

**UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.: 17-22197-MC-UNA

IN THE MATTER OF THE  
EXTRADITION OF RICARDO  
ALBERTO MARTINELLI BERROCAL

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**RICARDO MARTINELLI'S MOTION FOR RELEASE ON BAIL**

Today, Panamanian President Juan Carlos Varela visits the White House. Exactly one week ago, the United States government arrested Varela's political archenemy, former Panama President Ricardo Martinelli, on an extradition warrant that Panama requested over a year ago. The timing underscores the political nature of this extradition proceeding and the punitive nature of the United States' robotic opposition to bond for President Martinelli, who has lived openly in the United States since 2015 and recently had an asylum interview with the government here.

As for Panama, which has been persecuting former President Martinelli since he left office in 2014, the political nature of its case is illustrated by Harry Diaz, the Panamanian prosecutor and one of the judges in President Martinelli's case. When asked to rate, on a scale of 1 to 10, the independence of the Panamanian judiciary that approved the charges, Diaz suggested that it would be in the "negative numbers." This lack of independence is on full display here. Panama's purported charges against President Martinelli are legally defective, lack probable cause, and are transparently motivated by politics.

This Court should release President Martinelli on bond pending its examination of Panama's extradition request because "special circumstances" warrant his release and he is neither a flight risk nor a danger to the community.

At least seven special circumstances apply here:

- First, President Martinelli has *six* substantial, case-dispositive claims against extradition, including (i) lack of probable cause that President Martinelli committed any crimes; (ii) President Martinelli's immunity from the charges under black letter Panamanian law; and (iii) Panama's failure to produce a valid warrant for an extraditable offense;
- Second, this will be a protracted proceeding. As a result, President Martinelli faces the specter of a detention period that could last years;

- Third, bail would be available in Panama to a Panamanian citizen facing these charges;
- Fourth, because of Panama's years-long delay in seeking extradition, the diplomatic necessity for ordering detention is sorely missing;
- Fifth, President Martinelli has no criminal history, much less any history of violent crime;
- Sixth, President Martinelli is a 65-year-old man with numerous health issues. His condition will undoubtedly deteriorate during a prolonged detention period;
- Seventh, the charges against President Martinelli are transparently motivated by politics, as evidenced by the fact that he fired the sitting president of the country that is seeking his extradition.

With respect to risk of flight, President Martinelli is not going anywhere. He has family here. He has filed for political asylum here. And, unlike other defendants who appear before this Court, President Martinelli knew he might be arrested and did nothing to elude it. As a show of his commitment to stay and fight extradition, President Martinelli is presenting this Court with an unprecedented bond package that goes well beyond the package approved by Judge O'Sullivan in *In the Matter of the Extradition of Arias Leiva*, Case No. 16-23468-MC-O'Sullivan (S.D. Fla. Feb. 6, 2017), a case which involved a political figure from Colombia who posed a markedly greater risk of flight than President Martinelli and who had actually fled Colombia *after* his conviction there.

## I. FACTS

### A. The Chronology

#### 1. Background

##### *a. President Martinelli is Elected to Office*

President Martinelli's political career began in 1998, when he founded the Cambio Democratico Party. President Martinelli is currently the president of the Cambio party, the opposition party to the Panamenista Party, the party currently in power and President Varela's party.

In 2009, President Martinelli ran for president, with Juan Carlos Varela running as vice-president. Although Varela was a member of the opposition, he and President Martinelli agreed that, if elected, they would run a coalition government. President Martinelli also promised Varela that he and the Cambio Party would support Varela's run for president in 2014.

President Martinelli and Varela won the 2009 election with over 61% of the popular vote. After he was elected president, President Martinelli, consistent with common political practice in Panama, appointed Varela to the cabinet post of Foreign Minister, a position that is the functional equivalent of United States Secretary of State.

*b. President Martinelli Fires the Current President of Panama*

In 2011, two years into his presidential term, President Martinelli received information that Vice-President Varela, in his position as Foreign Minister, was requiring a number of his foreign consulate officers to pay him as much as \$25,000 a month in kickbacks from their overseas posts. On August 30, 2011, after confronting Varela, President Martinelli fired Varela as foreign minister. Because Panamanian law prohibited President Martinelli from firing Varela from his position as vice-president, Varela technically remained in that position.

*c. President Martinelli Withdraws Support; Varela is Elected President*

Once President Martinelli became aware of Varela's conduct while in office, he decided that he could not support Varela's campaign for the presidency. President Martinelli publicly announced that the Cambio Party would be nominating someone else for president. In response, Varela announced that he was leaving the coalition government and running for the presidency as a member of the Panamenista party. Varela was ultimately elected president. President Martinelli left the presidency with an approval rating of 67%.

*d. Varela Launches Numerous Investigations into President Martinelli*

Immediately upon his election to the presidency, in July 2014, President Varela launched numerous criminal investigations into President Martinelli. The original prosecutor assigned to one such case was Lizette Chevalier, Panama's top anti-corruption prosecutor. While she was on the case, cabinet members, the National Police, and President Varela's office attempted to steer her investigation towards President Martinelli and members of the Cambio party. The National Police even ordered Ms. Chevalier to lodge groundless accusations against individuals so that they would falsely implicate President Martinelli in a crime. When Ms. Chevalier refused to allow such influence, she was removed from the case, transferred to another city, and ultimately fired.

On August 30, 2016, on the five-year anniversary of his firing by President Martinelli, President Varela discussed the firing during a nationally covered press conference, calling it "probably one of the most difficult days in my public life[.]" Sertv, *Juan Carlos Varela*,

*Presentación de Plan Estratégico Interinstitucional de Juventudes*, YOUTUBE (Aug. 30, 2016), <https://www.youtube.com/watch?v=eBC3WNFnfog>.

