UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 1:17-cv-23576-MGC

RICARDO ALBERTO MARTINELLI BERROCAL,

Petitioner,

v.

JEFFERSON BEAUREGARD SESSIONS III, United States Attorney General, REX WAYNE TILLERSON, United States Secretary of State, ROBERT WILSON, Acting Warden of the Federal Detention Center Miami

Respondents.
_____/

PETITIONER'S REPLY IN SUPPORT OF HIS MOTION FOR RELEASE ON BOND

Petitioner and former President of Panama, Ricardo Alberto Martinelli Berrocal, files this reply in support of his motion for release on bond pursuant to Local Rule 7.1(c). This Court has the power to release President Martinelli on bond despite the finding of extraditability as the overwhelming weight of authority establishes. Similarly, special circumstances exist in this case, at least as to the special circumstance Magistrate Judge Torres previously found. As a result, the sole arguable basis for denying President Martinelli's release on bond is that he could be a flight risk. As demonstrated in the underlying motion, however, "any risk of flight can be satisfactorily mitigated by the conditions of the release[.]" *See In re Extradition of Kapoor*, No. 11-M-456 RML, 2011 WL 2296535, at *5 (E.D.N.Y. June 7, 2011) ("*Kapoor I*"). To that end, President Martinelli is willing to subject himself to any conditions the Court deems proper to extinguish any supposed risk of flight he poses. President Martinelli believes that his past conduct, as discussed in the

underlying motion, shows that he is not a flight risk. To the extent the Court has even minimal doubts, President Martinelli requests a hearing where those doubts can be dissipated and he can make clear that he intends to and can comply with the exact conditions for release the Court desires to impose.

I. There is no authority for the notion that a post-certification release on bond is precluded by statute and, in this exact situation, binding precedent has held that the Court has this power.

Respondents recognize that the Court has the inherent authority to release a person on bond in the context of habeas proceedings absent a controlling statute. See Gov't's Resp. in Opp. to Pet.'s Mot. for Release on Bond 7 [D.E. 25] ("Opp."). Respondents argue that there is a statutory preclusion to release on bond found at 18 U.S.C. § 3184, and that this statutory language is supported by the Supreme Court's ruling in *Wright v. Henkel*, 120 U.S. 40 (1903). As made clear in the underlying motion, "[this] argument has not fared well in federal courts." *Nezirovic v. Holt*, 990 F. Supp. 2d 594, 598 (W.D. Va. 2013). Respondents attempt to distinguish one case cited in the underlying motion, *In re Kapoor*, No. 11-M-456 (RML), 2012 WL 2374195 (E.D.N.Y. June 22, 2012) ("*Kapoor II*"), "and the few like it," by arguing that those courts "fail[ed] to apply the law" and they were "not even presented with the question at issue here[.]" Opp. 9. Both arguments miss the mark.

The court in *Kapoor II* and the other cases like it did not fail to apply the law—Respondents merely do not like the way the courts applied it. *See* 2012 WL 2374195; *see also, Wroclawski v. U.S.*, 634 F. Supp. 2d 1003 (D. Ariz. 2009) (cited in the underlying motion and holding that 18 U.S.C. § 3184 did not preclude the granting release on bond after a certificate of extraditability had been issued); *In re Extradition of Gonzalez*, No. 09-mj-70576-DMR-1, 2015 WL 1409327, at *5 (N.D. Cal. Mar. 27, 2015) (same and additionally holding that "courts have 'time and again considered bail requests after a judicial finding of extraditability'" (footnote omitted) (citation

omitted)). Despite Respondents' characterization of the cases holding that a court has the power to release a person on bail post-certification of extraditability as "few," they are actually numerous. *See, e.g., Nezirovic v. Holt*, 990 F. Supp. 2d 594, 598 (W.D. Va. 2013) ("[T]he court concludes that *Wright v. Henkel* allows a court to release an extraditee on bond pending habeas review following certification of the extradition by a magistrate judge."); *Zhenli Ye Gon v. Holder*, No. 7:11-cv-575, 2013 WL 5726292, at *2 (W.D. Va. Oct. 22, 2013) (rejecting the government's argument that the petitioner was "not entitled to bond, as a matter of law, because a certificate of extraditability has issued"); *In re Extradition of Hilton*, No. 13-7043-JCB, 2013 WL 3282864, at *3 (D. Mass. June 26, 2013) ("several courts have found that they have the authority to grant release after the issuance of a certificate of extradibility and during the pendency of habeas proceedings" and holding the same with regards to the extraditee before the court despite the government's argument under 18 U.S.C. § 3184); *Garcia v. Benov*, No. CV 08-07719 MMM (CWx), 2009 WL 6498194, at *5 n. 23 (C.D. Cal. Apr. 13, 2009) ("The court rejects respondent's argument that the courts are without power to grant bail following certification of a request for extradition."). In fact, "many courts, including three circuit courts of appeals, have addressed the issue of bond in international extradition cases following certification. These decisions, applying the *Wright v. Henkel* special circumstances standard, contain no hint that a federal court lacks the power to issue a bond post-certification." *Nezirovic*, 990 F. Supp. 2d at 598 (citing *Salerno v. U.S.*, 878 F.2d 317 (9th Cir. 1989); *Beaulieu v. Hartigan*, 554 F.2d 1 (1st Cir. 1977); *Yau-Leung v. Soscia*, 649 F.2d 914 (2d Cir. 1981)).[1]

