No. _____

In the
Supreme Court of the United States of America

In re

RICARDO MARTINELLI

EMERGENCY PETITION
FOR WRIT OF HABEAS CORPUS

Ricardo J. Bascuas
1311 Miller Drive
Coral Gables, Florida 33146
305-284-2672
r.bascuas@miami.edu

Marcos Daniel Jiménez
MARCOS D. JIMÉNEZ, PA
255 Alhambra Circle, No. 800
Coral Gables, Florida 33134
305-772-6026
mdj@mdjlegal.com

David Oscar Markus
Counsel of Record
MARKUS/MOSS PLLC
40 NW Third Street, PH1
Miami, Florida 33128
305-379-6667
dmarkus@markuslaw.com

Counsel for Petitioner

Questions Presented

This Court last addressed whether and under what circumstances bail is available in an international extradition case 114 years ago. Since then, courts across the country have misconstrued *Wright v. Henckel*, 190 U.S. 40 (1903), as having erected a heavy presumption against bail in such cases. The widespread misreading of *Wright* has yielded an arbitrary jurisprudence, which, extradition courts have themselves noted, provides no legal standards or criteria to guide the determination. The belief that *Wright* imposed an unlawful presumption has prevailed for so long that it is now binding across the country. *Only* this Court can resolve the confusion at this point.

But, no case presenting this issue will ever reach this Court unless it originates here. An adverse decision on bail in an extradition case can be reviewed only by a petition for a writ of habeas corpus; direct appeal is barred by erroneous precedent. Petitioning the district or circuit courts for habeas corpus is futile; there is never the time and other resources and precedent forecloses any relief. The underlying extradition case will be resolved before the district court inevitably denies the petition for bail.

Therefore, Ricardo Martinelli, the former President of the Republic of Panama, respectfully requests that this Court consider these questions:

> Whether the Bail Reform Act of 1984 governs bail in an extradition case; and, if not, whether denying bail in this case, on the basis of an arbitrarily enforced presumption against bail, violated the Constitution of the United States.

Parties to the Proceeding

The petitioner, Ricardo Martinelli, is the former President of the Republic of Panama and the relator in the extradition proceeding pending before the United States District Court for the Southern District of Florida.

The Republic of Panama is the complainant that initiated the extradition proceeding. Panama is represented by the United States Department of Justice.

The respondent is Robert Wilson, the acting warden of the Federal Detention Center Miami.

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Decisions Below and Basis for Jurisdiction

The order of the United States District Court for the Southern District of Florida denying bail for the pendency of the extradition proceeding was entered on July 7, 2017. The court denied a motion for reconsideration of that order on July 18, 2017.

The extradition court had jurisdiction over Panama's extradition complaint under 18 U.S.C. § 3184, the Treaty Between the United States and Panama for the Mutual Extradition of Criminals, the Convention on Cybercrime, and the United Nations Convention against Corruption.

This Court has jurisdiction pursuant to 28 U.S.C. § 1651 and 28 U.S.C. § 2241.

Provisions of Law

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law ... .

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Title 18 U.S.C. § 3141 provides:

> (a) *Pending trial.* A judicial officer authorized to order the arrest of a person under section 3041 of this title before whom an arrested person is brought shall order that such person be released or detained, pending judicial proceedings, under this chapter.
>
> (b) *Pending sentence or appeal.* A judicial officer of a court of original jurisdiction over an offense, or a judicial officer of a Federal appellate court, shall order that, pending imposition or execution of sentence, or pending appeal of conviction or sentence, a person be released or detained under this chapter.

Title 18 U.S.C. § 3142 provides in pertinent part:

> (a) *In general.* Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be
>
> (1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;
>
> (2) released on a condition or combination of conditions under subsection (c) of this section;

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or

(4) detained under subsection (e) of this section.

* * *

(j) *Presumption of innocence.* Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

Title 18 U.S.C. § 3184 provides:

Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), 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, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate judge of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to

> believe the person will shortly enter the United States. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b), he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he 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.

Reasons for This Court to Exercise Its Discretion

This Petition meets the prerequisites, specified by Rule 20.1, for this Court to review this Petition. The misinterpretation of *Wright* has effectively eliminated this Court's appellate jurisdiction over bail decisions in international extradition cases. The circumstances of this case are exceptional because (1) the Petitioner is incarcerated in a Federal Detention Center despite the extradition court's acknowledgment that he made "a strong case for the grant of bail as a former head of state of an American ally," App. at A-3, and (2) the basis for his imprisonment is widespread confusion among the lower courts about the nature of extradition cases and the law that governs them. Finally, no other court will entertain an appeal from the denial of bail or this Petition.

First, this Petition is in aid of this Court's appellate jurisdiction, which the lower courts' confusion over *Wright* has impaired. This Court has held that "[t]he proper

procedure for challenging bail as unlawfully fixed is by motion for reduction of bail and appeal to the Court of Appeals from an order denying such motion." *Stack v. Boyle*, 342 U.S. 1, 6 (1951). Review could then be sought in this Court pursuant to a writ of certiorari. However, the Eleventh Circuit has cut off that path for President Martinelli. Failing to understand that an extradition proceeding is criminal in nature, the Eleventh Circuit has held that neither the district court nor the court of appeals has jurisdiction over an appeal from an extradition court's bail determination. *In re Extradition of Ghandtchi*, 697 F.2d 1037, 1037 (CA11 1983). Resolving the issue raised in this Petition would remove that improper obstruction to this Court's appellate jurisdiction. The impairment is real, as evidenced by the fact that this Court last addressed bail in the context of international extradition 114 years ago.