*e. President Martinelli Travels to the United States and Seeks Asylum*

Due to President Varela's actions, in February 2015 President Martinelli traveled to the United States, and on July 15, 2015, he filed his asylum application, providing the government with his home address and fingerprints. In his asylum application, President Martinelli openly discussed, in detail, the pending investigations against him, including the investigations into his alleged misuse of government equipment to wiretap and surveil political opponents and members of the Panamanian government. President Martinelli unequivocally denied any involvement in illegal activities. He had his asylum interview with the Department of Homeland Security on March 16, 2017.

2. The Extradition Request

*a. Harry Diaz Charges President Martinelli without "Imputación" and Despite Immunity*

President Martinelli is entitled to two forms of immunity. The first form, presidential immunity, precludes him from being convicted of any crimes that he committed while in office, with a few, limited exceptions. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ, 1972, Title VI, Ch. 1, art. 191. The second form is immunity that President Martinelli has based on his membership in the Central American Parliament ("Parlacen"). Morales Aff. at 7. This immunity precludes him from being *charged* with any crimes, unless Panama succeeds in having that immunity revoked. *Id.*

Despite his immunity, Panama assigned Harry Diaz, a Supreme Court judge, to serve as "Prosecuting Magistrate" in the investigation of President Martinelli for alleged misuse of government equipment for wiretapping and surveillance. Under the Panamanian law, before a prosecutor can properly file formal charges against a person, an investigative phase must occur. Moreno (Imputación) Aff. at 3-4.<sup>1</sup> A key part of the investigative phase is the "imputación." Despite the fact that no "imputación" had occurred in President Martinelli's case, on October 9, 2015, Prosecuting Magistrate Diaz issued an indictment against President Martinelli. The indictment charged four crimes: (1) interception of telecommunications without judicial

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<sup>1</sup> A translation of the affidavit of Roberto J. Moreno will be provided when it becomes available.

authorization, in violation of Article 167 of the Criminal Code of Panama; (2) tracking, persecution, and surveillance without judicial authorization, in violation of Article 168 of the same code; (3) embezzlement by theft and misappropriation, in violation of Article 338; and (4) embezzlement of use, in violation of Article 341.<sup>2</sup> Despite having and setting forth no evidence in the indictment for the last two charges, *see* Moreno (Embezzlement) Aff. at 6, Diaz added them because of Panama's recognition that President Martinelli has presidential immunity for the first two charges.

Although Diaz's indictment purports to charge the previously mentioned offenses, on December 11, 2015, a magistrate judge in Panama issued an arrest warrant for President Martinelli solely for "contempt," which is not a criminal offense in Panama and certainly not an extraditable offense under the Treaty. The declaration of contempt was improper under Panamanian law.

*b. Panama's Vice-President Publicly Discusses the Planned Extradition*

On May 5, 2016, the Vice-President of Panama, Isabel de Saint Malo de Alvarado, gave a public interview at a Council on Foreign Relations event held in the United States, during which she talked about Panama's plan to extradite President Martinelli. Interview by Nelson Cunningham with Saint Malo de Alvarado, Vice-President of Panama, at the Council on Foreign Relations (May 5, 2016). Vice-President Saint Malo noted that Panama was having "discussions with the United States authorities" about supporting the request and that she "hope[d] that we will request his extradition soon enough." *Id.* During this same interview, Vice-President Saint Malo commented on President Martinelli's use of social media, commenting that "this person is living in the United States really just dedicated to Panamanian politics through social media." *Id.*

*c. President Martinelli Announces Candidacy; Panama Seeks Extradition*

On June 5, 2017, President Martinelli announced, on social media, his candidacy for the offices of mayor of Panama in 2018 and vice-president of Panama in 2019. This announcement came two weeks before President Varela's planned visit to the White House on June 19, 2017.

On June 12, 2017, a week *after* President Martinelli announced his candidacy, and a week *before* President Varela's planned visit to the White House, the United States filed its Complaint seeking extradition. That same day, federal marshals arrested President Martinelli.

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<sup>2</sup> *See* "Selected Excerpts of Panamanian Code," attached.

*d. The Complaint and the “Pitti” Affidavit*

The Complaint sets out the same charges contained in the Diaz indictment. Compl. at \*1-2.

Although Panama produced a “box of exhibits” in support of the Complaint, the allegations in the Complaint rely heavily on an affidavit only recently executed by a man named Ismael Pitti.<sup>3</sup> Pitti Aff. Pitti, according to the Complaint, served on the “special, covert unit within the NSC” that President Martinelli allegedly created. Compl. at \*3. Pitti, who is well known to the Panamanian government, does not appear as a witness in the Diaz indictment. As a result, he could not be a witness in Panama against President Martinelli. His affidavit was executed on the basis of “information and belief” and reeks of rank hearsay, as Pitti does not identify a single personal interaction with Martinelli. The Panamanian government has bought and paid him as a witness, providing him with a well-paid job in Washington, D.C., despite his alleged participation in the alleged offenses.<sup>4</sup>

Notably, Pitti’s primary source for information was a man named Ronny Rodriguez. Pitti Aff. Rodriguez, according to the Complaint, was also a member of the “special, covert” NSC unit. Compl. at \*3. Rodriguez has submitted a sworn statement that denies that President Martinelli was involved in any wiretapping or surveillance. Rodriguez Aff. at 4. Rodriguez also reports that, in or around July 2014, Pitti called him and told him that he was “receiving . . . pressure to incriminate President Martinelli.” *Id.* at 2.

**B. The Panama Judiciary**

The State Department recently acknowledged the “human rights problems” associated with the Panamanian judiciary, which is “susceptible to corruption and outside influence,” U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Panama 2016 Human Rights Report 1 (2016), and noted that it was facing “allegations of manipulation by the executive branch.” *Id.* at 6.

