DAVID L. ANDERSON (CABN 149604)
United States Attorney

HALLIE HOFFMAN (CABN 210020)
Chief, Criminal Division

ELISE LAPUNZINA (NYBN 2540730)
Assistant United States Attorney

450 Golden Gate Ave., 11th Fl.
San Francisco, California 94102-3495
Telephone: (415) 436-6878
Fax: (415) 436-7234
Email: Elise.LaPunzina@usdoj.gov

CHRISTOPHER J. SMITH (VABN 75445)
Associate Director

REBECCA A. HACISKI (DCBN 996656)
Trial Attorney

Office of International Affairs
Criminal Division
U.S. Department of Justice
1301 New York Avenue NW
Washington, D.C. 20530
Telephone: (202) 616-2534
Fax: (202) 514-0080
Email: Rebecca.Haciski@usdoj.gov

Attorneys for United States of America

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN THE MATTER OF THE EXTRADITION OF ALEJANDRO TOLEDO MANRIQUE	CASE NO. 3-19-71055 MAG **MEMORANDUM OF EXTRADITION LAW AND REQUEST FOR DETENTION PENDING EXTRADITION PROCEEDINGS**

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The United States of America, by the undersigned attorneys, in fulfilling its treaty obligations to Peru, respectfully requests that the fugitive in this case, Alejandro Toledo Manrique ("Toledo" or "the fugitive"), be held without bond pending the hearing on the certification of his extraditability pursuant to 18 U.S.C. §§ 3181 *et seq*. This memorandum summarizes the framework of extradition law in the United States and sets forth the reasons why Toledo should be detained. In short, the Bail Reform Act does not apply to extradition proceedings, as they are not criminal cases. Instead, there is a strong presumption against bail in extradition cases where the extradition request is proper and pursuant to a valid treaty, which is the case here. It is Toledo's burden to show that he is not a flight risk and poses no danger to the community, and that special circumstances warrant his release. Toledo cannot meet that burden because he is a significant flight risk. Further, there are no special circumstances to justify his release. The Court should detain him.

BACKGROUND

Peru seeks the extradition of Toledo, who served as President of Peru from 2001 to 2006, to stand trial on charges of influence peddling, in violation of Section 400 of the Peruvian Criminal Code[1]; collusion, in violation of Section 384 of the Peruvian Criminal Code[2]; and money laundering, in violation of Article 1 of Peruvian Act No. 27765.[3] *See* Req. at 3152-90 (Prosecutor's Decision No. 3 of Jan. 21,

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[1] Section 400 of the Peruvian Criminal Code provides:

Whoever, invoking real or simulated influences, receives, makes someone give or promise for himself or for third parties, donations or promises or any other advantage or benefit offering to mediate before a public official or civil servant who hears, is hearing or has heard a judicial or administrative case, shall be punished by imprisonment for not less than four (4) and not more than six (6) years. If the perpetrator is an official or public servant, he shall be punished by imprisonment for not less than four (4) and not more than eight (8) years and disqualification pursuant to subsections 1 and 2 of Section 36 of the Criminal Code.

[2] Section 384 of the Peruvian Criminal Code provides:

The government officials or civil servants who, in contracts, supplies, tenders, competitive biddings, auctions or any other similar operation in which they participate by reason of their office or on a special commission, swindle the Peruvian State or State-supported bodies or entities, pursuant to law, by making arrangements with the concerned parties in agreements, adjustments, liquidations or supplies, shall be punished by imprisonment for not less than three (3) years and not more than fifteen (15) years.

[3] Article 1 of Peruvian Act No. 27765 provides:

Whoever converts or transfers money, property, instruments, or proceeds, knowing or suspecting their unlawful origin, with the intention to prevent the identification of their origin, their seizure or forfeiture,

2017); *id.* at 3191-3247 (Prosecutor's Decision No. 6 of Feb. 3, 2017); *id.* at 3248-91 (Prosecutor's Decision No. 8 of Mar. 7, 2017); *id.* at 3292-97 (Prosecutor's Decision No. 13 of June 5, 2017).[4] Judge Richard Augusto Concepcion Carhuancho of the First National Preliminary Investigation Court in Peru issued a warrant for Toledo's arrest on February 9, 2017. *See id.* at 3212-3553 (transcription of Court Decision No. 2 of Feb. 9, 2017).

I. FACTUAL BACKGROUND

During Toledo's presidency, the Peruvian government undertook the Peru-Brazil Southern Interoceanic Highway Project ("Project"), to construct a highway spanning between Peru and Brazil ("Highway"). Toledo signed legislation and executive decrees to facilitate the Highway's construction, including: (1) Act No. 28214 of April 30, 2004, declaring the Project to be a "public need, national interest and priority execution"; (2) Supreme Executive Resolution No. 044-2004-EF of May 10, 2004, appointing certain members of the Private Investment Promotion Agency ("Proinversion") Committee on Infrastructure and Public Services Projects, which conducted the bidding process for the Project[5]; and (3) Supreme Executive Resolution No. 156-2004-EF of December 21, 2004, ratifying Proinversion's proposed tender process. *Id.* at 8-9, 857-64. According to information provided by Peruvian authorities, Toledo solicited a US$35 million bribe from the Highway contractor and ultimately received US$20 million, which he directed to be laundered through various companies and off-shore accounts, as described further below.

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shall be punished by imprisonment for not less than eight (8) and not more than fifteen (15) years, and by a fine of one hundred and twenty (120) to three hundred fifty (350) days.

[4] Peru's extradition request is referred to herein as "Req." with citations to the page numbers appearing at the top right of each page of the request. A copy of the request will be filed manually with the Court.

5 Proinversion is a Peruvian state agency created via a Supreme Executive Order issued in 2002, with a board of directors composed of several government ministers. Req. at 867, 889, 4337. Pursuant to Executive Resolution No. 044-2004-EF of May 10, 2004, Sergio Bravo Orellana was appointed Chairman of the Proinversion Committee for Assets, Projects and State Companies and the Proinversion Committee for Infrastructure and Public Services Projects; Alberto Pasco-Font Quevedo was appointed Permanent Member of the Proinversion Committee for Infrastructure and Public Services Projects; and Jose Chueca Romero was appointed Permanent Member of the Proinversion Committee for Assets, Projects and State Companies. *Id.* at 859-61.

A. Influence Peddling and Collusion

Near the end of 2004, at a social event held at the government palace in Lima, Peru, Avraham Dan On ("Dan On"), a close friend and advisor of Toledo who served as Toledo's chief of security, approached Jorge Henrique Simoes Barata ("Barata"), superintendent of Constructora Norberto Odebrecht S.A. ("Odebrecht") in Peru.[6] *Id.* at 27. According to Barata, Dan On introduced himself as an intermediary of Toledo, and offered to favor Odebrecht in the tenders for the construction of sections 2, 3, and 4 of the Highway Project. *Id.* at 27, 353.

Thereafter, Dan On invited Barata to attend a series of meetings about the tenders held at the government palace. *Id.* at 27. For those meetings, Barata entered through a side door, without recording his visits on the official register. *Id.* at 256. During one of the meetings, Dan On told Barata that if Odebrecht was successful in the tenders, it would need to pay Toledo a sum of money, the amount of which would be detailed later by associates of Josef Maiman ("Maiman"), another close friend and advisor of Toledo. *Id.* at 27.