Second, exceptional circumstances warrant this Court's discretionary review of this Petition, as the extradition court acknowledged. App. at A-3 ("[T]he circumstances involved are indeed extraordinary ... ."). The Petitioner, the former President of the Republic of Panama, is imprisoned without bail at the Federal Detention Center in Miami pending review of Panama's extradition request. The legal basis for this detention is the mistaken notion that this Court's decision in *Wright* created a heavy presumption against bail in every international extradition case. This idea is binding precedent in several circuits, including the Eleventh Circuit. *See United States v. Kin-Hong*, 83 F.3d 523, 525 (CA1 1996) ("There is a presumption against bail in extradition cases and only 'special circumstances' justify release on bail.") (citing *Wright*); *Salerno v. United States*, 878 F.2d 317, 317 (CA9 1989) ("There is a presumption against bail in an extradition case and only 'special

circumstances' will justify bail.") (citing *Wright*); *United States v. Leitner*, 784 F.2d 159, 160 (CA2 1986) ("In [*Wright*], the Supreme Court held that federal courts could grant bail in extradition cases in 'special circumstances.' ... The courts continue to hold that there is a presumption against bail ... ."); *In re Extradition of Russell*, 805 F.2d 1215, 1216 (CA5 1986) ("Bail should be denied in extradition proceedings absent 'special circumstances.'") (citing *Wright*); *Martin v. Warden*, 993 F.2d 824, 827 (CA11 1993) ("[A] defendant in an extradition case will be released on bail only if he can prove 'special circumstances.'") (citing *Wright*).

As this Petition shows, *Wright* created no such legal presumption; a heavy presumption against bail in every extradition case is, in fact, unconstitutional. The extradition court's order violated, among other basic rights, the presumption of innocence because it imposed on President Martinelli an impossible burden. The extradition court, in fact, conceded that President Martinelli made "a strong case for the grant of bail," App. at A-3, but denied bail anyway based on an arbitrarily applied supposed presumption. The order, therefore, "is not mere error but usurpation of power," *De Beers Consolidated Mines v. United States*, 325 U.S. 212, 217 (1945), because the Constitution denies courts the power to deny bail categorically or arbitrarily. This Court's discretionary review is therefore justified by the extraordinary circumstances attending this imprisonment.

Third, not only has direct appeal been foreclosed, but adequate relief can not be obtained by bringing this Petition in the district court or in the court of appeals. Every federal court in the Eleventh Circuit is bound to

apply the supposed presumption. Panel opinions are considered binding on future panels in the Eleventh Circuit and, given that the lower federal courts are in virtual unanimity that *Wright* created a presumption against bail, there is no chance of *en banc* review. Therefore, any attempt to bring this Petition in the district court or in the court of appeals is foreclosed by binding authority construing *Wright*. Only this Court can clarify what *Wright* actually held.

Nor is there time to bring this Petition in the district court, then appeal its denial to the Eleventh Circuit, and then seek review in this Court on a writ of certiorari. The underlying extradition case will be resolved long before that. *Wright* reached this Court 114 years ago only because the time between Whitaker Wright's application for bail and this Court's resolution of his appeal was 75 days. Mr. Wright asked the U.S. Commissioner presiding over his extradition case to set bail on March 18, 1903. 190 U.S. at 43. Having been denied, he petitioned the Circuit Court two days later for writs of habeas corpus and certiorari. *Id.* That court denied his petition on March 30, *id.* at 40, and he appealed to this Court. *Id.* at 43. This Court heard argument in the case on April 28 and 29, and rendered its decision on June 1, 1903. *Id.* at 40.

This Court can and should exercise its discretion without requiring the Petitioner to run a futile and wasteful gauntlet through the lower courts. *See Ex parte Peru*, 318 U.S. 578, 586 (1943) (exercising discretionary review over a petition for a writ of prohibition where "the case is one of such public importance and exceptional character as to call for the exercise of our discretion to issue the writ rather than to relegate the Republic of Peru

to the circuit court of appeals, from which it might be necessary to bring the case to this Court again by certiorari"). In this regard, it is worth repeating that the extradition court denied bail *despite* its conclusion that President Martinelli "has made a strong case for the grant of bail as a former head of state of an American ally ... ." App. at A-3. *Compare Ex parte Peru*, 318 U.S. at 586–87 ("The case involves the dignity and rights of a friendly sovereign state ... .").

For these reasons, President Martinelli respectfully requests that this Court exercise its discretionary jurisdiction over this Petition, which seeks to correct a persistent framework within which fundamental constitutional rights are routinely violated nationwide. *Wright* meant to create a flexible framework, not a rigid presumption. The misreading of *Wright* conflicts with the Eighth Amendment's prohibition on excessive bail as well as with the Fifth Amendment's guarantee of due process of law. Its effect is to needlessly and cruelly subject the majority of extradition relators, who are presumed innocent, to incarceration at the Treasury's expense. *Wright* did not freeze the law in amber at the turn of the previous century, and this Court should take this opportunity to say so.