On March 17, 2017, Diaz, the person who issued the charges underlying the extradition request, gave an interview to a reporter in Panama. Interview by Flor Mizrachi Angel with Harry Diaz, Prosecuting Magistrate (Mar. 12, 2017). During the interview, Diaz stated that he had

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<sup>3</sup> The affidavit was signed in Washington D.C. on January 23, 2017, over a year after Diaz issued the indictment against President Martinelli. Pitti Aff.

<sup>4</sup> President Martinelli will have witnesses available who can testify to these facts.

“stained my name, serving as a magistrate.” *Id.* at 1. During this same interview, Diaz publicly maligned the independence of the Panamanian judiciary. *Id.* Noting that the Court had been in a “free fall” since President Varela’s ascension to the presidency, Diaz pointed out the national police’s frequent visits to Court chambers and the various surveys that showed the court’s “lack of independence and credibility.” *Id.* The reporter then asked Diaz to rate the independence of the judiciary, on a scale of 1 to 10. *Id.* Diaz’s response: “Can we go into negative numbers?” *Id.* at 3.

During this same interview, Diaz also noted President Varela’s control over current Panamanian Supreme Court President Jose Ayu Prado. He noted that President Varela selected Panamanian Supreme Court Justice Ayu Prado for the position because “[Court President Ayu Prado] allowed himself to be told what to do.” *Id.* at 1. The allegation that Court President Ayu Prado is in President Varela’s pocket is particularly troublesome given the recent expansion of Ayu Prado’s influence. In its report, the State Department noted that, in 2016, the judiciary had “hired 931 lawyers to serve as public defenders, judges, and magistrates.” Human Rights Report at 6. The State Department reported allegations that these “new hires lacked independence, as some of them previously worked for current Chief Justice Jose Ayu Prado.” *Id.*

## II. MEMORANDUM OF LAW

A Court may issue a bond in an extradition case if (A) special circumstances warrant the defendant’s release; and (B) the defendant is not a flight risk. Both apply here.

### A. Special Circumstances Warrant President Martinelli’s Release

To be entitled to bond, President Martinelli must prove the existence of “special circumstances.” *In re Extradition of Ghandtchi*, 697 F.2d 1037, 1038 (11th Cir. 1983). Special circumstances include: (1) “the raising of substantial claims upon which the appellant has a high probability of success,” *Salerno v. United States*, 878 F.2d 317, 317 (9th Cir. 1989); (2) the likelihood of “lengthy delays . . . as a result of the actual extradition proceedings themselves and the appeals therefrom,” *In re Kirby*, 106 F.3d 855, 863 (9th Cir. 1996); (3) the availability of bail in the requesting state for the underlying crime, *Matter of Extradition of Nacif-Borge*, 829 F. Supp. 1210, 1220 (D. Nev. 1993); (4) “a lack of any diplomatic necessity” for detention, *In re Chapman*, 459 F. Supp. 2d 1024 (D. Haw. 2006); (5) the fact that the defendant does not have a “prior record” and has not been “charged with a crime of violence,” *United States v. Taitz*, 130 F.R.D. 442, 446

(S.D. Cal. Apr. 20, 1990); and (6) a “serious deterioration in health while in custody.” *Salerno*, 878 F.2d at 317.

Although this list is illustrative, it is not exhaustive. *Wroclawski v. United States*, 634 F. Supp. 2d 1003 (D. Az. 2009) (noting that court was “not bound by an exhaustive list of ‘special circumstances’”). A court may consider other special circumstances as well. *Id.* Ultimately, “[t]he determination of what [special circumstances] to consider and how much weight to give them is within the ‘sound discretion’ of the Court.” *Id.* (quoting *Beaulieu v. Hartigan*, 554 F.2d 1, 1-2 (1st Cir. 1977)); Michael Abbell, *Extradition to and from the United States* § 4-1 (2010) (noting that judges “have been accorded substantial discretionary latitude” when it comes to the question of what constitutes “special circumstances”). And a court may rely on special circumstances, in the aggregate, to order release. *Matter of Extradition of Morales*, 906 F. Supp. 1368, 1376 (S.D. Cal. 1995) (relying on four special circumstances to release defendant on bond).

Here, *seven* special circumstances warrant President Martinelli’s release.

1. President Martinelli has Numerous Claims with a High Probability of Success

Numerous courts have released a defendant pending an extradition hearing because the defendant presented a substantial claim against extradition. *In re Extradition of Huerta*, Magistrate No. H-08-342M, 2008 WL 2557514, at \*4 (S.D. Tex. June 23, 2008); *Matter of Extradition of Gonzalez*, 52 F. Supp. 2d 725, 741 (W.D. La. 1999) (same); *In re Extradition of Santos*, 473 F. Supp. 2d 1030 (C.D. Cal. Dec. 21, 2006) (same); *United States v. Ramnath*, 533 F. Supp. 2d 662, 665 (E.D. Tex. 2008) (same); *Nacif-Borge*, 829 F. Supp. at 1216 (same). Here, President Martinelli has six such claims.

*i. Probable Cause Does Not Support the Charges*

If a defendant is able to show “a substantial likelihood” that “there is no probable cause” that he committed the extraditable offenses, “that may constitute special circumstances justifying bail pending the extradition hearing.” *In re Extradition of Gonzalez*, 52 F. Supp. 2d 725, 737 (W.D. La. 1999).

Here, nothing better demonstrates the lack of probable cause than the Pitti affidavit. Although apparently serving as the linchpin of the extradition request—the Complaint appears to pull most of its facts from the affidavit—the affidavit offers only speculation and innuendo. Its author, an alleged member of President Martinelli’s supposed “special,” “covert,” three-person unit within the NSC, appears to have had no contact whatsoever with President Martinelli. He

liberally uses the passive voice throughout his affidavit, obfuscating the source of his information. And when he *does* identify the source, it is almost always a man named Ronny Rodriguez. This is notable because Rodriguez has submitted an affidavit that not only denies everything that Pitti has said, but that notes that Pitti himself had complained to him about pressure from Panama to incriminate President Martinelli.