Also around the end of 2004, Toledo told Maiman that he was planning to establish a foundation for which he would receive "donations" that might total substantial amounts. *Id.* at 32. Toledo requested Maiman's support in receiving those funds, and stated that he would provide more details later. *Id.* at 32, 484. Although Maiman suspected the "donations" might in fact be intended to cover up illicit activity, he did not ask questions in that regard because of his longstanding friendship with Toledo. *Id.*

The details of Toledo's bribe were further confirmed on or around November 4, 2004, when Barata attended a meeting in Brazil with Toledo, Dan On, Maiman, and two of Maiman's associates, Gideon Weinstein ("Weinstein") and Sabi Saylan ("Saylan"). *Id.* at 27. At the meeting, Toledo said he wanted Odebrecht to win the Highway contracts, and would ensure that the schedule for the tenders was not delayed and that the terms of the tenders would be modified to make it difficult or impossible for other companies to participate in them. *Id.* at 27-28. Also during that meeting, Weinstein and Saylan approached Barata and told him that, if Toledo ensured that the tender schedule would not be delayed and that the

[6] Odebrecht is a subsidiary of Odebrecht S.A., a Brazil-based company that has been implicated in a massive transnational bribery scheme, involving hundreds of millions of dollars in bribes paid to foreign officials and others in multiple different countries. Req. at 141.

terms would be modified such that Odebrecht was awarded the Project contracts, Odebrecht should give Toledo US$35 million, via payments made to various companies owned or controlled by Maiman using fictitious contracts with Odebrecht. *Id.* at 27.

Maiman told Peruvian authorities that at the meeting in Brazil, he spoke with Barata, who said that there would be donations for Toledo's foundation, without providing any details. *Id.* at 33, 486. Barata and Maiman agreed to meet in Lima, Peru to discuss the donations further at the end of the month. They held subsequent meetings, some of which were attended by Toledo, through the end of 2004 and beginning of 2005 at Maiman's residence or businesses. *Id.* at 257.

To bid on the Highway Project, Odebrecht entered into joint ventures with three Peruvian companies.[7] *Id.* at 28. Barata told Peruvian authorities that he informed the chairmen of the boards of directors of all three companies about the agreement with Toledo generally, and that the chairmen understood that the companies would pay the requested bribe, with each one assuming a portion of the payment. *Id.* at 358.

On December 22, 2004, Proinversion's board of directors held a meeting (Session No. 87) to discuss several infrastructure projects, including the Highway Project. *Id.* at 52. The meeting was held at the government palace, which was not the usual meeting place, because Toledo wanted to be informed about the progress of the Project. *Id.* at 52, 779-80. In what a number of witnesses considered to be a highly unusual move, Toledo attended a portion of the meeting which was dedicated to discussion of the Highway Project. *Id.* at 47-48, 874. At the meeting, Toledo asked whether it was possible to shorten the deadlines for the Project. *Id.* at 45. The board ultimately agreed to a nine-month timeline, with the invitation for bids to be issued on January 24, 2005, and the signing of the contracts to occur on September 26, 2005. *Id.* at 184-86. This timeline was much shorter than usual, as bidding usually lasted approximately two years. *Id.* at 355.

Although proposed public works projects in Peru were usually subject to mandatory assessments regarding their feasibility and suitability to be executed at the pre-investment stage, no such assessment

[7] Their agreement was formalized with the incorporation of Interoceanica Sur Tramo 2 S.A. (the joint venture that bid on the contract for section 2 of the Highway) and Interoceanica Sur Tramo 3 S.A. (the joint venture that bid on the contract for section 3 of the Highway) in July 2005. Req. at 409-15.

was conducted for the Highway Project as a result of Supreme Executive Resolution No. 022-2005-EF, which Toledo signed on February 9, 2005, exempting the Project from the applicable regulations. *Id.* at 219-26, 878-80.

On June 23, 2005, Proinversion decided to award the contracts for constructing sections 2 and 3 of the Highway, for US$31,858,000 and US$40,682,000, respectively, to the Odebrecht joint ventures.[8] *Id.* at 55. A public ceremony for signing the contracts was scheduled to be held on August 4, 2005, over a month ahead of schedule. *Id.* at 185-87.

Proinversion's board of directors convened a meeting (Session No. 109) on August 4, 2005, at the Ministry of Economy and Finance to review the bidding process for the Highway Project. *Id.* at 56. At approximately 10:00 a.m. that day, Peruvian Vice Comptroller General Rosa Elizabeth Urbina Mancilla ("Vice Comptroller") sent an official letter to the Proinversion board, stating that Odebrecht and one of its joint venture partners had pending litigation with the State of Peru, which, if true, would disqualify the joint venture from bidding on the Highway Project. *Id.* at 50, 914-15. Per regulation, in this situation, Proinversion should have requested an opinion from its legal manager and from an experienced private law firm, suspended the bidding process, and, if necessary, returned the bids. *Id.* at 187-88.

According to Peruvian Minister of Transportation and Communications and Proinversion board member Jose Ortiz Rivera ("Ortiz"), Toledo appeared annoyed at the possibility that the contract signing would be disrupted. *Id.* at 45, 778. However, within just a few hours, the Proinversion board reconvened at the government palace, upon Toledo's request. *Id.* at 46. As recorded in the minutes for the board meeting, Sergio Bravo Orellana ("Orellana"), a Proinversion Committee Chairman who had been appointed by Toledo, informed the board that he had received a report from attorney Juan Monroy Galvez ("Galvez"), concluding that the litigation referenced in the Vice Comptroller's letter did not in fact involve companies in the Odebrecht joint venture and, therefore, the concerns raised in the letter were unfounded. *Id.* at 2060-61, 2076-86. Also as recorded in the board minutes, Orellana further informed the board that he had also received a report prepared by Proinversion's Legal Manager, Percy Velarde Zapater ("Zapater"), expressing his opinion that the allegation that members of the Odebrecht joint venture were

[8] The contract for section 4 of the Highway was awarded to another bidder. Req. at 1284.

involved in legal proceedings with Peru was inaccurate in light of both Galvez's report and also supplemental sworn statements provided by the companies contradicting the allegation. *Id.* at 2061-63, 2107-08. However, in subsequent statements to Peruvian authorities, Galvez asserted that in fact he did not send Proinversion his report until several days after the board meeting, on August 8, 2005, and could not have prepared the report in just a few hours, *id.* at 2090, 2095-97; and Zapater asserted that he did not send Proinversion his report until later in the afternoon on August 4, 2005, after the board meeting and signing ceremony had concluded, *id.* at 2099, 2136-38.

The Highway contracts were signed later in the day on August 4, 2005.[9] *Id.* at 46. Toledo was present for the signing, even though it was unusual for him to appear at such an event. *Id.*

On January 26, 2006, legislation (specifically, Law No. 28670, which had been proposed by Peru Possible, Toledo's political party) was passed ratifying the validity of the Odebrecht contracts, thereby preventing any further review by Peru's Comptroller General's Office into the validity of the bidding process. *Id.* at 117-18, 241-42, 881-83.

Although Odebrecht had been awarded the Highway contracts, because Toledo failed to modify the bidding terms to prevent or discourage other companies from bidding, Barata decided to pay him US$20 million instead of the initially requested US$35 million. *Id.* at 10-11. According to Barata, the US$20 million was taken out of the profits realized by Odebrecht and its three Peruvian partners from the Highway Project. *Id.* at 359. As noted in an expert financial report prepared on behalf of Peruvian prosecutors, Odebrecht's Peruvian partners paid their portions of the bribe through an irregular assignment of dividends to Odebrecht under the cover of "additional risks." *Id.* at 445-46 (expert report concluding that Odebrecht's joint venture partners gave up over US$15 million in profits by approving larger dividends for Odebrecht for "additional risks").

B. Money Laundering

According to Maiman, at some point after Toledo had first discussed the "donations" for which he needed Maiman's assistance in receiving, Toledo had clarified that the "donations" would amount to

[9] Zapata told Peruvian authorities that he was not present when the board reconvened on August 4, 2005, contrary to the minutes of the meeting noting his presence, but that he participated in part of the meeting by telephone. Req. at 2057, 2134-35.

approximately US$20 million. *Id.* at 484. Also according to Maiman, in early 2006, Toledo told him to expect the first "donations" to come in. *Id.* at 33, 486. Maiman told Peruvian authorities that he understood that Toledo wanted to use Maiman's accounts because Toledo did not want to be linked to the transactions. *Id.* at 495.

