

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
NORTHERN DIVISION

NO. 2:15-MJ-1021-KS

*IN RE* REQUEST BY SPAIN FOR THE  
EXTRADITION OF INOCENTE  
ORLANDO MONTANO MORALES

REPLY TO GOVERNMENT'S  
RESPONSE IN OPPOSITION TO  
REQUEST FOR CONTINUANCE OF  
CERTIFICATION PROCEEDING

Inocente Orlando Montano Morales, by and through undersigned counsel, respectfully submits this reply in response to the Government's opposition to a continuance of the extradition proceedings. Based on the following, Mr. Montano contends that a continuance is essential to ensure he has a meaningful opportunity to defend against the requested extradition to Spain.

*A. Voluminous Record Requires Careful and Thorough Review*

To effectively represent Mr. Montano, undersigned counsel needs sufficient time to review and evaluate the hundreds of pages of extradition materials received between April 15 and May 1, 2015. Docket Entries (DE) 3, 19. Counsel has had little more than two weeks to review these voluminous and detailed documents (replete with footnotes citing other evidentiary sources). The Governments of Spain and the United States (collectively, the "Government"), on the other hand, have had the past five years to obtain and review thousands of documents, initiate criminal proceedings in Spain, and pursue extradition.

Since 2008, the Government has relied extensively upon a U.S. based human rights organization, the Center for Justice and Accountability ("CJA"). In fact, the CJA, via its Spanish counterpart, initiated the criminal prosecution against Mr. Montano and other former Salvadoran

officials as private, “popular” prosecutors. DE 3-4, p. 5. The thousands of documents compiled by the CJA, the Government, and the Spanish criminal court, purport to describe various events leading up to and following the killing of the Jesuit priests and their housekeepers on November 16, 1989, during a massive rebel offensive against the Salvadoran government.

Importantly for purposes of the Government’s extradition request, the documents describe often differing accounts of numerous meetings leading up to and following the killings. The Government asserts that the nature of these various meetings and its supposed participants “undergird the terrorist murder charges” which provide the statutory ground for its extradition request. DE 19-1, pp. 35-67. However, even a cursory review of the record reveals differing accounts of several meetings, especially regarding exactly when and where the kill order was supposedly given by Colonel Ponce to Colonel Benavides.

Through these alleged meetings, the Government seeks to weave a tenuous conspiracy theory thread which supposedly connects Mr. Montano to the killing of the priests and their housekeepers. To weave this conspiracy theory, the indictment relied upon reports from governmental and non-governmental sources, numerous witnesses, Salvadoran court proceedings, expert opinion testimony, and over 3,000 declassified U.S. government documents on reserve at the Library of Congress that the Spanish judge deems “essential” to the case. DE 19-1, pp. 87-91.

Given the importance of ascertaining a sufficiently credible and reliable account of the events which preceded the killings, especially of the various alleged meetings, undersigned counsel needs sufficient time to review these “essential” documents, and identify and obtain additional relevant evidence. This will not only help clarify which if any accounts of the supposed meetings are credible, it will provide Mr. Montano with the fair process which our Constitution requires.

*B. Due Process Requires a Meaningful Opportunity to Challenge Extradition*

Mr. Montano's due process rights also support his request for a meaningful opportunity to mount his defense to extradition. *Matthews v. Diaz*, 426 U.S. 67, 77 (1976) ("The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons [illegal aliens] from deprivation of life, liberty, or property without due process of law."); *Atuar v. United States*, 156 Fed. App'x 555, 561 (4th Cir. 2005) (unpublished) (emphasizing, "an alien within the United States' plenary and exclusive jurisdiction enjoys Fifth Amendment protections") (quoting *Matthews, supra*).

The three factors which determine the scope of this constitutional guarantee – liberty interest at stake, relevant governmental interests, and risk of an erroneous decision – support Mr. Montano's request for sufficient preparation time.

First, he faces prolonged incarceration both in this country, and then in Spain, a foreign land far from his home country of El Salvador. Regardless of whether one characterizes incarceration in this country as "civil commitment," it is a "massive curtailment of liberty." *Vitek v. Jones*, 445 U.S. 480, 491 (1980); *Addington v. Texas*, 441 U.S. 418, 425 (1979) ("This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."). Such prolonged incarceration for Mr. Montano - a 71-year-old man with severe health problems, facing a 30 year prison term in a foreign country (DE 3-2, pp. 74-75) – likely deprives him of both liberty and life.

Second, despite the Government's general comity interest which is present in any bi-lateral treaty, this interest is lessened here because Spain seeks to assert extra-territorial jurisdiction over a crime committed in another country from a quarter-century ago.

Third, given the significant due process rights of life and liberty at stakes, the risks of an

erroneous certification by this Court are inordinately high. *Addington*, 441 U.S. at 425 (“[T]he function of the legal process is to minimize the risk of erroneous decisions.”). Should the Court certify Mr. Montano’s extradition to Spain, it is highly likely the State Department will extradite him. *See United States v. Fernandez*, 99 F. Supp. 2d 1358, 1371 & n.9 (S.D. Fla. 1999) (“The Court cannot help but note that since 1940, the Secretary of State has refused to surrender legally extraditable persons only four times.”) (citing *In Re Extradition of Lang*, 905 F. Supp. 1385, 1398 (C.D. Cal. 1995)). And, given Mr. Montano’s indigent status, once turned over to Spain, the high bond imposed by the presiding judge – 3.2 million Euros (D.E. 19-1, p. 108) – inevitably means he will remain in prolonged, pretrial custody. Providing him with sufficient time to review and analyze the voluminous record, and a meaningful opportunity to develop and present evidence, will help minimize these risks.