[1] President Martinelli further posits that the binding precedent in *Jimenez v. Aristiguieta*, 314 F.2d 649 (5th Cir. 1963) ("*Jimenez II*"), also falls into this category for the reasons discussed later. *See also, Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) (holding that decisions of the Fifth Circuit handed down before October 1, 1981, are binding precedent in this circuit). Perhaps recognizing this, Respondents argue that *Jimenez II* fails in light of the statutory

Ironically, Respondents offer only one case that supposedly supports their position: *In re Extradition of Markey*, No. 3:09-MJ-75 CAN, 2010 WL 610975 (N.D. Ind. Feb. 18, 2010). But there, the extraditee not only failed to offer any argument as to why the statute did not apply, he explicitly agreed with the government's position. *Id.* at *4 ("[T]he United States filed its submission, arguing that the Court has no authority to release Markey once it issues the certificate of extraditability pursuant to 18 U.S.C. § 3184. Markey, in his submission, agrees."). For this and other reasons, the great weight of authority has distinguished *In re Markey*; the statute does not deprive this Court of the power to release President Martinelli on bond. *See, e.g.*, *Nezivoric*, 990 F. Supp. 2d at 599 (holding that *In re Markey*'s "precedential value is negligible"); *Zhenli Ye Gon*, 2013 WL 5726292, at *2 (holding that *In re Markey* was "inapposite" for several reasons, including because it did not arise "in the habeas setting"). As a result, and given that "[*In re Markey*] contains no analysis on this issue[,]" there is no case law which supports the Respondents' argument that 18 U.S.C. § 3184 precludes the release of President Martinelli on bond. *In re Gonzalez*, 2015 WL 1409327, at *5 n.1.

Respondents' second argument against the Court's authority is that the cases relied on by President Martinelli did not deal with the situation present here: a detained person seeking release on bond following certification and denial of a petition for writ of habeas corpus. *See* Opp. 8. Respondents' argument is bereft of authority. Further, it misses the underlying thread of the many cases cited above: that there is no distinction between a pre-certification and a post-certification bond motion in an extradition case. This is true even after the denial of a petition for writ of habeas corpus. *See, e.g., In re Gonzalez*, 2015 WL 1409327, at *1 (allowing the extraditee to remain out

limitation supposedly provided by 18 U.S.C § 3184, but for the reasons that precede this note and those that follow, no court has found that limitation. Instead, they have all found that the statute does not limit the district court's power to grant bail.

on bond after "Judge Koh issued an order denying the [habeas] petition" and subsequent to extraditee's filing a notice of appeal); *Garcia*, 2009 WL 6498194, at *1 (finding the court had authority to release a person on bail "pending resolution of his second petition for habeas corpus" (emphasis added)); *Yau-Leung*, 649 F.2d at 920 (affirming a release on bail despite reversing a grant of a petition for writ of habeas corpus).

Fatal to Respondents' arguments is that, in binding precedent, the former Fifth Circuit Court of Appeals found that the district court had authority to release an individual on bond in this exact situation.[2] A Latin American former head-of-state was found extraditable and was "committed… to the custody of the [United States] to await the action of the Secretary of State under 18 U.S.C. § 3186." *Jimenez v. Aristeguieta*, 311 F.2d 547, 552 (5th Cir. 1962) ("*Jimenez I*"). This occurred on June 16, 1961. *Id.* Subsequent to him being taken into custody, petitioner in that case had both his original and amended petitions for writ of habeas corpus dismissed on August 23, 1961. *Id.* at 550. On that same day, however, petitioner was—again, after being in custody for two months—released on bond by the same judge who had just denied his habeas petitions. *See Jimenez II*, 314 F.2d at 651 (stating that the district court entered an order on August 23, 1961, "enlarging appellant on bond").[3] Exactly as should occur here, a Latin American former head of state was found extraditable, taken into custody, lost a petition for habeas corpus and then was granted release on bond by the district court judge. On review of the order revoking the

[2] For this reason and the fact that this case has been cited numerous times, Respondents' are incorrect when they argue that they are not aware of any case in which a fugitive found extraditable was detained, lost a petition for habeas corpus, and was then released on bond. *See* Opp. 1.