According to Barata, Odebrecht made payments of approximately US$20 million to Toledo in a phased manner from 2006 to 2010, via bank transfers of "unrecorded slush funds," and possibly also funds disbursed through fictitious contracts, to offshore companies owned by Maiman. *Id.* at 37-43, 355. Barata reported that on one occasion in 2010 after Toledo had left office, Toledo summoned Barata to his home in Camacho to pressure Barata to continue the payments. *Id.* at 28.

Odebrecht's records document at least US$9,626,010 of the US$20 million bribe. As described further below, Peruvian authorities have traced those funds as having filtered through numerous accounts:

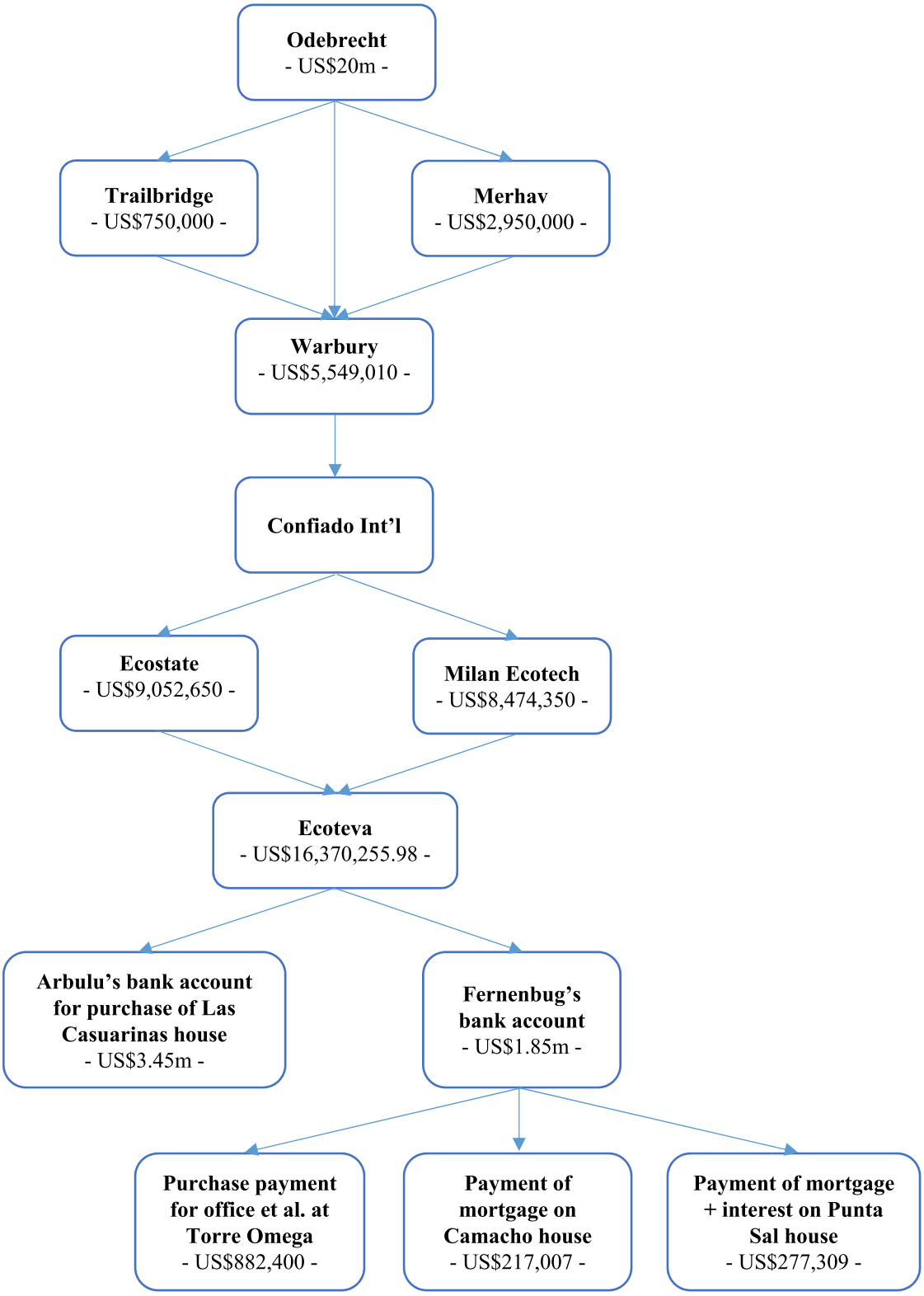
First, Odebrecht transferred the funds to two of Maiman's companies, Trailbridge Ltd. ("Trailbridge") and Merhav Overseas Ltd. ("Merhav"), as well as to a third company Maiman used as a funds receiving agent, Warbury and Co. ("Warbury").

Second, Maiman transferred the funds to another of his companies, Confiado International Corp. ("Confiado"), and then to two Costa Rican companies which had been designated by Dan On for receiving the funds, Ecostate Consulting S.A. ("Ecostate") and Milan Ecotech Consulting S.A. ("Milan Ecotech").

Third, the funds were transferred to another Costa Rican company, Ecoteva Consulting Group S.A. ("Ecoteva"), the chairman of which was nominally Eva Fernenbug ("Fernenbug"), Toledo's mother in law.

Finally, at Fernenbug's direction, at least some of the funds were transferred to two Peruvian bank accounts, one held by Fernenbug and another held by a person named Luis Fernando Arbulu Alva ("Arbulu"), and were used to purchase properties (and to pay mortgages for properties) in Peru.

These transfers are summarized on the following chart:


Odebrecht
- US$20m -
Trailbridge
- US$750,000 -
Merhav
- US$2,950,000 -
Warbury
- US$5,549,010 -
Confiado Int'l
Ecostate
- US$9,052,650 -
Milan Ecotech
- US$8,474,350 -
Ecoteva
- US$16,370,255.98 -
Arbulu's bank account for purchase of Las Casuarinas house
- US$3.45m -
Fernenbug's bank account
- US$1.85m -
Purchase payment for office et al. at Torre Omega
- US$882,400 -
Payment of mortgage on Camacho house
- US$217,007 -
Payment of mortgage + interest on Punta Sal house
- US$277,309 -

Transfers were made from Odebrecht, through several different accounts, to accounts held by Trailbridge and Merhav at Citibank of London, and to an account held by Warbury at Barclays Bank.[10] *Id.* at 23, 41-42. Odebrecht transferred at least US$750,000 to Trailbridge, US$2,950,000 to Merhav, and $5,549,010 to Warbury, as follows[11]:

Approx. Date	Receiving Company	Amount
6/23/2006	Trailbridge	$750,000
1/11/2010	Merhav	$1,000,000
3/4/2010	Merhav	$550,000
3/17/2010	Merhav	$450,000
3/29/2010	Merhav	$450,000
5/24/2010	Merhav	$250,000
6/3/2010	Merhav	$250,000
7/28/2008	Warbury	$500,000
8/5/2008	Warbury	$500,000
11/27/2008	Warbury	$500,000
12/16/2008	Warbury	$500,000
12/22/2008	Warbury	$500,010
3/31/2009	Warbury	$505,000
3/31/2009	Warbury	$495,000
11/18/2009	Warbury	$499,000
1/11/2010	Warbury	$1,000,000
1/22/2010	Warbury	$550,000

Id. at 29-30, 366-87.

[10] According to Maiman, the Trailbridge and Warbury accounts were also funded by illicit payments to Toledo made by Camargo Correa, one of the companies in the joint venture that was awarded the contract for section 4 of the Highway. Req. at 517, 526, 2270. In particular, Maiman reported that he was supposed to receive between US$4 million and US$5 million from Carmargo Correa for Toledo, and that he had verified that Carmargo Correa had transferred US$760,000 to the Trailbridge account (which was then transferred to an Israeli account owned by Merhav) and US$3,224,334 to the Warbury account. *Id.*

[11] Odebrecht also identified that it transferred $377,000 to Lucas Valera on October 14, 2008, as part of the bribe payment.