The Government’s contrary insistence that the Court proceed forthwith risks turning the important certification process into a rush to judgment and a merely ministerial rubber-stamp. This would inhibit the Court’s statutory authority to carefully “consider the evidence,” 18 U.S.C. § 3184; *Bingham v. Bradley*, 241 U.S. 511, 517 (1916) (probable cause in extradition hearing requires “competent and adequate evidence”).

Of greater import, such a rush to judgment would render the certification requirement “toothless,” and contravene due process which calls for a case-specific application and “requires a magistrate judge to consider such evidence in its proper context.” *Atuar*, 156 Fed. App’x at 561 & n.11.

Indeed, as the Fourth Circuit recognized in *Atuar*, “[i]n certain circumstances due process also requires the magistrate judge to consider evidence submitted by the accused that explains or negates probable cause.” *Id.* Similarly, the Sixth Circuit has recognized that in certain extradition

cases, due process may require the Government to comply with the disclosure demands of *Brady v. Maryland*, 373 U.S. 83 (1963). *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353 (6th Cir. 1993) (“We believe *Brady* should be extended to cover denaturalization and extradition cases where the government seeks denaturalization or extradition based on proof of alleged criminal activities of the party proceeded against.”); *see also United States v. Edwards*, 777 F. Supp. 2d 985, 996-97 (E.D.N.C. 2011) (extending *Brady* to 18 U.S.C. § 4248 civil commitment proceedings, given the significant liberty interests at stake, citing *Demjanjuk*). This case, similar to *Demjanjuk*, concerns allegations of decades-old crimes against humanity. Given the complicated fact patterns, the strong desire to vindicate such crimes creates potential for confusion and mistaken determinations. In short, a Court faced with such a case cannot permit an understandable quest for vindication to trample upon the rights to a fair extradition process.

*C. Factual and Legal Issues Relevant to Certification Decision Remain*

In addition to the voluminous record and complicated, fact-intensive theory of culpability, several legal and factual issues need clarification before the Court can consider the Government’s extradition request.

First, as noted in Mr. Montano’s motion, the extradition request cites several treaties between the United States and Spain, dating from 1970 to 2004. *See Gov’t April 15, 2015 Filing*, DE 3-4, p. 24. Referencing the various treaties, on April 15, 2015 the Government stated:

Together, these treaties are referred to as the “Extradition Treaty. It is important to note that each supplement is not an entire reprint of the treaty; supplements only partially modify terms and provisions of earlier treaties. ***Therefore certain portions of older versions of the Extradition Treaty remain good law.***

DE 3-4, p. 20 & n.62 (emphasis added). Yet, in its response, the Government now asserts “there is only one treaty at issue here . . . [t]here are no other treaties relevant to this proceeding.” DE-21, p.

2. Given this contradictory representation, neither party nor the Court can proceed without a determination regarding which treaty provisions apply.

Finally, and most importantly, the precise ground for Spain's assertion of extra-territorial jurisdiction remains somewhat unclear. The 2011 indictment asserted what amounts to universal jurisdiction over charges related to crimes against humanity, and terrorist acts. Then, following Spain's 2014 legislation limiting its assertion of universal jurisdiction, the Government changed the crimes cited as grounds for extradition to "terrorist murders" which it limited to those priests identified as "Spanish nationals." DE 19-1, pp. 2-3. However, the record neglects to identify any supporting evidence for this assertion of Spanish nationality. During the past two weeks, undersigned counsel has encountered several news reports that identify the five priests as "Spanish born" Salvadoran nationals. If the Government now seeks to ground Spain's exercise of extra-territorial jurisdiction on the citizenship of the victims, the Government must support this assertion with evidence and relevant Spanish law. The relevant factual issues would include when the priests re-located to El Salvador, and whether and when they became Salvadoran nationals.

In addition to those factual clarifications, a legal analysis of applicable Spanish law regarding dual citizenship would be necessary to determine whether any of the slain priests were in fact Spanish citizens on the date of their deaths. If none were, then the extradition request should fail for two reasons. First, it means Spain does not have jurisdiction over the crimes alleged. Second, since nationality or citizenship is an essential element to the specified crimes, 18 U.S.C. § 2232, and Spain's assertion of "terrorist murders," the Government could not meet its burden to show probable cause of the alleged crimes.

In order to further investigate this crucial jurisdictional issue which, in addition, comprises an element of the alleged crime, undersigned counsel may need to consult with experts in Spanish

law. It will take time to identify, vet and obtain approval to hire such an essential expert. The Government has from the beginning benefitted from such expertise from Spain, the CJA, and its Spanish counterpart. At a minimum, due process should provide Mr. Montano with an equal opportunity to obtain and utilize this resource, so that he “has access to the raw materials integral to the building of an effective defense.” *Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985).

Based on the foregoing, Mr. Montano respectfully requests that the Court grant his motion for a continuance.

Respectfully submitted this 6th day of May, 2015.

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*CERTIFICATE OF SERVICE*

I HEREBY CERTIFY that a copy of the foregoing was served upon:

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by electronically filing the foregoing with the Clerk of Court on May 6, 2015, using the CM/ECF system which will send notification of such filing to the above.

This the 6th day of May, 2015.

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