Statement of the Case

The extradition court rebuffed the Petitioner's motion for bail only because of a supposed presumption favoring preventive detention. *See* App. at A-3 ("Though the circumstances involved are indeed extraordinary, and though the Defendant has made a strong case for the grant of bail as a former head of state of an American ally like the Republic of Panama, bail cannot be granted."). This

deprived the Petitioner of basic constitutional guarantees, and only this Court can rectify this serious error.

Ricardo Alberto Martinelli Berrocal was the 36th President of the Republic of Panama, serving from 2009 to 2014. President Martinelli was born in Panama City but has long-standing ties to the United States. He attended high school at the Staunton Military Academy in Staunton, Virginia, and earned his bachelor's degree in 1973 at the University of Arkansas in Fayatteville. He began his career at Citibank in Panama and went on to become a successful entrepreneur and businessman.

He later entered politics and forged a coalition that won Panama's 2009 presidential election as well as control of the legislature. Juan Carlos Varela, who had been a rival candidate, became the coalition's Vice President and also its Foreign Minister. In 2011, President Martinelli determined that Varela was abusing his position as Foreign Minister to extort kickbacks from consular officers and removed him from the cabinet. The President was constitutionally incapable of removing Varela from the vice presidency, so he remained in that role only nominally.

President Martinelli was credited with devising an investment program that "helped Panama maintain a decade-long growth rate that is the envy of Latin America ... ." *A new leader for Panama: Business is over*, THE ECONOMIST (5 May 2014). However, because the Panamanian presidency is limited to two non-consecutive five-year terms, President Martinelli was not eligible for reelection in 2014. With the governing coalition dissolved, Varela won the election against President Martinelli's preferred successor.

Immediately following his inauguration, President Varela launched several retaliatory criminal investigations of President Martinelli. Six months later, President Martinelli returned to the United States, where he had kept a house or condominium unit continuously since the late 1980s. A few months after arriving, he formally applied for political asylum. The Department of Homeland Security conducted its asylum interview on March 16, 2017. Therefore, President Martinelli is lawfully in the United States. For more than two years, he lived openly in Miami until his arrest last month.

On June 12, 2017, Panama brought an extradition complaint against President Martinelli in the United States District Court for the Southern District of Florida. The extradition complaint alleges in four counts that President Martinelli violated Panamanian law by conducting illegal surveillance and wiretapping without judicial authorization and by committing embezzlement. The complaint was assigned to a magistrate judge who issued an arrest warrant, which the U.S. Marshals promptly executed. The next day, President Martinelli had an initial court appearance.

On June 19, 2017, Panama, through counsel provided by the U.S. Department of Justice, moved for President Martinelli's detention pending the conclusion of the extradition proceeding. On the same day, President Martinelli moved for release on bail and proposed conditions restrictive enough to remove any incentive to flee:

- execution of a $5,000,000 ten-percent bond, co-signed by President Martinelli's wife and backed by equity in President Martinelli's Florida real estate;

- execution of a $2,000,000 personal surety bond, co-signed in part by a friend and backed by equity in the friend's Florida residence;
- confinement to President Martinelli's Florida home;
- around-the-clock electronic monitoring;
- around-the-clock posting of a police officer at President Martinelli's home, to be approved by Panama's attorneys and paid by President Martinelli;
- restrictions of access to modes of transportation (*e.g.*, airplanes or boats); and
- execution of a waiver of extradition that would become operative if President Martinelli were to flee.

Despite this proffer, the extradition court, after a hearing, denied bail and ordered President Martinelli detained. The court held that, while President Martinelli had presented a "strong case for the grant of bail as a former head of state of an American ally," App at A-3, it fell short of meeting his "heavy burden to show why bail should be granted," App. at A-48.

Argument

Confusion reigns in the lower federal courts over the nature of extradition proceedings and, consequently, over the law that governs them. This Court should clarify that extradition proceedings are criminal in nature. Essentially, they are probable cause proceedings to determine whether probable cause supports the seizure of the extradition relator, as the Fourth Amendment requires. They sometimes become complicated and protracted, however, because the law that the relator allegedly violated is foreign, as is the evidence offered to support arrest.

The last time this Court considered the question of bail in an international extradition case — in 1903 — the federal bail statute applied only to domestic charges. The Bail Reform Act of 1984, however, is not similarly limited. The plain text of the Act therefore applies to extradition cases and supplies a familiar, workable framework for setting bail in such cases. This Court recognized the criminal nature of extradition cases twice before, including in *Wright* itself, which noted that the only reason the federal bail statute did not govern was the express limitation on its scope to domestic charges. 190 U.S. at 61–62.

Even if the Bail Reform Act does not apply, the lower courts' misinterpretation of *Wright* is untenable and unconstitutional. A heavy presumption against bail in every extradition case, without regard to the particular circumstances, violates the Excessive Bail Clause and abrogates the presumption of innocence. Worse, as commentators and extradition courts themselves have noted, there are no discernible legal standards or criteria guiding the determination of bail in extradition cases today. Bail is granted or denied arbitrarily and unpredictably.

I. An extradition proceeding is criminal in nature, and bail in such a case is governed by federal statute.

President Martinelli was denied bail in large part because the extradition court misapprehended the nature of its function. In support of its reasons for keeping President Martinelli imprisoned, the court stated that "this is not a criminal case where bail would ordinarily be granted. This is an administrative proceeding arising under international law ... ." App. at A-3.