But what is most telling about the Pitti affidavit is its timing. Panama secured the affidavit just five months ago, which was *after* Panama charged President Martinelli with the four crimes set out in the Complaint. Apparently, Panama decided that it needed to bolster its case for extradition and the best it could come up with was the speculation of the Pitti affidavit. Importantly, Pitti does not appear to be a witness identified by Prosecuting Magistrate Diaz and thus would not testify in Panama after extradition. That Panama would go to such lengths speaks to the clear lack of merit and evidence in its case against President Martinelli. *In re Extradition of Bowey*, 147 F. Supp. 2d 1365, 1368 (N.D. Ga. 2001) (granting release pending extradition hearing because “the Court believes that the criminal case against Mr. Bowey in France may have little prosecutorial merit”).<sup>5</sup>

*ii. Immunity Precludes the Prosecution of President Martinelli*

Panama cannot pursue the extradition of President Martinelli for the alleged crimes because President Martinelli has immunity for these crimes. This immunity comes from two discrete sources.

First, under Article 191 of the Panamanian constitution, President Martinelli generally has immunity for crimes committed during his presidency. Although this immunity does not apply to a limited number of crimes that are enumerated in the constitution, CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ, 1972, Title VI, Ch. 1, art. 191, it clearly applies to the “wiretapping” crimes charged here (i.e., interception of telecommunications/surveillance without authorization). *Morales Aff.* at 17.

Second, President Martinelli, as a member of the Central American Parliament, has “Parlacen” immunity that precludes him from being charged for *any* crime. *Morales Aff.* at 13. Although Parlacen immunity is “revocable,” *Morales Aff.* at 19, revoking it requires Panama to

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<sup>5</sup> The Ninth Circuit has said that “[t]he credibility of witnesses and the weight to be accorded their testimony is solely within the province of the extradition magistrate.” *Quinn v. Robinson*, 783 F.2d 776, 815 (9th Cir. 1986).

petition a body within the Central American Parliament, *id.*, which Panama has not done here. As Professor Morales notes, in November 2013, the Central American Court of Justice expressly opined, in the case of former Panama President Martin Torrijos Espino, that Panama could not even initiate a criminal *investigation* against Espino until his Parlacen immunity had been revoked. Morales Aff. at 19-20. President Martinelli is attaching the Espino opinion along with an English translation.<sup>6</sup>

*iii. Panama has Failed to Produce an Arrest Warrant for an Extraditable Offense*

Second, Panama has failed to produce an arrest warrant for an extraditable offense. With respect to this argument, President Martinelli incorporates his prior filing by reference. *See* DE:12. The government's response effectively concedes that there is no arrest warrant for the offenses set forth in the extradition complaint, in violation of the Treaty's requirement that the government produce a warrant of arrest for the extraditable crimes. *See* DE: 13.

*iv. There is no Properly Issued Legal "Charge" Against President Martinelli*

Another prerequisite to extradition is the existence of a charge or conviction for an extraditable offense. Treaty, art. I; *Sacirbey v. Guccione*, 589 F.3d 52, 67 (2d Cir. 2009). Here, there is no such charge because the Diaz indictment is inherently defective and invalid under Panamanian law.

A Panamanian court has to follow specific procedures before it can charge a person with a crime. Morales Aff. at 7. One of these procedures is the "imputación" codified in Article 280 of the Panamanian Penal Procedural Code. Código Procesal Penal de la República de Panamá ("CPP"), art. 280. Imputación is a cornerstone of Panamanian due process and derives from the Panamanian Constitution itself. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ, 1972, Title III, Ch. 1, art. 22. Given the importance of imputación, if a court fails to honor this process, the court has no jurisdiction and cannot issue a criminal charge. Morales Aff. at 11; Moreno (Imputación) Aff. at 3-4.

Panama, by its own admission, has disregarded the imputación phase. Prosecuting Magistrate Diaz has admitted that the criminal system had not yet charged President Martinelli. *See* Interview by Flor Mizrachi Angel with Harry Diaz, Prosecuting Magistrate (Mar. 12, 2017). Multiple Panamanian legal scholars have stated that Panama's failure to provide President

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<sup>6</sup> *See* Opinion of Central American Court of Justice regarding Former Panama President Martin Torrijos Espino," attached.

Martinelli with the required due process precludes his extradition to Panama. Morales Aff. at 15; Moreno (Imputación) Aff. at 6; *Martinelli Extradition Request Includes Arrest Warrant*, NEWSROOM PANAMA (Sept. 28, 2016) (“University of Panama professor Miguel Antonio Bernal, another victim of wiretapping said, “How will the US accept the extradition of a person who has not been charged, unless they alter their law, which I do not think it will?”).

In short, Panama’s failure to follow the required procedures has rendered the “charges” a legal nullity and incapable of supporting extradition. *Sacirbey*, 589 F.3d at 67 (holding foreign court’s lack of jurisdiction meant that it could not issue extraditable charges); *In re Huerta*, Case No. H-08-342M, 2008 WL 2557514, at \*6-9 (S.D. Tex. June 23, 2008) (ordering release of defendant and expressly relying on affidavits from Mexican lawyers interpreting Mexican law to hold that the defendant had viable legal challenges to the extradition request); *In re Santos*, 473 F. Supp. 2d 1030, 1040 (C.D. Cal. Dec. 21, 2006) (holding that “uncertainty regarding the ultimate validity of the arrest warrant” was a special circumstance justifying release of defendant); *Matter of Extradition of Hamilton-Byrne*, 831 F. Supp. 287, 290 (S.D.N.Y. Sept. 8, 1993) (noting that special circumstances may “include the presence of an inherent deficiency or impropriety in the charges or procedure”).