On Maiman's instructions, on or about June 18, 2006, and July 13, 2006, the funds transferred to Trailbridge were then transferred (in installments of US$530,000 and US$250,000) to an Israeli account owned by Merhav, and were used to cover that company's expenses. *Id.* at 44, 531-32. However, Maiman stated that he funded the Warbury account with the same amount of money out of his own pocket, *id.* at 530, such that the US$750,000 paid by Odebrecht to Trailbridge effectively ended up in the Warbury account. In addition, according to Maiman, US$900,000 was transferred from Merhav to Warbury, and the remaining funds in Merhav's account were used to cover the company's expenses. *Id.* at 511-12. Thus, in total, the Warbury account received at least $7,199,010 in bribe payments from Odebrecht.

According to Maiman, per his instructions, all of those funds were remitted to Confiado. To that end, Warbury entered into an agreement with Confiado on or about May 8, 2006. *Id.* at 539-42. The agreement provided that Warbury would manage certain payments owed to Confiado by Odebrecht for "certain services" rendered, in exchange for a commission. *Id.* at 35-36. Maiman told Peruvian authorities that this agreement was simply a device to funnel payments from Odebrecht to Toledo, and that there was never a services contract between Confiado and Odebrecht. *Id.* at 510-11. Amounts received by Warbury from 2006 to 2010 were transferred to Confiado's account at LGT Bank in Zurich. *Id.* at 23-24, 26, 37-41.

Although not fully documented in bank records provided by Peruvian authorities, according to Maiman, in total, the Confiado account received approximately US$17.5 million in bribe payments from Odebrecht. *Id.* at 488.

At the end of 2006 or beginning of 2007, Toledo told Maiman that Dan On would provide him the names of the companies to which Maiman should transfer the money received from Odebrecht. *Id.* at 34, 488. In or around October or November 2006, Dan On visited Maiman in Israel and provided the names of companies including Ecostate and Milan Ecotech, along with their Costa Rican bank account numbers. *Id.* at 513. Dan On served as president of the boards of both companies at different points in time. *Id.* at 67.

Between December 2006 and May 2010, Confiado made eighteen payments totaling US$9,052,650 to Ecostate and seventeen payments totaling US$8,474,350 to Milan Ecotech (*i.e.*, US$17,527,000) as follows[12]:

Payments from Confiado to Ecostate

Approx. Date	Amount
2/22/2007	$489,000
4/3/2007	$483,650
6/18/2007	$550,000
7/16/2007	$480,000
7/16/2007	$400,000
8/22/2007	$600,000
10/17/2007	$600,000
11/19/2007	$450,000
1/28/2008	$450,000
1/28/2008	$550,000
2/12/2008	$450,000
7/10/2008	$500,000
9/19/2008	$300,000
12/9/2008	$600,000
1/29/2009	$600,000
1/8/2010	$500,000
2/23/2010	$600,000
5/4/2010	$450,000

Payments from Confiado to Milan Ecotech

Approx. Date	Amount
12/1/2006	$500,000
12/21/2006	$500,000
2/22/2007	$548,000
4/3/2007	$516,350
6/18/2007	$490,000
7/16/2007	$520,000
8/22/2007	$600,000
10/17/2007	$490,000
11/19/2007	$610,000
1/28/2008	$360,000
1/28/2008	$640,000
2/12/2008	$300,000
5/26/2008	$500,000
7/2/2008	$600,000
9/19/2008	$350,000
1/8/2010	$500,000
5/4/2010	$450,000

Id. at 68-69, 2801-35.

In order to "validate" these transfers, Confiado signed certain agreements with the two Costa Rican companies, which, according to Maiman, were sham contracts to facilitate the transfer of funds. *Id.* at 535.

In turn, between March 2011 and December 2012, Ecostate and Milan Ecotech transferred US$8,274,048.47 and US$8,096,207.51, respectively (US$16,370,255.98 in total), to another Costa Rican company, Ecoteva, as follows[13]:

[12] Each transaction involved a small fee, which is not reflected herein.

[13] These payments were made in the form of one-year certificates of deposit.

Payments from Ecostate to Ecoteva

Approx. Date	Amount
3/18/2011	$140,000.00
3/21/2011	$1,500,000.00
4/20/2011	$999,876.00
4/20/2011	$61,000.00
5/26/2011	$483,583.00
7/26/2011	$547,311.89
10/27/2011	$966,306.88
11/25/2011	$1,915,219.05
12/16/2011	$328,751.65
1/13/2012	$72,000.00
1/19/2012	$490,000.00
2/7/2012	$500,000.00
3/2/2012	$270,000.00

Payments from Milan Ecotech to Ecoteva

Approx. Date	Amount
3/18/2011	$50,000.00
4/18/2011	$999,876.00
4/20/2011	$516,283.00
4/20/2011	$36,000.00
5/26/2011	$490,000.00
6/3/2011	$403,156.23
6/13/2011	$180,452.43
7/11/2011	$879,755.00
7/26/2011	$917,412.83
10/27/2011	$601,968.93
12/28/2011	$1,042,303.09
1/10/2012	$1,050,000.00
1/13/2012	$100,000.00
1/19/2012	$500,000.00
12/19/2012	$329,000.00

Id. at 70-71, 2216-19.

Although Toledo has denied participating in the creation of Ecoteva, a Costa Rican notary public ("Notary") told Peruvian authorities that on January 19 and 20, 2012, Toledo and Dan On met with him to discuss incorporating Ecoteva, and that Toledo had chosen the name of the company and had directed that his mother in law, Fernenbug, who was then approximately 80 years old, should be named chairman of it. *Id.* at 2717. Travel records corroborate Toledo and Dan On's presence in Costa Rica for these meetings. *Id.* at 2744, 2746-47.

In the summer of 2012, Toledo told the Notary that Fernenbug would be traveling to Costa Rica to meet with him. *Id.* at 2719. The meeting between Fernenbug and the Notary occurred on or about July 18, 2012. *Id.* At the meeting, Fernenbug said she wanted to transfer some money from Ecoteva to Peru. *Id.* Accordingly, between July and November 2012, at Fernenbug's direction, US$5.3 million was transferred from Ecoteva to two Banco Credito del Peru ("BCP") accounts in Peru, namely, US$3.45 million to a BCP account held by Arbulu, and US$1.85 million to Fernenbug's BCP account, as follows:

Payments from Ecoteva to Arbulu

Approx. Date	Amount
7/24/2012	$3,297,681
7/24/2012	$152,319

Payments from Ecoteva to Fernenbug

Approx. Date	Amount
7/24/2012	$130,000
8/8/2012	$500,000
8/9/2012	$500,000
9/14/2012	$300,000
10/17/2012	$300,000
11/26/2012	$120,000

Id. at 72-74, 2882-2905.

The funds transferred to Arbulu's BCP account appear to have been payment for Fernenbug's purchase of Arbulu's house located in Las Casuarinas, at Cascajal Street N° 709, Urbanización Panedia, Santiago de Surco, on or about July 26, 2012.[14] *Id.* at 2362.

The funds transferred to Fernenbug's account were used to purchase the following property and pay the following mortgage loans:

i. an office, three parking spaces, and a storage unit located in the Torre Omega building, at the intersection of Monterrico and Cruz del Sur avenues, lot 84, block E, Urbanización Los Granados, Santiago de Surco, for approximately US$882,400, on or about September 5, 2012;

ii. mortgage loan for a property owned by Toledo's daughter, located at Los Olivos Street N° 185-183, Urbanización Camacho-La Molina ("Camacho"), for approximately US$217,007 on or about December 14, 2012 (Toledo's daughter then transferred title of the property to her parents on or about October 7, 2013);

iii. mortgage loan for a property located in the Punta Sal Condominium, first stage, Km 1190 North Panamerican Highway, Canoas District, Contralmirante Villar, Tumbes ("Punta Sal"), for approximately US$277,309, owned by Toledo and his wife, and acquired by them on or about September 4, 2012.

[14] The total purchase price for the Las Casuarinas house was US$3.75 million.