A United States extradition court is not a creature of international law, as the magistrate judge asserted. Such courts were created, first by implication and soon after by statute, to satisfy the Fourth Amendment's bar on unreasonable seizures. An extradition court is charged to ascertain that there is probable cause to seize the relator against his will and deliver his or her person to a foreign government. An extradition proceeding, therefore, is necessarily criminal, not administrative, in nature. *See Brinegar v. United States*, 338 U.S. 160, 175 (1949) ("The substance of all the definitions of probable cause is a reasonable ground for belief of guilt.") (internal quotation marks and citation omitted).

It follows that such proceedings must be conducted within statutory and constitutional limits. A presumption favoring detention in every extradition case is incompatible with the Bail Reform Act of 1984, whose scope is not limited to domestic cases as earlier federal bail statutes were. The Act favors the granting of bail in most cases because mere accusations do not vitiate the presumption of innocence. Moreover, as explained in Part II, the presumption the extradition court relied upon to deny President Martinelli bail is incompatible with the Eighth Amendment's prohibition on excessive bail and the Fifth Amendment's guarantee of due process of law. This explains why *Wright* unanimously rejected the U.K.'s claim that extradition courts lacked authority to set bail.

A. The Fourth Amendment origins of extradition courts show that they are criminal in nature.

An extradition proceeding is not "administrative" in nature nor does it arise "under international law," contrary to the extradition court's belief. App. at A-3. Extradition

proceedings exist to ensure that the United States is constitutionally authorized to arrest a person sought by a foreign country to answer a criminal charge. The proceeding is, in its essence, indistinguishable from a probable cause hearing to test the validity of a domestic arrest. An extradition matter can be complicated and, thus, protracted because the crime is defined by foreign as well as domestic law, and the parties and the court usually lack familiarity with the foreign law, which they must study and analyze. Nonetheless, the proceeding is criminal in nature.

Extradition courts exists to satisfy the Fourth Amendment's requirement that all seizures be reasonable. Before there was an extradition statute, France requested an alleged forger's extradition from James Buchanan, who was then Secretary of State, under a treaty in force in both countries. Secretary Buchanan recognized that, under the Fourth Amendment, the federal government can not arrest anyone without a finding of probable cause to believe that the person committed a crime specified in a federal law. In extradition cases, the extradition treaty serves as the federal law specifying the crimes for which probable cause might be established.

Secretary Buchanan directed the U.S. Attorney to get an arrest warrant from a judge. The district court later agreed that the United States has no power to arrest, much less extradite, anyone without a judicial finding of probable cause to believe he committed an extraditable offense specified in a binding extradition treaty:

> [I]t is manifest that the provision demanding the apprehension and commitment of persons charged with crimes cannot be carried into effect in this country, but by aid of judicial authority. Not only in

> the distribution of the powers of our government does it appertain to that branch to receive evidence and determine upon its sufficiency to arrest and commit for criminal offences, but the prohibition in the constitution against issuing a warrant to seize any person except on probable cause first proved necessarily imports that issuing such warrant is a judicial act.

In re Metzger, 17 F.Cas. 232, 233 (S.D.N.Y. 1847).

This Court affirmed, commending Secretary Buchanan for involving the courts: "Whether the crime charged is sufficiently proved, and comes within the treaty, are matters for judicial decision; and the executive, when the late demand of the surrender of Metzger was made, very properly as we suppose, referred it to the judgment of a judicial officer." *In re Metzger*, 46 U.S. (5 How.) 176, 188–89 (1847).

Congress codified *Metzger* the next year. *See* 9 Stat. 302, 30 Cong. Ch. 167 (12 Aug 1848). Today's extradition statute, 18 U.S.C. § 3184, is substantially the same as its 1848 precursor.

This history shows that, from the earliest extraditions, all three branches of the United States government have recognized that an extradition proceeding is criminal in nature. Arrest pursuant to an extradition request is an unconstitutional seizure unless two conditions are met: (1) a valid treaty is in effect, which serves to define and provide notice of the offenses that may subject one to extradition, and (2) a judicial officer finds probable cause to believe that the relator committed one of those offenses. This, of course, accords with the general rule governing the constitutionality of arrests. *See, e.g.*, *Michigan v.*

Summers, 452 U.S. 692, 700 (1981) ("[E]very arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause."); *Dunaway v. New York*, 442 U.S. 200, 213 (1979) ("[A]ny 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause.").

B. Recognizing that extradition cases are criminal in nature, *Wright* did not create any legal presumption against bail.

This Court has addressed whether and under what circumstances extradition courts can set bail only once. In *Wright v. Henkel*, 190 U.S. 40 (1903), the United Kingdom argued that, because the extradition statute did not mention bail, extradition courts lacked power to set bail. The Court rejected the claim unanimously:

> We are unwilling to hold that the circuit courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief.

Id. at 63.

This passage has come to be universally misunderstood by extradition courts as having created a strong presumption against bail. The phrase "special circumstances" has become a Delphic, arbitrary standard that relators are burdened to meet. *See Parretti v. United States*, 143 F.3d 508, 512 (CA9 1998) ("As to the bail issue,

the government relies on cryptic language in an ambiguous case written by the Supreme Court almost 100 years ago for its argument that an almost irrebuttable presumption against bail exists in extradition cases.") (Reinhardt, C.J., dissenting). Very few succeed. No consensus understanding of the phrase has developed in 114 years. As a result, whether an extradition relator is conditionally released is unpredictable and arbitrary.