*v. The Alleged Crimes do not Qualify as Extraditable Offenses*

Even if Panama could clear the prior four hurdles, and it cannot, President Martinelli would have yet another case dispositive claim against extradition, specifically, that none of the charged crimes are extraditable under the Treaty.

A brief review of the four alleged crimes are in order. The indictment alleges: “(1) interception of telecommunications without judicial authorization, in violation of Article 167 of the Criminal Code of Panama; (2) tracking, persecution, and surveillance without judicial authorization, in violation of Article 168 of the same code; (3) “embezzlement by theft and misappropriation, in violation of Article 338”; and (4) “embezzlement of use, in violation of Article 341.”

With respect to the “embezzlement” crimes, crimes (3) and (4), they do not qualify as extraditable offenses under the Treaty’s definition of embezzlement because, unlike the Treaty definition, the charged crimes do not require the embezzlement of money. A charged crime can only fall within the treaty definition if the crimes “share the same essential elements.” *Koskotas v. Roche*, 740 F. Supp. 904, 910 (D. Mass. 1990). Here, a simple comparison of the Treaty’s

definition of embezzlement with the Panamanian code's definition of embezzlement makes clear that the charged embezzlement offenses do not fall within the Treaty. The Treaty defines "[e]mbezzlement by public officers" to include the essential element of embezzlement of a very specific thing, *money*, specifically, a sum exceeding "two hundred dollars." Treaty, art. II. But under the Code, Panama is not *obliged*, under *either* of the charged embezzlement crimes, to prove the embezzlement of money. Panama may, as the Complaint makes clear, prove embezzlement by mere "misappropriation" or "use." Compl. at \*2.

Nor, for that matter, has the Complaint even *alleged* that President Martinelli embezzled any money. Tellingly, the Complaint slips into the passive voice every time it asserts allegations about money. *See, e.g.*, Compl. at \*4 ("The system *was purchased* using public funds that had been allocated to the Social Investment Fund."); *id.* ("Specifically, US \$ 13,475,000 of those funds *were used* to purchase Pegasus and its associated equipment from M.L.M. Protection Ltd. ('MLM'), a private Israeli company."). By contrast, the Complaint uses the active voice when talking about the crimes of interception/surveillance (discussed separately below) and the crime of misappropriation ("[President Martinelli] misappropriated government resources . . ."). Compl. at \*2. But misappropriation is *not* embezzlement, and, critically, it is *not* an extraditable offense. *See* Treaty, art II; *In re Extradition of Platko*, 213 F. Supp. 2d 1229, 1236 (S.D. Cal. Jul. 26, 2002) (ordering release of defendant pending extradition because, among other things, the "fax machine misappropriation charges" did not fit the definition of "embezzlement" under the governing treaty). President Martinelli will show that Panama has not charged *anyone*, including him, with embezzlement related to the use of the funds to purchase the alleged equipment.

Shifting the focus now to the "wiretapping" crimes, these are not extraditable offenses because of the so-called requirement of "dual criminality." "Dual criminality is an essential element of the government's burden of proof to establish a basis for extradition." *United States v. Peterka*, 307 F.Supp.2d 1344, 1349 (M.D. Fla. 2003) (citation omitted). "To determine whether dual criminality exists, an extradition court may look to federal law or the law of the state where the extradition proceeding is being held." *See Hu Yau-Leung v. Soscia*, 649 F.2d 914, 918 (2d Cir.1981). Dual criminality exists is "if the particular act charged is criminal in both jurisdictions." *Collins v. Loisel*, 259 U.S. 309, 316 (1922).

Here, it is entirely unclear that the two wiretapping crimes would be crimes in the United States. Both crimes hinge on President Martinelli's alleged failure to obtain "judicial

authorization” for his alleged surveillance activities. *See* Compl. at \*1-2. But in the United States, a President is not necessarily required to obtain judicial authorization before engaging in surveillance. *See* 50 U.S.C. § 1802 (noting that “notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance *without a court order* under this subchapter to acquire foreign intelligence information....”) (emphasis added)). And courts and constitutional scholars have noted the argument that Article II of the United States Constitution may provide the President with broad authority to conduct surveillance, particularly when conducted for national security purposes. *United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 310 (1972) (noting that, under Article II, the President has a fundamental duty to “preserve, protect and defend the Constitution of the United States” and that “[i]n the discharge of this duty, the President—through the Attorney General—may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government”); William C. Banks & M.E. Bowman, Executive Authority for National Security Surveillance, 50 Am. U. L. Rev. 1, 92 (2000).

Here, given that the Complaint links President Martinelli’s purported surveillance to Panama’s National Security Council, ““a consultant and advisory body to the President, on *public security and national defense*,”” Compl. at \*3 (emphasis added), it is unlikely, even if proven, these alleged crimes would be considered crimes in the United States. Put another way, were President Donald Trump to engage in the same conduct during his tenure as United States president, it would likely not qualify as a crime.

*vi. The Alleged Crimes are of a Political Character*

The Treaty precludes extradition for crimes of a “political character.” Treaty, art. VI. Political offenses include so-called “pure” political crimes, namely, “treason, sedition, and espionage.” *Meza v. U.S. Atty. Gen.*, 693 F.3d 1350, 1358 (11th Cir. 2012). With respect to one of these crimes, sedition, the First Circuit has noted that the crime encompasses “speaking, writing, *or acting against an established government*.” *Ozonoff v. Berzak*, 744 F.2d 224, 232 (1st Cir. 1984) (emphasis added); *see also Sedition*, Black’s Law Dictionary (10th ed. 2014) (defining sedition as “[a]n agreement, communication, or other preliminary activity aimed at inciting treason or some lesser commotion against public authority”) (emphasis added)).