[3] For the avoidance of doubt, when the former Fifth Circuit referred to "enlarging appellant on bond[,]" the only correct understanding of "enlarge" is "[t]o free from custody or imprisonment." Black's Law Dictionary 610 (9th ed. 2009). If the court was modifying some other unmentioned order releasing the petitioner on bond, the sentence would have so said, and "enlarging" would have been followed by reference to that order—not the petitioner himself.

granting of release on bond, the former Fifth Circuit did not—as Respondents' arguments would require—hold that the district court had no authority to release petitioner after he had been committed. Instead, it held in binding precedent that "[t]he District Court had inherent power as the habeas corpus court or judge to enter the [bond order] respecting the custody or enlargement of appellant[.]"[4] *Id.* at 652 (emphasis added). This Court has the power to release President Martinelli on bond at this stage of the proceedings, and should do so.

II. There are special circumstances here, both individually and in the aggregate.

As a preliminary matter, Respondents' opposition contradicts itself with regards to whether Magistrate Judge Torres found that President Martinelli proved that a "special circumstance" warranted his release on bond. On the one hand, Respondents argue that President Martinelli has failed to demonstrate any special circumstances and "instead advances precisely the same arguments that Magistrate Judge Torres carefully considered and rejected." Opp. 6. On the other, Respondents recognize that "Magistrate Judge Torres posited that Petitioner's status as a former head of state '[m]ay be' a special circumstance given that '[t]his type of case does not come around often.'" Opp. 20 (alteration supplied). President Martinelli posits that his status as a former head of state, alone and together with the other bases argued in the underlying motion, constitute special circumstances in favor of bail.

As to the former-head-of-state argument, Magistrate Judge Torres agreed. *See* Order on Mots. Related to Release on Bail 2-3, no. 1:17-cv-22197-EGT [D.E. 38] (July7, 2017) ("[T]he circumstances involved are indeed extraordinary, and… [President Martinelli] has made a strong case for the grant of bail as a former head of state of an American ally like the Republic of

[4] The former Fifth Circuit's contrasting "custody" with "enlargement" in the quoted language is further proof that the district court released the petitioner on bond after, or at least concurrently with, the denial of the habeas petitions.

Panama[.]"); *id.* at 41 ("[W]e find that this unique case does give rise, at least in theory, to the type of 'special circumstance' that *Wright* may have been envisioning. The extraordinary nature of such an extradition request implicates significant foreign relations, comity, and international law issues. While those issues are hashed out, it is not inconceivable that a defendant in Pres. Martinelli's shoes would be granted bail solely on this basis."). Further, while Magistrate Judge Torres found that no other special circumstances qualified, he did not explicitly consider them in the aggregate. Indeed, he did not need to as he found the fact that President Martinelli was a former head of state constituted a special circumstance by itself.

Respondents take issue with the various special circumstances presented in the underlying motion and variously argue that the circumstances are not sufficiently extreme enough to warrant them or that cases—other than those cited by President Martinelli—have found those special circumstances to not be special circumstances at all. While the Court can weigh the sufficiency of each individual circumstance, it is clear that they are sufficient in the aggregate. *See Wrocklawski*, 634 F. Supp. 2d at 1009 ("when viewed in the aggregate, [they] compelled a finding of special circumstances"); *see also*, *In re Requested Extradition of Kirby*, 106 F.3d 855, 864 (9th Cir. 1996) ("Notwithstanding the weakness of the 'special circumstances' upon which the district court relied, we hold that such 'circumstances' do exist."). Indeed, as a single special circumstance is sufficient—President Martinelli's status as a former head of state—that necessarily requires that the special circumstances be sufficient in the aggregate.

III. President Martinelli presents no risk of flight.

President Martinelli was arrested a mere week after announcing his intention to run for mayor of Panama City in 2018 and Vice-President of the Republic of Panama in 2019. He believes, and continues to believe, that the Panamanian proceedings are a manifestation of President Varela's desire for revenge and to eliminate a political rival. It is on this basis that President

Martinelli and members of his family have filed for asylum in this country. Despite being aware of the extradition request and that he could be haled before a United States court to indirectly answer the spurious charges alleged against him, he made no effort to leave the United States.