The prevailing reading of *Wright*, however, distorts the decision. The United Kingdom could argue in *Wright* that extradition courts had no power to set bail because the bail statute then in force conferred that power only in cases alleging domestic charges. Affirming the criminal nature of extradition proceedings, this Court first consulted the criminal code and found that Congress had limited the bail statute's scope to domestic cases:

> By § 1015 of the Revised Statutes, it is provided: "Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders." *But this must be read with § 1014, the preceding section, and that is confined to crimes or offenses against the United States.*

190 U.S. at 61–62 (emphasis added; citations omitted). Section 1014 of the Revised Statutes indeed addressed only the authority to set bail for federal crimes. It provided:

> For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a Circuit Court to take bail, ... or other magistrate of any

> State where he may be found, and agreeably to the usual mode of process against offenders in such State, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense.

Thus, in 1903, § 1014 vested the power to arrest for offenses against the United States in certain judicial officers and § 1015 specified that bail should be set in all non-capital cases.

Wright rejected the U.K.'s argument anyway. It held that extradition courts should take reasonable steps, after considering all the circumstances, to ensure that the United States can surrender the relator if the court certifies that it is lawful to do so. 190 U.S. at 62. At the time, there was no reasonable way, short of incarceration, to prevent Mr. Wright's flight. This Court affirmed the denial of bail only because granting bail was impracticable, not because courts did not have the power to do so. This is clear from the rest of the paragraph in which the problematic phrase "special circumstances" appears:

> We are unwilling to hold that the circuit courts possess no power in respect of admitting to bail other than as specifically vested by statute ... . Nor are we called upon to do so, as we are clearly of opinion, *on this record*, that no error was committed in refusing to admit to bail, and that, although the refusal was put on the ground of want of power, the final order ought not to be disturbed.

Id. at 63 (emphasis added).

This analysis is grounded in pragmatics, not in law. It merely recognizes the practical impediments that attended setting bail *at the time* and *on that record*; it did not create a legal presumption to persist for all time, regardless of the circumstances.

On the contrary, the unanimous decision went to pains *not* to set a high bar against bail. The Court recognized, by rejecting the U.K.'s argument for a total bar on bail, that setting bail was theoretically, but not practically, permissible. In that context, the reference to "special circumstances" can only mean exactly the opposite of what courts have taken it to mean. "Special circumstances" means circumstances that will reasonably assure the extradition court that the relator will not or can not flee — thus minimizing the risk of diplomatic embarrassment. In such cases, extradition courts can set bail, not just theoretically but *actually*. Recognizing that it could not predict the future, the Court was careful to allow for the possibility that measures short of preventive incarceration could, in some future cases, reasonably assure that the relator would not flee.

Yet, the prevailing reading of *Wright* renders this Court's unanimous holding merely nominal. Even though today's courts can impose conditions of release that make absconding tremendously more difficult than it was in 1903, courts refuse to exercise their authority and constitutional obligation to set bail.

Today's extradition courts can ensure the accused's continued presence without resort to incarceration. Federal courts now have the capability to monitor a person's whereabouts electronically, reliably, and in real time. The U.S. Marshals Service is able to respond

instantaneously at any time of the day or night to any sign of a problem. International and domestic travel is regulated and surveilled. International communication is instantaneous, allowing for coordinated law enforcement worldwide. The movement of assets is tracked and can be blocked. Consumer transactions are monitored as they occur. Telephone and other communications can be intercepted.

At the turn of the 20th century, only a Jules Verne could possibly imagine the scientific discoveries and technological innovations that have blessed or cursed humanity with these monitoring and surveillance capabilities. But this Court was prescient enough to allow that such "special circumstances" might arise, one way or another, and unbridle extradition courts' power to set bail. Rather than using the tools at their disposal, extradition courts have clung to an overly literalistic reading of *Wright*. The result is an anachronistic, unprincipled, and arbitrary jurisprudence that keeps people, who are presumed innocent, in prison even when there is no rational or practical reason for it.

Wright purposively and unanimously created room for the law to develop as times and circumstances changed. But the vast majority of today's extradition courts read the case as having fixed the law in amber.

Even the minority of extradition courts that have granted bail have done so *despite* their belief that *Wright* created a presumption favoring detention. Relying on an eclectic assortment of quotations on justice — from *Oliver Twist* to Pope Pius XII — one extradition court concluded that denying bail was inhumane and warranted, notwithstanding the supposed presumption:

> Nothing beyond the naked presumption for detention counsels the court to keep Dr. Ramnath confined with the customary contingent of "crack-heads," crazies, and miscreants who usually inhabit dank county jails. On the other hand, every rational concern augurs for her release. Her husband and minor children need their wife and mother. ... She is not a risk of flight.

United States v. Ramnath, 533 F.Supp.2d 662, 685 (E.D. Tex. 2008).

Wright holds only that the extradition court should be mindful of the United States' diplomatic obligations in determining whether release on bail is reasonable. If President Martinelli's appearance at the extradition proceedings can be reasonably well assured short of incarceration, there is no reason or legal authority for confining him to a Federal Detention Center. On the contrary, a presumption favoring detention is plainly unconstitutional, as Part II shows.