Here, the four crimes listed in the Complaint sound in sedition. All are premised on President Martinelli’s alleged misappropriation of *government* property (the surveillance system)

to spy on then-current members *of the Panamanian government* and use the collected information against them. Compl. at \*2, \*6. Given that the charges are clearly “of a political character,” the Treaty expressly prohibits extradition.

2. The Extradition Process will be Lengthy

Moving to the second special circumstance, courts have released a defendant pending an extradition hearing based on the likely protracted nature of the extradition proceeding. *Chapman*, 459 F.Supp.2d at 127; *Taitz*, 130 F.R.D. at 445; *In re Extradition of Kapoor*, No. 11-M-456 RML, 2011 WL 2296535, at \*4 (E.D.N.Y. June 7, 2011).

Here, there is no question that we are headed for a protracted fight over extradition for a number of reasons.

First, Panama has produced voluminous materials in support of the Complaint. It will take significant time to review and analyze these materials. *Taitz*, 130 F.R.D. at 445 (holding likelihood of lengthy proceedings supported release where “[t]he government has submitted to the court a carton containing the exhibits it intends to use at the extradition hearing” and the “exhibits need to be analyzed by the parties and the court before arguments can be made and a decision rendered”).

Second, President Martinelli intends to raise numerous, meritorious challenges to his extradition, some of which are preliminarily discussed above. *Kapoor*, 2011 WL 2296535, at \*4 (holding likelihood of lengthy proceedings supported release where defendant “posited complex and weighty arguments as to why she is not extraditable”); *In re Extradition of Sidali*, 899 F. Supp. 1342, 1351-52 (D.N.J. 1995) (same); *Morales*, 906 F. Supp. at 1375 (same);

Third, because of the three to five-year gap between the time of the alleged offenses and the filing of the Complaint requesting extradition, President Martinelli will need time to track down and gather the evidence that will prove the falsity of the accusations. *Chapman*, 459 F.Supp.2d at 127 (holding likelihood of lengthy proceedings justified release “[b]ecause the underlying offense occurred more than three years ago” and “it may be difficult to track down witnesses and prepare evidence for the hearing”).

And fourth, if the Court were to order extradition, President Martinelli intends to pursue all avenues of review, including by filing a petition of habeas corpus, appealing to the Eleventh Circuit, and requesting relief from the State Department. *Taitz*, 130 F.R.D. at 445 (holding likelihood of lengthy proceedings justified release where “resolution of this issue will no doubt

involve habeas corpus proceedings in the district court and the Court of Appeals” and “would likely last for as long as two years”); *Kapoor*, 2011 WL 2296535, at \*4 (same).

3. The Availability of Bail in Panama

A third special circumstance justifying release is the availability of bail in Panama. *Castaneda-Castillo*, 739 F.Supp.2d at 59 (ordering release because, among other things, “if he had been arrested in Peru on the charges presently pending against him [the defendant] may have been released on bail”); *Matter of Extradition of Nacif-Borge*, 829 F. Supp. 1210, 1221 (D. Nev. 1993) (same); *In re Gannon*, 27 F.2d 362 (E.D. Pa. 1928) (same); *Kapoor*, 2011 WL 2296535, at \*3 (same).

Here, under Article 241 of the Panamanian Penal Code, all offenses are eligible for bail. *Morales Aff.* at \*16. And where, as here, the statutory maximum terms of imprisonment for the charged offenses are low, a Panamanian court is more likely to provide bail. *Id.*; *see Nacif-Borge*, 829 F. Supp. at 1221 (ordering release where “Nacif has provided a favorable legal opinion [on the availability of bail in Mexico] from an attorney in Mexico . . . who has twenty years of experience in criminal law”).

4. Lack of Diplomatic Necessity

The lack of diplomatic necessity for refusing to issue a bond to a defendant is another special circumstance justifying bail in this case, particularly because the requesting country has been dilatory in seeking extradition. *Chapman*, 459 F. Supp. 2d at 1027 (ordering release of defendant based partly on lack of diplomatic necessity where requesting country did not act with urgency in seeking extradition of defendant); *United States v. Castaneda-Castillo*, 739 F. Supp. 2d 49, 58 (D. Mass. 2010) (same); *Kapoor*, 2011 WL 2296535, at \*3 (same).

Here, Panama’s delay in pursuing President Martinelli establishes a lack of diplomatic necessity. Despite the fact that President Martinelli has lived openly in Miami since 2015, the Complaint was not filed until more than two years later, for political purposes a week after President Martinelli announced his candidacy for office in Panama.

5. President Martinelli’s Lack of Criminal History and Nature of the Charges

Another recognized special circumstance is where a defendant “has no prior record and is not charged with a crime of violence.” *Taitz*, 130 F.R.D. at 446; *see Chapman*, 459 F.Supp.2d at 1026; *Nacif-Borge*, 829 F.Supp.2d at 1220-21. President Martinelli has no criminal history whatsoever. And the Complaint does not charge him with a crime of violence.

6. Detention will Result in a Serious Deterioration in President Martinelli's Health

Another special circumstance justifying release here is President Martinelli's health. *See Taitz*, 130 F.R.D. at 446; *Sidali*, 899 F. Supp. at 1351-52; *See Huerta*, 2008 WL 2557514, at \*4. President Martinelli is a 65-year-old man. He has recently undergone both angioplasty and gastric bypass surgery. He takes cardiac medications that require readjustments and monitoring. Given his age and medical conditions, the stress of a prolonged detention will almost surely result in a serious deterioration of President Martinelli's health. *See Taitz*, 130 F.R.D. at 446 (holding that defendant's allergic reactions to the food and soap at the detention center qualified as a special circumstance supporting release).