Id. at 2225-35, 2938-95, 3021, 3050-51.

While Fernenbug purchased the Omega Torre property, Toledo negotiated the purchase price in June 2012, according to the seller's general manager. *Id.* at 100-01, 3099-3100.

Toledo has admitted to owning the Camacho and Punta Sal houses. *Id.* at 2640. While he claimed that the mortgages were paid off via a loan from Maiman, Maiman stated that he was not aware of the payments that were made, and that Toledo controlled the funds that were used in the transactions. *Id.* at 534, 2658-59.

II. PROCEDURAL HISTORY

Peru has requested that Toledo, who is a legal permanent resident of the United States, be extradited pursuant to its extradition treaty with the United States, the Extradition Treaty Between the United States of America and the Republic of Peru, U.S.-Peru, July 26, 2001, S. Treaty Doc. No. 107-6 (2002) (the "Treaty"). The United States, in accordance with its obligations under the Treaty and pursuant to 18 U.S.C. §§ 3181 *et seq.*, filed a complaint in this District seeking a warrant for Toledo's arrest. This Court issued the arrest warrant, and Toledo was arrested on July 16, 2019. Toledo is currently in the custody of the U.S. Marshals Service.

ARGUMENT

I. LEGAL FRAMEWORK OF EXTRADITION PROCEEDINGS

A. The limited role of the Court in extradition proceedings

The extradition process is unique. Extradition is primarily an executive function with a specially defined role for the Court, which is authorized by statute to hold a hearing at which it determines whether to certify to the Secretary of State that the evidence provided by the requesting country is "sufficient to sustain the charge." 18 U.S.C. § 3184; *see, e.g.*, *United States v. Knotek*, 925 F.3d 1118, 1124 (9th Cir. 2019) ("As we have stated on many occasions, '[e]xtradition is a matter of foreign policy,' a diplomatic process over which the judiciary provides 'limited' review.") (citation omitted). The Secretary of State, and not the Court, then decides whether the fugitive should be surrendered to the requesting country. 18 U.S.C. §§ 3184, 3186; *Prasoprat v. Benov*, 421 F.3d 1009, 1012 (9th Cir. 2005). "This bifurcated procedure reflects the fact that extradition proceedings contain legal issues peculiarly

suited for judicial resolution, such as questions of the standard of proof, competence of evidence, and treaty construction, yet simultaneously implicate questions of foreign policy, which are better answered by the executive branch." *United States v. Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997).

At the extradition hearing, the Court's role is limited to considering the requesting country's evidence and determining whether the legal requirements for certification of extraditability—as defined in the applicable extradition treaty, statutes, and case law—have been established. *See Quinn v. Robinson*, 783 F.2d 776, 786 n.3 (9th Cir. 1986) (citing *Charlton v. Kelly*, 229 U.S. 447, 461 (1913)) (analogizing extradition hearing to a preliminary hearing in a criminal case). If the Court finds that the requirements for certification have been met, it must provide the certification to the Secretary of State, together with a copy of any testimony taken before the Court, and must commit the fugitive to the custody of the U.S. Marshal to await the Secretary's final determination regarding surrender. 18 U.S.C. § 3184 (following certification, the extradition judge "shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made"); *see Vo v. Benov*, 447 F.3d 1235, 1237 (9th Cir. 2006); *Barapind v. Reno*, 225 F.3d 1100, 1105 (9th Cir. 2000).

B. The requirements for certification

The Court should certify a fugitive's extradition to the Secretary of State when the following requirements have been met: (1) the judicial officer is authorized to conduct the extradition proceeding; (2) the Court has jurisdiction over the fugitive; (3) the applicable extradition treaty is in full force and effect; (4) the crimes for which surrender is requested are covered by the treaty; and (5) there is sufficient evidence to support a finding of probable cause as to each charge. *See Manta v. Chertoff*, 518 F.3d 1134, 1140 (9th Cir. 2008). The following sections briefly discuss each of those requirements.

1. Authority over the proceedings

The extradition statute authorizes proceedings to be conducted by "any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State." 18 U.S.C. § 3184. As such, the judicial officer conducting the extradition hearing prescribed by Section 3184 does not exercise "any part of the judicial power of the United States," but rather acts in a "non-institutional capacity by virtue of a special

authority," *In re Extradition of Howard*, 996 F.2d 1320, 1325 (1st Cir. 1993) (internal quotation marks and citations omitted). Both magistrate judges and district judges may render a certification under Section 3184. *See Austin v. Healey*, 5 F.3d 598, 601-02 (2d Cir. 1993). Here, Rule 7-1(b)(13) of the Criminal Local Rules for the U.S. District Court for the Northern District of California expressly delegates to magistrate judges the authority to handle extradition matters.

2. Jurisdiction over the fugitive

The Court has jurisdiction over a fugitive, such as Toledo, who is found within its jurisdictional boundaries. 18 U.S.C. § 3184 ("[A judge] may, upon complaint made under oath, charging any person found within his jurisdiction . . . issue his warrant for the apprehension of the person so charged.").

3. Treaty in full force and effect

Section 3184 provides for extradition in specifically defined situations, including whenever a treaty or convention for extradition is in force between the United States and the requesting state. *See id.*; *see also Then v. Melendez*, 92 F.3d 851, 853 (9th Cir. 1996) (noting that "the executive branch does not have the power to extradite alleged criminals absent a valid extradition treaty"). The government will satisfy this requirement at the extradition hearing by offering into evidence a declaration from an attorney in the Office of the Legal Adviser for the U.S. Department of State, attesting that there is a treaty in full force and effect between the United States and Peru. The Court must defer to the Department of State's determination in that regard. *Then*, 92 F.3d at 854.

4. Crimes covered by the treaty

Extradition treaties create an obligation for the United States to surrender fugitives under the circumstances defined in the treaty. Article I of the applicable treaty in this case provides for the return of fugitives charged with (or found guilty of, or sentenced for) an "extraditable offense," as that term is defined under the Treaty. "The question of whether an offense is extraditable involves determining: (1) whether it is listed as an extraditable crime in the relevant treaty; (2) whether the alleged conduct is criminalized in both countries; and, (3) whether the offenses in both countries are substantially analogous." *Knotek*, 925 F.3d at 1128-29.

Article II of the Treaty defines offenses as extraditable if the criminal conduct is punishable under the laws of both the United States and Peru by a deprivation of liberty for a maximum period of more than one year or by a more severe penalty. In assessing whether the conduct alleged by Peru is criminalized both in that country and in the United States, the Court should examine the description of criminal conduct provided by Peru in support of its charges and decide whether that conduct, if it had been committed here, would be criminal under U.S. federal law, the law of the state in which the hearing is held, or the law of a preponderance of the states. *See, e.g.*, *id.* at 1128-29 & n.10; *Cucuzzella v. Keliikoa*, 638 F.2d 105, 107-08 (9th Cir. 1981). A requesting country need not establish that its crimes are identical to ours. *Clarey v. Gregg*, 138 F.3d 764, 765 (9th Cir. 1998) ("The primary focus of dual criminality has always been on the conduct charged; the elements of the analogous offenses need not be identical."). Rather, "the court looks at whether 'the essential character of the transaction is the same, and made criminal by both statutes.'" *Knotek*, 925 F.3d at 1131 (quoting *Wright v. Henkel*, 190 U.S. 40, 62 (1903); brackets omitted). Indeed, "[t]he law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions." *Collins v. Loisel*, 259 U.S. 309, 312 (1922).

In fulfilling its function under Section 3184, the Court should liberally construe the applicable extradition treaty in order to effectuate its purpose, namely, the surrender of fugitives to the requesting country. *Factor v. Laubenheimer*, 290 U.S. 276, 299-300 (1933); *see also, e.g.*, *Martinez v. United States*, 828 F.3d 451, 463 (6th Cir. 2016) (en banc) ("default rule" is that any ambiguity in an extradition treaty must be construed in favor of "facilitat[ing] extradition"); *In re Extradition of Mathison*, 974 F. Supp. 2d 1296, 1305 (D. Or. 2013). Accordingly, because extradition treaties should be "interpreted with a view to fulfil our just obligations to other powers," *Grin v. Shine*, 187 U.S. 181, 184 (1902), the Court should "approach challenges to extradition with a view towards finding the offenses within the treaty," *McElvy v. Civiletti*, 523 F. Supp. 42, 48 (S.D. Fla. 1981).