C. Bail in an extradition proceeding is now governed by the Bail Reform Act of 1984.

The Bail Reform Act of 1984, which governs bail in the federal system today, is phrased substantially differently from the federal bail statute that *Wright* analyzed. It provides: "A judicial officer authorized to order the arrest of a person under section 3041 of this title before whom an arrested person is brought shall order that such person be released or detained, pending judicial proceedings, under this chapter." 18 U.S.C. § 3141. This statute applies, by its plain terms, whenever *any* arrested person is brought before a judicial officer authorized to issue arrest warrants for federal crimes — whether or not the arrest was for an

offense against the United States. The Act governs bail in all cases in which "an arrested person is brought" before a "[a] judicial officer authorized to order the arrest of a person under section 3041 of this title ... ." 18 U.S.C. § 3141.

President Martinelli was "an arrested person" who was "brought before" a magistrate judge. The magistrate judge was "authorized to order the arrest of a person under section 3041" because § 3041 authorizes magistrate judges to warrant arrests "[f]or any offense against the United States ... ."

Under this new statute, the fact that President Martinelli was arrested pursuant to 18 U.S.C. § 3184, not § 3041, makes no difference. Unlike the bail statute in effect in 1903, the Bail Reform Act's scope is not defined by the crime for which the accused is arrested. Its scope is broader. It applies to *any* "arrested person" brought before a judicial officer who can issue federal arrest warrants. President Martinelli was arrested and brought before a magistrate judge with such authority. The Bail Reform Act therefore plainly applies. *See also* 18 U.S.C. § 3142(a) ("Upon the appearance before a judicial officer of a person charged *with an offense* ... .") (emphasis added).

The Bail Reform Act, this Court has held, does not generally permit detention without bail. In *United States v. Salerno*, this Court approved detention without bail only in the limited circumstances delineated in the Act. 481 U.S. 739, 747 (1987) ("The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes."). It explicitly respects the presumption of innocence. *See* 18 U.S.C. § 3142(j). It is a workable framework that federal courts are familiar with.

The only reason the extradition court in this case did not apply the Bail Reform Act was its mistaken belief that extradition courts are "administrative" rather than criminal in nature and have their roots in international law rather than the Fourth Amendment. App. at A-3 ("[T]his is not a criminal case where bail would ordinarily be granted. This is an administrative proceeding arising under international law ... ."). Those premises are false. The Bail Reform Act applies. Its plain text says so.

II. Alternatively, any presumption against bail in extradition cases is unconstitutional.

President Martinelli's "strong case for the grant of bail as a former head of state of an American ally," App at A-3, was denied only because the extradition court required him to rebut a widely enforced presumption that does not and can not legally exist. This violated President Martinelli's constitutional rights in three ways, common to every bail hearing in every U.S. extradition court: *First,* the presumption violated the Eighth Amendment's Excessive Bail Clause because it presupposes that a total denial of bail is the norm, regardless of the circumstances of the particular case, and that the relator has the burden of establishing the right to bail. *Second,* the particular presumption at issue here was applied arbitrarily and capriciously, in violation of the same Clause, because there are no intelligible standards or criteria governing how it might be rebutted. *Third,* applying a presumption against bail abridged the presumption of innocence guaranteed by the Fifth Amendment's Due Process Clause.

A. *Wright*'s supposed presumption violates the Excessive Bail Clause.

Because the extradition proceeding is criminal in nature, complicated only by the need to understand the foreign law involved and the foreign evidence adduced, the magistrate judge should not have required President Martinelli to prove that he posed no risk of flight. On the contrary, it was Panama's burden to prove that President Martinelli's appearance could not be reasonably assured by measures less aggressive than incarceration.

The magistrate judge mistakenly believed that neither the Constitution nor the Bail Reform Act applied to an extradition proceeding. *See* App. at A-22 ("[T]he federal extradition statute provides no explicit authority for a district court to grant bail to a potential extraditee. Certainly, the Eighth Amendment does not speak to this issue, and neither does the Bail Reform Act.") (citations omitted). This was premised on the mistaken belief that extradition proceedings are "administrative" rather than criminal in nature. *See* App. at A-3. It was on this basis that the court usurped a non-existent power to impose a heavy burden against bail. However, as *Metzger* shows, extradition proceedings are criminal proceedings. Therefore, the Constitution, as well as the Bail Reform Act, regulates them.

The Eighth Amendment's prohibition on requiring "excessive bail" creates a presumption in favor of bail. "The command of the Eighth Amendment that 'Excessive Bail shall not be required ...' *at the very least* obligates judges passing upon the right to bail to deny such relief only for the strongest of reasons." *Sellers v. United States*, 89 S.Ct. 36, 38 (1968) (Black, J., in chambers) (emphasis

original). This Court's decision in *United States v. Salerno*, 481 U.S. 739, 753 (1987), which affirmed the constitutionality of the Bail Reform Act of 1984, confirms Justice Black's understanding of the Bail Clause.