Respondents argue that release on bond is not proper because President Martinelli "has the financial and practical means to flee[,]" that he poses "an unacceptable risk." Opp. 10-11. To arrive at this conclusion, Respondents rely on media reports, along with a gratuitous reference to '*Scarface*', to argue that President Martinelli is a "billionaire who own his own plane, two helicopters, and a yacht[.]" Opp. 5. President Martinelli contests such characterizations as they are simply untrue. While President Martinelli is not a billionaire, neither is he a person without means. Unfortunately, and as a direct result of these proceedings and those in Panama, he lacks access to the grand majority of his means.[5] It is unreasonable, however, to believe that he would take "flight from the United States to yet another country, or to an underground location in the United States," and thereby become an international fugitive with no hopes of reviving his political career and lose what little access he has to his supposed billion dollars. Opp. 11. In light of President Martinelli's decision to remain and seek asylum in the United States, and his willingness to submit to onerous bond conditions, Respondents' speculation should be rejected.

To make clear that he poses no risk, President Martinelli is willing to subject himself to any conditions the Court deems proper to extinguish any supposed risk of flight he poses: be they financial, related to surveillance, related to limitations on his activity once released on bond, or related to any other area. *See Kapoor I*, 2011 WL 2296535, at *5 ("any risk of flight can be

[5] Respondents argue that the bond conditions outlined in the underlying motion are "slightly watered down" from the conditions proposed to Magistrate Judge Torres. Opp. 10. To the extent this is true, it is because of President Martinelli's inability to access his supposed near-limitless financial wherewithal.

satisfactorily mitigated by the conditions of the release"). If the Court eliminates the possibility of flight, there can be no risk of flight.

Finally, Respondents argue that President Martinelli's continued detention is "vital" to ensure that United States can meet its treaty obligations, primarily relying on the decision rendered in *Wright* more than 100 years ago. Opp. 19. President Martinelli does not contest that the United States has an interest in meeting its treaty obligations, but granting his release on bond would not in any way vitiate that interest. This Court may impose conditions on President Martinelli's release that would have been the stuff of science fiction in 1903 when *Wright* was decided, including electronic monitoring twenty-four hours a day every day, surveillance methods, and travel restrictions. Even without the Court's explicit ordering, international and domestic travel is heavily regulated and surveilled. In sum, the Court can make President Martinelli's ability to flee impossible, and thereby, impossible for him to frustrate the United States' interest in complying with treaties after President Martinelli has exercised his appellate rights. To the extent the Court has even minimal doubts, President Martinelli renews his request—made in his underlying motion—that the Court dispel them by imposing its desired conditions. Should the Court have any hesitation, President Martinelli requests an expedited hearing where he can make clear his intent to stay, make clear his intent to (and ability to) comply with the exact conditions for release the Court desires to impose, and make clear that he does not pose a risk of flight.

Dated: February 5, 2018

Respectfully submitted,

s/ Marcos Daniel Jiménez

Marcos Daniel Jiménez
Florida Bar No. 441503
MARCOS D. JIMÉNEZ, P.A.
255 Alhambra Circle, Suite 800
Coral Gables, Florida 33134
Telephone: 305.772.6026
Email: mdj@mdjlegal.com

John R. Byrne
Florida Bar No. 126294
Jordi C. Martínez-Cid
Florida Bar No. 100566
LEÓN COSGROVE, LLP
255 Alhambra Circle, Suite 800
Coral Gables, Florida 33134
Telephone: 305.570.3233
Facsimile: 305.437.8158
Email: jbyrne@leoncosgrove.com
Email: jmartinez-cid@leoncosgrove.com
Email: lburns@leoncosgrove.com

David A. Howard
Florida Bar No. 956589
DAVID A. HOWARD, P.A.
25 S.E. 2nd Avenue, Suite 1100
Miami, Florida 33131
Telephone: 786.360.6056
Email: david@davidhowardlaw.com

Counsel for Ricardo Alberto Martinelli Berrocal

REQUEST FOR HEARING

Petitioner and former President of Panama, Ricardo Alberto Martinelli Berrocal, pursuant to Local Rule 7.1(b)(2), requests a hearing on his underlying motion for release on bond. While the Local Rules envision the filing of this request along with the underlying motion, President Martinelli did not believe that such a hearing was necessary. Respondents, however, argue that President Martinelli poses an unacceptable risk of flight and that the bond conditions are inadequate. To the extent the Court believes there is merit to Respondents' argument in this or any other regard, President Martinelli would appreciate the opportunity to address those concerns and provide the Court whatever assurances it desires.

s/ Marcos Daniel Jiménez
Marcos Daniel Jiménez

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2018, I electronically filed the foregoing using the CM/ECF system which in turn will serve a copy by electronic mail to all counsel of record.

s/ Marcos Daniel Jiménez
Marcos Daniel Jiménez