5. Probable cause that the fugitive has committed the offenses

To certify the evidence to the Secretary of State, the Court must conclude there is probable cause to believe that the crimes charged by Peru were committed by the person before the Court. *Vo*, 447 F.3d at 1237. The evidence is sufficient, and probable cause is established, if it would cause a "prudent man" to "believ[e] that the (suspect) had committed or was committing an offense." *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975) (internal quotation marks and citation omitted). The extradition judge's probable cause determination is "not a finding of fact 'in the sense that the court has weighed the evidence and resolved disputed factual issues,'" but instead "'serve[s] only the narrow function of indicating those items of submitted evidence on which the decision to certify extradition is based.'" *Quinn*, 783 F.2d at 791 (quoting *Caplan v. Vokes*, 649 F.2d 1336, 1342 n.10 (9th Cir. 1981)).

C. An extradition hearing follows unique procedures

As detailed above, the purpose of an extradition hearing is to decide the sufficiency of each charge for which extradition is requested under the applicable extradition treaty; it is not to determine the guilt or innocence of the fugitive—that determination is reserved for the foreign court. *Collins*, 259 U.S. at 316; *Neely v. Henkel*, 180 U.S. 109, 123 (1901). Accordingly, an extradition hearing is not a criminal proceeding, *see, e.g.*, *Kamrin v. United States*, 725 F.2d 1225, 1228 (9th Cir. 1984); *Martin v. Warden, Atlanta Penitentiary*, 993 F.2d 824, 828 (11th Cir. 1993); and it is governed by "the general extradition law of the United States and the provisions of the Treaty," *Emami v. U.S. Dist. Ct.*, 834 F.2d 1444, 1450-51 (9th Cir. 1987).

The Federal Rules of Evidence do not apply to extradition proceedings. Fed. R. Evid. 1101(d)(3) ("These rules—except for those on privilege—do not apply to . . . miscellaneous proceedings such as extradition or rendition."); *Then*, 92 F.3d at 855. Indeed, hearsay evidence is admissible at an extradition hearing, and, moreover, a certification of extraditability is properly based entirely on the authenticated documentary evidence and information provided by the requesting government. *See, e.g.*, *Collins*, 259 U.S. at 317; *Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. 1986). Nothing more is required, and typically nothing more is provided. *See, e.g.*, *Zanazanian v. United States*, 729 F.2d 624, 627-28 (9th Cir. 1984) (police report describing witness statements is competent evidence); *In re Extradition of*

Mainero, 990 F. Supp. 1208, 1212-13 & 1226-29 (S.D. Cal. 1997) (statements of co-conspirators and other witnesses sufficient in extradition to Mexico). Extradition treaties do not require, or even anticipate, the testimony of live witnesses at the hearing. Indeed, requiring the "demanding government to send its citizens to another country to institute legal proceedings, would defeat the whole object of the treaty." *Bingham v. Bradley*, 241 U.S. 511, 517 (1916); *see also, e.g.*, *Zanazanian*, 729 F.2d at 626-27.

The Federal Rules of Criminal Procedure also do not apply to extradition proceedings. Fed. R. Crim. P. 1(a)(5)(A) ("Proceedings not governed by these rules include . . . the extradition and rendition of a fugitive."); *Mathison*, 974 F. Supp. 2d at 1304. A fugitive has no right to discovery. *See, e.g.*, *Prasoprat*, 421 F.3d at 1014. Furthermore, many constitutional protections applicable in criminal cases do not apply. For example, a fugitive has no right to cross-examine witnesses who might testify at the hearing, *see, e.g.*, *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1406-07 (9th Cir. 1988); there is no Sixth Amendment right to a speedy trial, *see, e.g.*, *In re Extradition of Kraiselburd*, 786 F.2d 1395, 1398 (9th Cir. 1986); the Fifth Amendment guarantee against double jeopardy does not apply to successive extradition proceedings, *see, e.g.*, *In re Extradition of Powell*, 4 F. Supp. 2d 945, 951 (S.D. Cal. 1998) (citing *Collins v. Loisel*, 262 U.S. 426, 429 (1923)); the exclusionary rule is not applicable, *see, e.g.*, *Simmons v. Braun*, 627 F.2d 635, 636-37 (2d Cir. 1980); and a fugitive does not have the right to confront his accusers, *see, e.g.*, *Bingham*, 241 U.S. at 517.

Relatedly, a fugitive's right to present evidence is severely constrained. A fugitive may not introduce evidence that contradicts the evidence submitted on behalf of the requesting country, but rather may only introduce evidence explaining the submitted evidence. *See Charlton*, 229 U.S. at 461-62. A contrary rule "might compel the demanding government to produce all its evidence . . . both direct and rebutting, in order to meet the defense thus gathered from every quarter." *Collins*, 259 U.S. at 316 (quoting *In re Extradition of Wadge*, 15 F. 864, 866 (S.D.N.Y. 1883)). The admission of explanatory evidence is largely within the discretion of the Court. *See Hooker v. Klein*, 573 F.2d 1360, 1369 (9th Cir. 1978).

In addition, courts routinely reject technical and affirmative defenses in extradition proceedings. *See, e.g.*, *Bingham*, 241 U.S. at 517 (rejecting objections to extradition that "savor of technicality");

Hooker, 573 F.2d at 1368 (noting that extradition court "properly may exclude evidence of alibi, or facts contradicting the government's proof, or of a defense such as insanity"). These issues, which require factual or credibility determinations, are reserved for the courts in the requesting country to resolve after the fugitive is extradited.

D. Rule of non-inquiry

All matters raised by the fugitive as a defense to extradition, other than those related to the requirements for certification, are to be considered by the Secretary of State, not by the Court. *See* 18 U.S.C. §§ 3184 & 3186. For example, the Secretary of State should address a fugitive's contentions that an extradition request is politically motivated, that the requesting state's justice system is unfair, or that extradition should be denied on humanitarian grounds. *Prasoprat*, 421 F.3d at 1016 (extradition judge does not have authority to consider humanitarian objections to extradition); *Koskotas v. Roche*, 931 F.2d 169, 173-74 (1st Cir. 1991) (motives of requesting state is a matter for consideration by the executive branch); *Quinn*, 783 F.2d at 789-90 (noting that "the Secretary of State has sole discretion to determine whether a request for extradition should be denied because it is a subterfuge made for the purpose of punishing the accused for a political crime, or to refuse extradition on humanitarian grounds because of the procedures or treatment that await a surrendered fugitive") (citation omitted). This practice is consistent with the long-held understanding that the surrender of a fugitive to a foreign government is "purely a national act . . . performed through the Secretary of State." *See In re Kaine*, 55 U.S. 103, 110 (1852).

II. TOLEDO SHOULD BE DETAINED

Just as extradition hearings follow unique procedures, the determination of whether to release a fugitive on bail is also *sui generis*. The federal statutes governing extradition in the United States, 18 U.S.C. §§ 3181 *et seq.*, do not provide for bail. Further, the Bail Reform Act, 18 U.S.C. §§ 3141 *et seq.*, does not apply because, as explained above, an extradition proceeding is not a criminal case.[15] *See*

[15] The Bail Reform Act applies only to "offenses" in violation of U.S. law that are triable in U.S. courts. *See* 18 U.S.C. §§ 3141(a), 3142, 3156(a)(2). Here, Toledo is not charged with an "offense" within the meaning of 18 U.S.C. § 3156, but rather with offenses committed in violation of the law of the requesting state, Peru.

