a county jail during the pendency of the extradition proceedings, not in an adequate BOP medical facility. A county jail is just not suited for the continued care he will need. However, the proposed third-party custodians, his brother-in-law and sister, Manuel and Ana Martinez, can provide the attention and care of Mr. Montano's health needs.⁴ *See Salerno v. United States*, 878 F.2d 317, 317(9th Cir. 1989) (citing a "serious deterioration of health" as a special circumstance warranting release).

In addition, several unique factors of Spain's extradition request constitute special circumstances warranting release. Most notably, Spain waited for over 20 years to pursue criminal charges for events that occurred in another country more than 25 years ago. *See In re Extradition of Chapman*, 459 F. Supp. 2d 1024, 1027 (D. Haw. 2006) (citing the "lack of any diplomatic necessity for denying bail" as evidenced by the three year delay in initiating extradition proceedings as a special circumstance). And, as Judge Woodlock observed in the Massachusetts case, "there does not appear to be any urgency about presenting him to Spain for purposes of prosecution." Attach. 1, p.40.

Moreover, Spain's reliance on unspecified hearsay reports made by anonymous sources to advance a tenuous collective conspiracy theory necessitates thorough and careful preparation

⁴ Mr. and Mrs. Martinez, both naturalized U.S. citizens, testified at Mr. Montano's detention hearing as his proposed third party custodians. As they were then, they continue to be willing and prepared to take Mr. Montano into their home pending the resolution of this extradition request. Mrs. Martinez is a retired certified nurse assistant (CNA) who could provide her brother with the needed health care. Both also testified to their commitment to sign an unsecured bond, if required, to provide 24/7 vigilance of Mr. Montano, facilitate electronic monitoring, and fulfill any other responsibilities deemed necessary by the Court. Mr. Martinez retired from 30 years of service as an airline mechanic for United Airlines. The Martinez's also took Mr. Montano to self-report to BOP custody, in October 2013.

before Mr. Montano can have a meaningful opportunity to challenge extradition. Since most of the documents presented by Spain do not specify the actual source of this hearsay, counsel will have to review thousands of documents mentioned in scattered footnotes, in order to even identify the actual source (if any) of this hearsay. Not one attributed source of this hearsay was present at these supposed meetings.

In the Massachusetts case, Judge Woodlock conducted a 4-day sentencing hearing where the Government relied upon many of the same reports cited by Judge Velasco, and the same expert, Stanford University Professor Terry Karl, to argue for a significant upward variance based in large part on the allegations of Mr. Montano's complicity in the killing of the Jesuit priests and their housekeepers. After considering all the Government had to offer, Judge Woodlock observed, "there has not been that proof here that meets any standard of due process . . . [instead] what we have is reports and totem pole hearsay[.]" Attach. 1, p.19. Referring to the hearsay information of a supposed meeting where the order to kill the priests allegedly issued, the Court concluded:

I have no evidence of his being present when the orders were given, no evidence in the sense of some witness who says, 'I was there and he was sitting at the table and he did not have his fingers in his ears.' I don't have anything like that. What I have is reports that say *ipse dixit* that he was there[.]

Id. p.51.

In sum, the Government's tenuous theory of collective guilt relies on crediting mostly unattributed hearsay. Due process demands that Mr. Montano have sufficient time to weed through the thousands of documents referenced by Judge Velasco and the Government's submissions so he can have a fair opportunity to challenge extradition. This means the proceedings could well be prolonged and protracted, both within the courts and, if necessary, within the State Department. *See In Matter of Extradition of Kirby*, 106 F.3d 855, 863 (9th Cir.

1996) (finding special circumstances based on the likelihood that extradition would be significantly delayed by the appeals process). Confining Mr. Montano for such an extended time to incarceration in a county jail which regularly has 24-32 hour lockdown will severely limit his ability to assist counsel to mount a meaningful challenge to extradition.