The Clause does not create an absolute right to bail, but the allegations animating the extradition proceeding against President Martinelli do not justify a denial of bail. "A court may, for example, refuse bail in capital cases. And, ... a court may refuse bail when the defendant presents a threat to the judicial process by intimidating witnesses." *Salerno*, 481 U.S. at 753. No such considerations apply here. The sole reason why President Martinelli was denied bail was that the extradition court burdened him with proving that his flight was literally impossible. App. at A-3. Imposing this insurmountable burden on President Martinelli constituted "excessive bail" within the meaning of the Bail Clause. "[W]hen the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more." *Salerno*, 481 U.S. at 754–55 (citing *Stack v. Boyle*, 342 U.S. 1 (1951)).

The conditions of release suggested by President Martinelli's motion for bail would have ensured his appearance. Indeed, the extradition court itself conceded that President Martinelli had "made a strong case for the grant of bail as a former head of state of an American ally ... ." App. at A-3. Specifically, President Martinelli offered to secure his appearance with a multi-million-dollar bail bond, as well as with other restrictive conditions including monitored home confinement.

This did not satisfy the extradition court, which deemed *any* risk of flight, no matter how remote, to be "'too

significant a risk for the national interest to tolerate.'" App. at A-24 (quoting *In re Extradition of Garcia*, 761 F.Supp.2d 468, 470–71 (S.D. Tex. 2010)). Burdening the relator with proving beyond all doubt that any risk of flight had been eliminated was an impossible and unfair standard — and one incompatible with American values. *See Stack*, 342 U.S. at 8 ("Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice.") (opinion of Jackson, J.).

The extradition court further reasoned that the multi-million-dollar bond would not compensate Panama were President Martinelli to somehow abscond. *See* App. at A-26. However, a bail bond is not compensatory or remedial. Its only purpose, this Court has noted, is to deter flight:

> [T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment.
>
> Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.

Stack v. Boyle, 342 U.S. 1, 5 (1951).

The extradition court should not have placed the burden of proof on President Martinelli at all. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755.

B. *Wright*'s supposed presumption is unguided by any discernible legal standards or criteria, which violates the Due Process Clause.

In more than 100 years, no discernible legal standards or criteria have developed to inform the "special circumstances" analysis: "[W]hat exactly constitutes 'special circumstances' has yet to be defined. Courts have only described this concept in the abstract, leaving trial courts without specific factors or parameters to follow." *Shaw*, 2015 WL 521183 at *6. The result is an arbitrary and unprincipled jurisprudence that denies extradition relators due process in their bail determination.

Many relators who would pose little, if any, risk of flight are detained. That is true of President Martinelli who made a "strong case" for release. Conversely, some courts find "special circumstances" that would seem to *undermine* the case for release. *See, e.g.*, *In re Extradition of Kirby*, 106 F.3d 855, 864–65 (CA9 1996) (finding that "special circumstance" warranted bail because the relators, members of the Irish Republican Army, "enjoy the sympathy and are objects of concern of many Americans"). While the random deprivations of liberty that this legal disarray inflicts are unjustifiable even for the healthy, its effect on the sick is needlessly cruel. *See, e.g.*, *Garcia*, 761 F.Supp.2d at 481–82 (denying bail to a relator who recently had back surgery, was prescribed physical therapy, and was "in danger of losing the movement of his left leg").

One extradition court recently encapsulated the severe gravity of the problem facing both relators and extradition courts grappling with bail:

> A review of the relevant case law most certainly demonstrates that what constitutes special

circumstances is anything but clear. "Special circumstances" have never been specifically defined, but have only been described in the abstract, leaving trial courts with little to no guidance. Thus, bail decisions are contradictory and irreconcilable. *See, e.g.*, Nathaniel A. Persily, *International Extradition and the Right to Bail*, 34 STAN. J. INT'L L. 407, 426 (Summer 1998) ("The case law regarding the criteria for pretrial release in extradition cases has been, to stay the least, inconsistent."); Christopher S. Kelly, *Bail in International Extraditions: How the "Special Circumstances" Standard has Become "Especially Confusing,"* 21 DCBA BRIEF 34, 36 (March 2009) ("The cases are replete with contradictory and irreconcilable decisions, which only serve to further confuse the courts and muddy the law."); Joshua J. Fougere, *Let's Try This Again: Reassessing the Right to Bail in Cases of International Extradition*, 42 COLUM. J.L. & SOC. PROBS. 177, 188 (Winter 2008) ("There is not one consistent legitimate special circumstance that warrants release on bail.").

Multiple factors have led to this convoluted "special circumstances" standard. First, as discussed above, there is no clear authority on the issue of bail in international extradition proceedings. Second, it is not uncommon for defense attorneys to present a myriad of special circumstances in support of their client's bail application. This tactic results in courts considering, and recognizing or rejecting, more circumstances as "special."

> Third, there are very few circuit court bail decisions providing guidance to the lower courts. This is because the bail decision quickly becomes moot. Fourth, because circuit court decisions are scarce, the vast majority of bail opinions in international extradition cases are by magistrate and district court judges. These opinions hold no precedential value and are merely illustrative.

Garcia, 761 F.Supp.2d at 471–72 (footnotes and some citations omitted).

This case typifies the problems the *Garcia* court catalogued. The extradition court in this case first rejected what it termed "traditional special circumstances" that President Martinelli argued in support of bail, holding that prior extradition courts' decisions precluded consideration of any of them. App. at A-32–A-44. However, the court held that President Martinelli's status as a former head of state "does give rise, at least in theory, to the type of 'special circumstance' that *Wright* may have been envisioning" because it implicates "foreign relations, comity, and international law issues." App. at A-46. The analysis as a whole, which typifies the unpredictability of extradition courts' approach to bail, is arbitrary and unguided by the precept that should be the core concern of any bail determination — ensuring that the relator does not flee.