7. The Transparently Political Nature of the Charges

What might be the most special of the special circumstances here is the transparently political nature of the charges. On this point, President Martinelli asks the Court to consider the following four things:

First, the source of the charges. This may be the only extradition case in history where the country seeking extradition is being led by a man who is not only a political opponent of the defendant but was publicly and notoriously fired by him. In 2011, President Martinelli fired then Vice-President and Foreign Minister Varela because he had learned that Varela had received kickbacks from foreign consulate officers. Any doubts about whether President Varela holds a grudge over this firing were laid to rest on August 30, 2016. On that day, the five-year anniversary of his firing, President Varela publicly discussed the firing at a nationally covered press conference. Since President Varela has taken office, he has sought to jail President Martinelli, who remains the leader of the opposition party in Panama.

Second, the timing of Panama's extradition request. On June 5, 2017, President Martinelli publicly announced on Twitter that he intended to run for Mayor of Panama in 2018 and for Vice-President of Panama in May 2019. Just a week later, on June 12, 2017, Panama, acting through the United States, filed the extradition Complaint. This filing occurred exactly one week before President Varela's planned visit to the White House, scheduled for today, June 19, 2017. This sequence of events betrays the base political motives behind this extradition request. President Varela's administration, which has admitted to monitoring President Martinelli's social media

feed, has successfully used the United States justice system to silence President Martinelli during President Varela's trip to the White House.

Third, how other, non-parties are viewing the charges in this case. On June 1, 2017, the General Secretary of the International Police Organization ("INTERPOL") decided to lift red notices regarding President Martinelli. Interpol Order at 2. Interpol has communicated this decision to Panama. The fact that an intergovernmental organization with no stake in Panamanian politics has taken such a measure underscores the profound flaws with these charges.

Fourth, and finally, what awaits President Martinelli should he be extradited to Panama. If extradited to Panama, he will face an executive branch led by a president with a personal vendetta against him and a judicial branch whose independence has been publicly maligned by the prosecuting magistrate that issued the indictment in his case. In short, if ever there were a uniquely "special" circumstance justifying release, the political nature of this case would be it.

**B. President Martinelli is not a Flight Risk**

President Martinelli poses no risk of flight for numerous reasons.

1. President Martinelli's Past Behavior Proves he is no Flight Risk

Here, President Martinelli's past behavior proves he is no flight risk. Panama's filing of an extradition request here came as a surprise to precisely nobody. As far back as May 5, 2016, Panama's own vice-president was openly discussing Panama's plan to request President Martinelli's extradition. The pending extradition request was also widely covered by the media, which noted that President Martinelli's defense team was preparing for the pending request. *Panama Judge Asks Interpol to Help Catch Ex-President*, TELESURTV (June 29, 2016) <http://www.telesurtv.net/english/news/Panama-Judge-Asks-Interpol-to-Help-Catch-Ex-President-20160628-0050.html>. Despite the fact that Panama telegraphed its proverbial punch, President Martinelli did nothing to hide. Now the Government would have this Court believe that, if the Court gives President Martinelli a bond, he will decide the time is ripe to execute his escape from the United States. Such a position flunks the common-sense test. If President Martinelli was going to flee this country, he would have done so a long time ago.

2. President Martinelli's Pending Asylum Claim Proves he is no Flight Risk

Another relevant factor in the risk of flight analysis is whether the defendant facing extradition has filed a claim for asylum in the United States. The filing of such a claim, as courts have held, helps prove that the defendant is *not* a flight risk. *Kapoor*, 2011 WL 2296535, at \*5

(ordering release of defendant facing extradition because “failure to appear would seriously affect [defendant’s] efforts to gain asylum”).<sup>7</sup>

Here, President Martinelli has already availed himself of the United States legal system by seeking asylum in this country. He has undergone the required interview and his asylum claim is now ripe for adjudication. President Martinelli firmly believes in the merits of his asylum claim, which is premised on the same kind of political machinations that are at work in this case. He has no desire to abandon that claim.

3. President Martinelli’s Ties to the Community Prove that he is no Flight Risk

Numerous courts have released a defendant facing extradition based on the defendant’s substantial ties to the community. *Kapoor*, 2011 WL 2296535, at \*5; *Chapman*, 459 F. Supp. 2d at 1027. There is no question that such ties exist here.

President Martinelli has family, including his only grandchild, close friends, and political supporters in South Florida. He was educated at the University of Arkansas and has continuously maintained a home or apartment in the United States since the late 1980s. Other members of the Martinelli family are actively seeking asylum in the United States because of fear of political persecution. President Martinelli also has nowhere else to go. Although he is a citizen of Italy, he is seeking asylum from that country as well, for reasons that his counsel will explain under appropriate conditions given the sensitive nature of the information. In short, President Martinelli is rooted to this community and these roots provide an ample basis for ordering release. *Chapman*, 459 F. Supp. 2d at 1027 (ordering release of three Hawaii-based defendants facing extradition and noting that the defendants had “households, children and significant financial interests in Hawaii”); *Kapoor*, 2011 WL 2296535, at \*5 (ordering release of New York-based defendant facing extradition because defendant’s children, husband, and father lived in New York City).

4. President Martinelli’s Proposed Bond Package Guarantees his Appearance

To prove to the Court that he is committed to remaining in the United States, President Martinelli has put together a bond package that goes well beyond the bond packages in any of the published decisions of which he is aware. The key terms of the package are set out in bullets below:

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<sup>7</sup> A court has considered a defendant’s application for asylum as another “special circumstance.” *United States v. Wroclawski*, 574 F. Supp. 2d 1040, 1045 (D. Ariz. 2008).