Given the paucity of evidence to support even a probable cause determination that Mr. Montano willfully conspired to kill the priests, there is a high probability that he will successfully challenge the Government's certification request. A higher probability exists of an acquittal of these charges in Spain, assuming that country provides him with a fair trial. *See In re Extradition of Nacif-Borge*, 829 F. Supp. 1210, 1215 (D. Nev. 1993) (citing the relator's showing of a high probability of success on the merits at the extradition hearing as a basis for release).

In fact, as noted in Mr. Montano's May 6, 2015 reply in support of a continuance, DE-23, thus far the Government has presented only mere assertions that the priests were citizens of Spain at the time of their deaths, November 16, 1989. Though Spanish-born, counsel has discovered credible reports that the priests had become Salvadoran nationals well before 1989. If they in fact were not also Spanish citizens when killed, then the Government cannot show probable cause of an essential element – citizenship of the victims -- and Spain has no jurisdiction over this case. Regardless, the factual investigation and application of Spanish dual-criminality laws may also contribute to a lengthy certification process.

Finally, after the hearing on May 7, 2015, counsel learned that on May 6, 2015, the Supreme Court of Spain had issued an opinion which permitted Judge Velasco to continue prosecution of the Jesuit murder case. Attach. 4 (Spanish Supreme Court Press Release, and English Translation). The Court primarily addressed Judge Velasco's conclusion that Spain

could exercise extra-territorial jurisdiction over the alleged crimes because El Salvador's criminal prosecution of the murders was found inadequate.⁵ The issuance of this opinion on May 6, 2015 raises a concern regarding whether the Government should have even initiated the extradition complaint a month before, on April 8, 2015. It is difficult to understand how the Government could have presented its extradition complaint for this Court's consideration before Spain's Supreme Court affirmed the jurisdictional validity of Judge Velasco's criminal proceedings. Certainly, the Government would have had to withdraw the complaint had the Spanish Supreme Court invalidated the prosecution. And, presumably, the Government did not know that Court would permit the prosecution to continue. Absent further explanation, it appears the Government filed the extradition complaint one week before Mr. Montano's release from BOP custody to keep him incarcerated and out of deportation proceedings to El Salvador.

IV. CONCLUSION AND CLAIM FOR RELIEF

For all these reasons, there existed no reasonable grounds for denying Mr. Montano bail pending the conclusion of the extradition process. Given the special circumstances present here, and because he poses neither a risk of flight nor a danger to the community, Mr. Montano respectfully requests this Court to grant this application for a writ of habeas corpus and release him on similar conditions as those previously imposed in the Massachusetts case. Alternatively,

⁵ As a result of this prosecution, El Salvador convicted the colonel who supposedly gave the kill order, several officers and enlisted men from the unit that carried out the killings, and at least one officer who destroyed documents after the killings. Mr. Montano was never charged for any crime related to the Jesuit murders. In 1993, following the peace accord between the government and the rebels, El Salvador enacted an amnesty law and those convicted were released from prison.

Coincidentally, Judge Velasco also initiated criminal prosecutions of several high-level officials from the Bush II Administration for torture of Guantanamo detainees, under a similar 'collective command' responsibility used to charge Mr. Montano and other high-level Salvadoran officials. Judge Velasco only suspended that prosecution after the Department of Justice responded to his inquiry regarding whether the United States adequately investigated these alleged human rights abuses. Even more coincidentally, the DOJ cited the 2004 prosecution of CIA contractor David Passaro in this district as proof of the Government's commitment to thoroughly investigate and prosecute the alleged abuses. See Attach. 5, *DOJ Mar 1, 2011 Letter to Judge Eloy Velasco; United States v. Passaro*, 5:04-CR-211-BO (E.D.N.C.).

Mr. Montano respectfully requests a hearing on this petition, to provide him a full and fair opportunity to be released on conditions during the pendency of the extradition proceedings conducted by U.S. Magistrate Judge Kimberly Swank.

Respectfully requested this the 14th day of May, 2015.

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