Kamrin, 725 F.2d at 1228; *Martin*, 993 F.2d at 828. Rather, case law provides that bail should be granted in an extradition proceeding "only in the most pressing circumstances, and when the requirements of justice are absolutely peremptory." *United States v. Leitner*, 784 F.2d 159, 160 (2d Cir. 1986) (quoting *In re Mitchell*, 171 F. 289, 289 (S.D.N.Y. 1909) (Hand, J.)).

A. Applicable law

1. A strong presumption against bail governs in an international extradition proceeding

Unlike in domestic criminal cases, "[t]here is a presumption against bail in an extradition case." *Salerno v. United States*, 878 F.2d 317, 317 (9th Cir. 1989); *see also Martin*, 993 F.2d at 827; *In re Extradition of Martinelli Berrocal*, 263 F. Supp. 3d 1280, 1294 (S.D. Fla. 2017) ("[A]ny release of a detainee awaiting extradition is largely antithetical to the entire process."). The Supreme Court established this presumption against bail in *Wright v. Henkel*, explaining that when a foreign government makes a proper request pursuant to a valid extradition treaty, the United States is obligated to deliver the person sought after he or she is apprehended:

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

190 U.S. at 62.

The prudential reasons for this presumption against bail in international extradition cases are clear and compelling. When, as here, a requesting country meets the conditions of the Treaty, the United States has an "overriding interest in complying with its treaty obligations" to deliver the fugitive. *In re Extradition of Garcia*, 615 F. Supp. 2d 162, 166 (S.D.N.Y. 2009); *see also Wright*, 190 U.S. at 62. It is important that the United States be regarded in the international community as a country that honors its agreements in order to be in a position to demand that other nations meet their reciprocal obligations to the United States. Such reciprocity would be defeated if a fugitive flees after being released on bond. *See Martinelli Berrocal*, 263 F. Supp. 3d at 1306 ("[O]ur Executive Branch has a vested interest in

enforcing our own treaty obligations for fear that other treaty partners will refrain from doing so in the future. And a difficult but necessary measure in carrying out that responsibility is to secure a wanted individual and surrender him or her to the foreign jurisdiction.").

2. Fugitives must be detained unless they establish "special circumstances" and also demonstrate that they are neither a flight risk nor a danger to the community

In light of the strong presumption against bail established in *Wright*, fugitives may not be released on bail unless they demonstrate that (1) they are neither a flight risk nor a danger to the community, *and* (2) "special circumstances" warrant their release. *See, e.g.*, *In re Extradition of Kirby*, 106 F.3d 855, 862-63 (9th Cir. 1996); *Leitner*, 784 F.2d at 160-61; *In re Extradition of Antonowicz*, 244 F. Supp. 3d 1066, 1068 (C.D. Cal. 2017); *In re Extradition of Mainero*, 950 F. Supp. 290, 294 (S.D. Cal. 1996).[16] "This 'special circumstances' standard is much stricter than the 'reasonable assurance' of appearance standard made applicable to domestic criminal proceedings by the Bail Reform Act." *In re Extradition of Kin-Hong*, 913 F. Supp. 50, 53 (D. Mass. 1996).

In evaluating a fugitive's risk of flight in the extradition context, courts have considered, among other things, the fugitive's financial means, ties with foreign countries, and incentive to flee based on the severity of the offense. *See, e.g.*, *Martinelli Berrocal*, 263 F. Supp. 3d at 1304; *In re Extradition of Beresford-Redman*, 753 F. Supp. 2d 1078, 1091 (C.D. Cal. 2010) (finding that a "well-educated and sophisticated" fugitive facing serious charges in foreign country had both the "incentive and ability to flee" and therefore presented a flight risk); *In re Extradition of Patel*, No. 08-430–MJ–HUBEL, 2008 WL 941628, at *2 (D. Or. Apr. 4, 2008) (considering the fact that a fugitive, a physician, had "more than sufficient assets available with which to flee"). Crucially, the special circumstances inquiry is separate from considerations of danger to the community or risk of flight. *See, e.g.*, *In re Extradition of Perez-*

[16] Several courts in this Circuit have required fugitives to meet this burden with clear and convincing evidence, reasoning that the presumption against bail in extradition cases justifies a heightened standard of proof, *see, e.g.*, *In re Extradition of Patel*, 08-430–MJ–HUBEL, 2008 WL 941628, at *1 (D. Or. Apr. 4, 2008); *Mainero*, 950 F. Supp. at 294; others have applied a preponderance of the evidence standard, *see, e.g.*, *In re Extradition of Santos*, 473 F. Supp. 2d 1030, 1035 n.4 (C.D. Cal. 2006). Other courts have found it unnecessary to resolve the issue because of the difficulty of satisfying either standard. *See, e.g.*, *In re Extradition of Perez-Cueva*, No. 16-0233M, 2016 WL 884877, at *2 (C.D. Cal. Mar. 7, 2016).

Cueva, No. 16-0233M, 2016 WL 884877, at *2 (C.D. Cal. Mar. 7, 2016) (special circumstances must exist in addition to absence of risk of flight). "Even a low risk of flight" is not a circumstance sufficiently "unique" to constitute a special circumstance. *Leitner*, 784 F.2d at 161; *see also Salerno*, 878 F.2d at 317-18 (lack of flight risk "is not a criteria for release in an extradition case"). Accordingly, a fugitive who poses a danger to the community or a risk of flight should be denied bail, even in the face of special circumstances. *In re Extradition of Siegmund*, 887 F. Supp. 1383, 1384 (D. Nev. 1995).

"Special circumstances must be extraordinary and not factors applicable to all defendants facing extradition." *Mainero*, 950 F. Supp. at 294 (citing *In re Extradition of Smyth*, 976 F.2d 1535, 1535-36 (9th Cir. 1992)). Courts have considered and rejected a lengthy list of would-be special circumstances, including:

- The complexity of the pending litigation, *see, e.g.*, *United States v. Kin-Hong*, 83 F.3d 523, 525 (1st Cir. 1996);
- The fugitive's need to consult with an attorney and/or participate in pending litigation, *see, e.g.*, *Smyth*, 976 F.2d at 1535-36;
- The fugitive's character, background, and/or ties to the community, *see, e.g.*, *In re Extradition of Noeller*, No. 17 CR 664, 2017 WL 6462358, at *5 (N.D. Ill. Dec. 19, 2017); *Beresford-Redman*, 753 F. Supp. 2d at 1089; *In re Extradition of Sidali*, 868 F. Supp. 656, 658 (D.N.J. 1994);
- The fact that the fugitive may have been living openly, *see, e.g.*, *Leitner*, 784 F.2d at 160-61; *In re Extradition of Pelletier*, No. 09-mc-22416, 2009 WL 3837660, at *1, 3-4 (S.D. Fla. Nov. 16, 2009);
- Discomfort, special dietary needs, or medical concerns that can be attended to while incarcerated, *see, e.g.*, *In re Extradition of Noeller*, 2017 WL 6462358, at *8-9; *Martinelli Berrocal*, 263 F. Supp. 3d at 1301-02; *In re Extradition of Kyung Joon Kim*, No. 04-cv-3886, 2004 WL 5782517, at *5 (C.D. Cal. July 1, 2004);
- U.S. citizenship or the pendency of naturalization or other immigration proceedings, *see, e.g.*, *Antonowicz*, 244 F. Supp. 3d at 1072; *In re Extradition of Orozco*, 268 F. Supp. 2d 1115, 1117 (D. Ariz. 2003);
- The fugitive's professional status, *see, e.g.*, *Pelletier*, 2009 WL 3837660, at *3-4 (allegedly well-respected businessman); *In re Extradition of Heilbronn*, 773 F. Supp. 1576, 1581-82 (W.D. Mich. 1991) (highly-trained doctor);
- The availability of electronic monitoring, *see, e.g.*, *In re Extradition of Rovelli*, 977 F. Supp. 566, 569 (D. Conn. 1997);

- Ordinary delay or delay occasioned by the fugitive in the course of extradition proceedings, *see, e.g.*, *Salerno*, 878 F.2d at 318; *Antonowicz*, 244 F. Supp. 3d at 1070; and

- The availability of bail for the same offense in the requesting country, *see, e.g.*, *Antonowicz*, 244 F. Supp. 3d at 1070; *Kyung Joon Kim*, 2004 WL 5782517, at *2; *Siegmund*, 887 F. Supp. at 1386-87.