- \$5,000,000 10% bond, co-signed by President Martinelli’s wife and backed by equity in President Martinelli’s property;
- \$2,000,000 personal surety bond, \$1,000,000 of which will be co-signed by a friend and backed by equity in the friend’s home in Miami, Florida;<sup>8</sup>
- Home confinement in President Martinelli’s Miami, Florida home;
- Electronic monitoring;
- The posting of an off-duty/retired police officer at President Martinelli’s home twenty-four hours a day and seven days a week<sup>9</sup>;
- Whatever restrictions of access to modes of transportation (e.g., planes, boats, etc.) the Court deems fit;
- And an executed waiver of extradition that would become operative if President Martinelli should flee the Court’s jurisdiction.

To help put these bond terms in perspective, the Court should consider the *Arias Leiva* case, a case arising out of this district. There, Judge O’Sullivan released the defendant on a \$1,000,000 personal surety bond that was co-signed by a United States citizen and secured with real property having equity of at least \$1,000,000, along with a condition of electronic monitoring. Although the *Arias Leiva* case and this case share similarities (e.g., both cases involve public figures from foreign countries who called out the political machinations behind the extradition request), this case presents an even more compelling argument for a bond. The following distinctions are noteworthy:

- Unlike *Arias Leiva*, President Martinelli merely stands (improperly) accused of an offense, not convicted.
- Unlike *Arias Leiva*, President Martinelli did not flee his country prior to being convicted. In fact, President Martinelli, was not even *present* in Panama when he was charged, having left the country to seek political asylum. In other words, President Martinelli, unlike *Arias*, has no record of non-compliance with conditions of release;

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<sup>8</sup> Notably, a court has cited a friend’s “willingness to post a home as security for [the defendant’s] release” as another special circumstance counseling release. *In re Extradition of Molnar*, 182 F. Supp. 2d 684, 689 (N.D. Ill. 2002).

<sup>9</sup> Officers to be approved by the Government and paid from an account funded in advance by President Martinelli.

- Unlike Arias Leiva, President Martinelli has continuously maintained a residence in the United States for decades.

Despite these differences, each of which makes President Martinelli a markedly less significant flight risk, President Martinelli's proposed bond package *exceeds* the package that Judge O'Sullivan approved in *Arias Leiva*.

5. Because President Martinelli is not a Flight Risk, Due Process Requires his Release

As held in *Paretti v. United States*, 122 F.3d 758 (9th Cir. 1997), if President Martinelli is not a flight risk, and he clearly is not, the Court must release him under the United States Constitution's Due Process Clause. The court wrote: "[U]ntil such time as an individual is found to be extraditable, his or her Fifth Amendment liberty interest trumps the government's treaty interest unless the government proves to the satisfaction of the district court that he or she is a flight risk." *Id.*

Although the *Paretti* opinion was ultimately withdrawn, and the appeal dismissed on other grounds, 143 F.3d 508 (9th Cir. 1998) (en banc), the opinion's due process analysis remains sound and applies here. Because President Martinelli is not a risk of flight, Due Process requires his immediate release.

In closing, President Martinelli wishes to address what he expects to be a cornerstone of Panama's argument for detention, specifically, the Supreme Court's dated holding in *Wright v. Henkel*, 190 U.S. 40 (1903), that bail should not ordinarily be granted in extradition cases. Putting the due process argument aside, numerous courts have recognized the erosion of *Wright's* so-called "presumption" of detention. *Beaulieu v. Hartigan*, 430 F. Supp. 915, 916 & n.2 (D. Mass. 1977) (concluding that "[i]n the more contemporary reported cases, granting of bail pending completion of the extradition proceedings has been the rule rather than the exception"); *Molnar*, 182 F. Supp. 2d at 688; *United States v. Messina*, 566 F. Supp. 740, 744-45 (E.D.N.Y. June 24, 1983); Abbell, *Extradition to and from the United States* § 4-1 ("[T]he special circumstances test is simply 'irrelevant' to the government's concern, and an anachronism based on insufficiently considered and deified dicta in a hundred year old Supreme Court opinion."). This liberalization on the bail issue is reflected not just by the numerous cases that President Martinelli has already cited in this motion, but also by cases from this very district. *See, e.g., In re Extradition of Nandwani*, 07-MC-23253-Dube, DE:24 (8 Jan 2008) (\$100,000 ten-percent bond, \$500,000 personal surety bond, and \$50,000 corporate surety bond); *In re Extradition of Villatoro-Monteagudo*, No. 06-MC-20469-

Dube, DE:22 (S.D. Fla. 18 Dec 2007) (\$200,000 personal surety bond); *In re Extradition of Sepulveda-Mery*, No. 05-CV-22648-O'Sullivan, DE:16, DE:20 (S.D. Fla. 2 Dec 2005) (\$500,000 ten-percent bond); *In re Extradition of Raut*, No. 04-MC-20093-Bandstra, DE7 (S.D. Fla. 12 Feb 2004).

In short, *Wright* is a 100-plus-year-old decision whose rationale is outdated in this modern age. Courts today can impose conditions on released defendants that, to the justices on the *Wright* court, would have been the stuff of science fiction, including 24-7 electronic monitoring that pinpoints a defendant's precise location and alerts authorities at any sign of a problem. And in this post 9-11 world, international and domestic travel is heavily regulated and surveilled. In sum, the Government can no longer blindly rely on *Wright* under the current case law and in this modern age. The *Wright* presumption is rebuttable and has been rebutted.

### III. CONCLUSION

For the foregoing reasons, the Court should grant President Martinelli's immediate release.

Dated: June 19, 2017

Respectfully submitted,

s/ Marcos Daniel Jiménez

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**CERTIFICATE OF SERVICE**

This motion was filed electronically on June 19, 2017 through CM/ECF and served on Adam Fels, counsel for Panama, through that system.

*s/ Marcos D. Jimenez*  
Marcos D. Jimenez