A minority of extradition courts have recognized that the "special circumstances" analysis is not helpful. They have understood *Wright*'s essential point — *i.e.*, that extradition courts should be mindful of the consequences of flight in extradition cases. An extradition court in the District of Massachusetts, for example, stated: "The standard of scrutiny and concern exercised ... in an

extradition case should be greater than in the typical bail situation, given the delicate nature of international relations. But one of the basic questions facing a district judge in either situation is whether, under all the circumstances, the petitioner is likely to return to court when directed to do so." *Beaulieu v. Hartigan*, 430 F.Supp. 915, 917 (D. Mass. 1977); *see also In re Extradition of Chapman*, 459 F.Supp.2d 1024, 1026 (D. Hawaii 2006) ("More recent cases in the Ninth Circuit also indicate the increasing importance of the flight risk determination. This primary threshold consideration becomes more crucial with the diminishing importance of the secondary 'special circumstances' determination.").

However, as *Garcia* pointed out, these decisions lack any precedential value. Consequently, the illegitimate presumption against bail continues to prevent the release of most extradition relators. For relators and their counsel, the lack of standards makes preparing a bail presentation an exercise in guesswork. Even when a "strong case" for bail is presented, an extradition court can find a wealth of authority to support the denial of bail based on nothing more than *Wright*'s supposed presumption. That is what happened in this case.

C. *Wright*'s supposed presumption abrogates the presumption of innocence.

The presumption of innocence, even in the face of serious allegations, is fundamental and constitutional: "'Axiomatic and elementary,' the presumption of innocence 'lies at the foundation of our criminal law.'" *Nelson v. Colorado*, 137 S.Ct. 1249, 1255–56 (2017) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). Accordingly, the Bail Reform Act expressly acknowledges the presumption,

see 18 U.S.C. § 3142(j), and generally burdens the prosecution with proving that bail should be denied.

In extradition cases, however, the federal courts have interpreted *Wright* as burdening the relator with proving that "special circumstances" justify bail and that there is no risk of flight. *See In re Extradition of Garcia*, 761 F.Supp.2d 468, 474 (S.D. Tex. 2010) ("There is general agreement that the potential extraditee bears the burden of establishing a bond is warranted."). The burden the extradition court imposed on President Martinelli was so high that not even his "strong case" for bail could meet it.

There is no agreement as to the weight of *Wright's* purported burden. *In re Extradition of Shaw*, 2015 WL 521183 at *6 (S.D. Fla. 2015) ("Some courts have determined that a defendant must meet his burden by clear and convincing evidence. Other courts have held that a preponderance of the evidence standard applies.") (citations omitted); *Garcia*, 761 F.Supp.2d at 474 ("[T]here is disagreement among the federal district courts regarding the burden of persuasion that a potential extraditee must satisfy, which adds to the uncertainty of making a bond determination."). The majority of extradition courts either do not specify a burden or require proof of entitlement to bail by clear and convincing evidence. *Id.* (collecting cases).

In this case, the presumption proved essentially irrebuttable. President Martinelli offered a multi-million-dollar bail bond, secured in part by real estate, and additionally offered to pay for around-the-clock personal and electronic monitoring of his home confinement. He offered to forfeit his right to contest the extradition request in the event that he attempted to flee. The

extradition court conceded that this was a "strong case for the grant of bail," App. at A-3, but still did not set bail. The only basis for detention in the face of this proffer was an unconstitutional presumption.

It is hard to imagine how anyone under constant surveillance could flee or would want to flee given the consequences proposed. The order therefore violated the presumption of innocence. "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack*, 342 U.S. at 4 (1951).

Conclusion

Extradition proceedings are probable cause determinations, which are criminal in nature. The plain language of the Bail Reform Act governs bail in such cases. *Wright* itself confirms this. This Court first consulted the federal bail statute in effect in 1903 to determine whether it resolved that case. That statute did not apply to extradition cases, but the modern successor statute does.

In any event, a heavy presumption against bail that applies in every extradition case is unconstitutional. This Court never intended to create one, and none exists.

The denial of bail in this case was therefore without lawful basis, and President Martinelli's confinement is unlawful and unconstitutional. He is entitled to a new bail hearing at the earliest possible time with a presumption *favoring* his release on conditions that will reasonably ensure his appearance at all proceedings.

Verification

Undersigned counsel to the Petitioner, President Ricardo Martinelli, are authorized to represent that, having reviewed this Petition, President Martinelli declares under penalty of perjury that the factual representations made in the Petition are true and correct to the best of his recollection.

Respectfully submitted,

Ricardo J. Bascuas
1311 Miller Drive
Coral Gables, Florida 33146
305-284-2672
r.bascuas@miami.edu

Marcos Daniel Jiménez
MARCOS D. JIMÉNEZ, PA
255 Alhambra Circle, No. 800
Coral Gables, Florida 33134
305-772-6026
mdj@mdjlegal.com

David Oscar Markus
Counsel of Record
MARKUS/MOSS PLLC
40 NW Third Street, PH1
Miami, Florida 33128
305-379-6667
dmarkus@markuslaw.com

Counsel for Petitioner

24 July 2017