While in certain exceptional cases some of the above may have been deemed a special circumstance, courts generally determine special circumstances to exist based on a confluence of factors, as opposed to any single consideration. Such findings are highly case-specific and within the discretion of the Court, mindful of the strong presumption against bail and future reciprocity of other countries at stake.

B. Analysis

As explained below, the Court should detain Toledo without bond because he poses a significant flight risk and there are no "special circumstances" warranting his release.

1. Toledo poses a significant risk of flight

Toledo is a significant flight risk for several reasons.

First, he has the financial means to flee. As described above, he is alleged to have received US$20 million, and he owns multiple properties in Peru. He also has other possible sources of income, including from serving as an international lecturer and consultant in the field of economics, and from a company he owns, Global Economic and Investment. *See* Req. at 2639. Such wealth would facilitate an easy escape to a third country.

Second, he has significant contacts in a multitude of foreign countries. As the former President of Peru, Toledo had numerous opportunities to create and cultivate relationships with high-powered individuals outside of Peru, relations which could facilitate a comfortable life in exile for him and his family. Toledo himself has told Peruvian authorities that he has "traveled the world," *id.* at 2694; and that he has "ties" with communities "not only in Costa Rica but also in Israel and the world," *id*. at 2641. He has also called himself "a friend of Shimon Perez – the [former] President of Israel," a country with which Peru does not have an extradition treaty and of which his wife is a citizen. *Id.* at 2642. Such contacts increase his risk of flight.

Third, Toledo has demonstrated that he is intent on, and capable of, avoiding prosecution. He left Peru in January 2017 (and is believed not to have returned since), after he had been questioned by Peruvian authorities in connection with the Odebrecht investigation, and approximately a month before the warrant for his arrest was issued. *Id.* at 5990. Despite being well-aware of the charges pending against him in Peru, which have been highly publicized in the media, he has deliberately chosen to stay in the United States rather than return to Peru to face the charges. The fact that Toledo has decided to evade prosecution in his home country is indicative of his risk of flight in the United States. *Cf. United States v. Botero*, 604 F. Supp. 1028, 1035 (S.D. Fla. 1985) ("In the context of determining whether a defendant poses a substantial risk of flight, this Court does not find any meaningful distinction between a person who left the country when he learned of pending charges and one who already outside the country refuses to return to face these charges. The intent is the same—the avoidance of prosecution.") (citing *Jhirad v. Ferrandina,* 536 F.2d 478, 483 (2d Cir. 1976)).

Given his prior history of relocating from Peru and failing to appear for his criminal proceedings there, further flight from the United States to yet another country or to an underground location in the United States is a reasonable assumption. Indeed, other individuals have taken drastic measures to avoid being arrested in connection with the Odebrecht investigation. For example, Alan Garcia, another former Peruvian president accused of having accepted bribes from Odebrecht, recently shot himself in the head when Peruvian authorities arrived at his house to arrest him in connection with the case. *See, e.g.*, Mitra Taj & Marco Aquino, *Peru's Ex-President Garcia Kills Himself to Avoid Arrest in Odebrecht Probe*, Reuters, Apr. 17, 2019, *available at* https://www.reuters.com/article/us-peru-corruption/perus-ex-president-garcia-kills-himself-to-avoid-arrest-in-odebrecht-probe-idUSKCN1RT1K4.

Fourth, both Toledo's age and the seriousness of the offenses with which he is charged provide a strong incentive to flee. Toledo is over 70 years old. Two of the charges against him each carry a penalty of up to fifteen years' imprisonment, and the third charge carries a penalty of up to eight years' imprisonment. Req. at 18-19. The combination of his age and the substantial amount of time he faces if convicted "naturally bears upon and increases the risk of flight." *United States v. Madoff*, 316 F. App'x 58, 59 (2d Cir. 2009); *see also, e.g.*, *Martinelli Berrocal*, 263 F. Supp. 3d at 1305 (sixty-six years of age

and potential twenty-one-year sentence "materially contribute[d] to [the fugitive's] high risk of flight"); *Perez-Cueva*, 2016 WL 884877, at *3 (seriousness of allegations against fugitive "militates against release on bail").

Furthermore, Toledo has not maintained a clean record during his time in the United States. He was arrested in San Mateo County in March 2019 for public drunkenness. *See, e.g.*, Mitra Taj & Marco Aquino, *Peruvian Ex-President Arrested for Being Drunk in Public in California*, Reuters, Mar. 18, 2019, *available at* https://www.reuters.com/article/us-peru-politics/peruvian-ex-president-arrested-for-being-drunk-in-public-in-california-idUSKCN1QZ2EU. Accordingly, he may not be able to meet his burden of demonstrating that he is not a danger to the community.

Allowance of bail in any amount would not guarantee Toledo's presence in court and would invite the possibility of embarrassing the United States in the conduct of its foreign affairs. The United States' ability to extradite fugitives from other countries could be severely compromised were the United States to release Toledo on bond and then have him flee the jurisdiction.

2. There are no "special circumstances" justifying Toledo's release

Toledo's risk of flight is alone sufficient for the Court to deny any forthcoming application for bail. However, even if the Court were satisfied that Toledo is not a flight risk and does not pose a danger to the community here or abroad, the government is unaware of any "special circumstances" that would justify bail in this case.

While Toledo may attempt to argue that his status as a former head of state is a "special circumstance," that is not so. In general, courts have found special circumstances based on unusual and exceptional factors relating to the potential ramifications of incarceration, or particular legal or procedural aspects of the extradition request or proceeding. *See, e.g.*, *Kin-Hong*, 83 F.3d at 524 ("'Special circumstances' may include . . . the raising of substantial claims against extradition on which the [fugitive] has a high probability of success, a serious deterioration in the [fugitive's] health, or an unusual delay in the appeals process."). Conversely, courts have rejected special circumstances based on factors akin to personal status. For example, the court in *Borodin v. Ashcroft* rejected a former foreign government official's argument that a special circumstance existed based on his then-current "status" as

"an important person [State Secretary] in the Russian-Belarus Union," as demonstrated by evidence supporting the fugitive's "personal and professional experience and standing in [certain] political communities." 136 F. Supp. 2d 125, 129, 131 (E.D.N.Y. 2001). In this case, Toledo's status as a wealthy, well-connected, and politically powerful individual "cannot be a 'special circumstance' within the meaning of *Wright*, unless [the Court is] prepared to say that the normal rules of extradition are not going to apply to [former heads of state] by virtue of who they are." *See Heilbronn*, 773 F. Supp. at 1581-82 (noting that "[t]he court is not aware of any authority for carving out . . . an exception" based solely on the fugitive's status as a doctor).

The last former head of state to face extradition from the United States, former Panamanian president Ricardo Martinelli, was detained pending his extradition proceedings. *See Martinelli Berrocal*, 263 F. Supp. 3d at 1307. While the court in that case concluded that the fugitive's "unique political status *may* give rise to special circumstance considerations" (emphasis added), it did not ultimately decide that such a circumstance in fact warranted his release because the court further found that "at the same time his equally unique financial and international status is also what concerns the Court the most about granting bail in this case. His professional ties to many countries . . . present significant obstacles to bail in this case." *Id.* at 1305. Toledo should similarly be detained in this case.

III. CONCLUSION

For the foregoing reasons, the United States requests that Toledo be detained pending resolution of this extradition proceeding.

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Respectfully submitted,

DAVID L. ANDERSON
United States Attorney

/s/

ELISE LAPUNZINA
Assistant United States Attorney
CHRISTOPHER J. SMITH
Associate Director
REBECCA A. HACISKI
Trial Attorney
Office of International Affairs