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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ELIAS MENDOZA PEREZ,
Petitioner,
v.
MARGARET MIMS,
Respondent.

No. 1:16-cv-01935-SKO HC
**ORDER DENYING PETITIONER'S
MOTION FOR STAY OF EXTRADITION**

(Doc. 4)

Petitioner Elias Mendoza Perez moves for a stay of extradition pending resolution of a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The United States of America and Respondent, Margaret Mims, Fresno County Sheriff, in her capacity as warden of the Fresno County Jail, where Petitioner is detained, oppose the motion.

I. Procedural Background

On May 15, 2015, a warrant issued for Petitioner's arrest pursuant to the Government's complaint for provisional arrest under the extradition treaty between the United States and Mexico. *See United States of America v. Elias Mendoza Perez*, No. 1:15-mj-00074-SKO, Docs. 1 and 2. The United States submitted a formal request for Petitioner's extradition based on a pending charge of homicide in the Mexican state of Michoacan. On February 29, 2016, a Magistrate Judge conducted a formal extradition hearing. On March 11, 2016, the Court issued a

1 Certification of Extraditability and Order of Commitment based on a finding of probable cause
2 and ordered Petitioner's extradition to Mexico.

3 On March 31, 2016, Petitioner filed his first petition for a writ of habeas corpus pursuant
4 to 28 U.S.C. § 2241. *See Perez v. Mims*, No 1:16-cv-00447-DAD-SKO, Doc. 1. Petitioner
5 contended that (1) his extradition to Mexico would violate the United Nations Convention
6 Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("the
7 Convention"), 1465 U.N.T.S. 85, because he has a "credible fear" that he will be tortured and
8 killed if he is extradited to Mexico, and (2) regardless of whether the Convention applies, an
9 exception to extradition on "humanitarian grounds" should be applied to his specific case. On
10 June 14, 2016, a Magistrate Judge filed findings and recommendations, in which she
11 recommended that the petition be denied because (1) Petitioner's claim that extradition would
12 violate his rights under the convention against torture was not ripe for review, (2) Petitioner's
13 arguments that extradition would violate the convention against torture was outside the scope of
14 habeas review, and (3) even if the claim were ripe for review, no humanitarian exception to the
15 rule of non-inquiry existed to authorize the Court's inquiry into the procedures or treatment that
16 Petitioner would experience if were extradited to Mexico. On October 31, 2016, the Court
17 adopted the findings and recommendations, and denied the habeas petition without prejudice.

18 On December 27, 2015, the United States Secretary of State signed the surrender warrant
19 authorizing Petitioner's extradition to Mexico. The State Department informed Petitioner that it
20 made the decision to extradite "[f]ollowing a review of all pertinent information, including the
21 materials submitted to the Department of State and pleadings and filings, including those
22 submitted to the U.S. District Courts for the District of Columbia and the Eastern District of
23 California, on behalf of Elias Mendoza Perez." The letter acknowledged the United States'
24 obligation, pursuant to the Convention, not to extradite any person to a country "where there are
25 substantial grounds for believing that he would be in danger of being subjected to torture." It
26 added that "[t]he Department carefully and thoroughly considers both claims cognizable under
27 the Convention and [other] humanitarian claims and takes appropriate steps, which may include
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1 obtaining information or commitments from the requesting government, to address the identified
2 concerns.”

3 On December 28, 2016, Petitioner filed his second federal petition for writ of habeas
4 corpus in this Court and moved to stay extradition pending its resolution.

5 **II. Stay of Extradition**

6 “A stay is not a matter of right, even if irreparable injury might otherwise result to the
7 appellant. It is an exercise of judicial discretion.” *Virginian Ry. Co. v. United States*, 272 U.S.
8 658, 672-73 (1926). Because “[t]he propriety of its issue is dependent upon the circumstances”
9 (*Id.*), the Court must analyze the four relevant factors according to the specific facts and
10 circumstances of the individual case. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The traditional
11 four factors for determining the propriety of a stay of proceedings are: “(1) whether the stay
12 applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the
13 applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will
14 substantially injure the other parties interested in the proceedings; and (4) where the public
15 interest lies.” *Id.* (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). “The first two factors
16 are the most critical.” *Nken*, 556 U.S. at 434. “The party requesting a stay bears the burden of
17 showing that the circumstances justify an exercise of [the Court’s] discretion.” *Id.*

18 **A. Probability of Success on the Merits**

19 The first factor that a court must consider in assessing the propriety of staying an
20 extradition order is the likelihood that the habeas petition will succeed on the merits. Although
21 more than the “mere possibility of relief” is required, *Nken*, 556 U.S. at 434, a petitioner need not
22 establish that success is more likely than not. *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir.
23 2011). The Ninth Circuit has suggested that the proper measure is a reasonable likelihood or
24 reasonable probability of success. *Id.* at 967.

25 **1. Extradition Proceedings**

26 Extradition is “the surrender by one nation to another of an individual accused or
27 convicted of an offense outside of its own territory, and within the territorial jurisdiction of the
28 other, which, being competent to try and to punish him, demands the surrender.” *Terlinden v.*

1 *Ames*, 184 U.S. 270, 289 (1902). Extradition from the United States is governed by 18 U.S.C.
2 § 3184, which “confers jurisdiction on any justice or judge of the United States or any authorized
3 magistrate to conduct an extradition hearing under the relevant extradition treaty between the
4 United States and the requesting nation.” *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1009 (9th
5 Cir. 2000), *overruled on other grounds by Trinidad y Garcia v. Thomas*, 683 F.3d 952, 957 (9th
6 Cir. 2012).

7 “The extradition process is ordinarily initiated by a formal request from a foreign
8 government to the Department of State, which along with the Department of Justice, evaluates
9 whether the request is within the scope of the relevant extradition treaty between the United
10 States and the requesting nation.” *Barapind v. Reno*, 225 F.3d 1100, 1105 (9th Cir. 2000);
11 *Cornejo-Barreto*, 218 F.3d at 1009. “Once approved, the United States Attorney for the judicial
12 district where the person sought is located files a complaint in federal district court seeking an
13 arrest warrant for the person sought.” *Barapind*, 225 F.3d at 1105; *Cornejo-Barreto*, 218 F.3d at
14 1009. A hearing is then held before a federal judge to determine whether the offense is
15 extraditable and probable cause exists to sustain the charge(s). *Prasoprat v. Benov*, 421 F.3d
16 1009, 1012 (9th Cir. 2005); *Cornejo-Barreto*, 218 F.3d at 1009. If these requirements are met,
17 the magistrate judge must certify to the Secretary of State that the individual is extraditable. 18
18 U.S.C. § 3184.

19 The magistrate judge who presides over the hearing “has no discretionary decision to
20 make.” *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326 (9th Cir. 1997), *superseded on other grounds*
21 *by Cornejo-Barreto*, 218 F.3d at 1010. Rather, “[i]f the evidence is sufficient to sustain the
22 charge, the inquiring magistrate judge is required to certify the individual as extraditable to the
23 Secretary of State and to issue a warrant.” *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*,
24 323 F.3d 1198, 1208 (9th Cir. 2003). The Secretary of State then determines in his discretion
25 whether the individual will be surrendered. *Id.*

26 The procedural background above illustrates procedural compliance with the extradition
27 process, culminating in the December 27, 2015, order for Petitioner’s removal to Mexico to stand
28 trial for homicide.

1 **2. Pending Habeas Petition**

2 “A petition for habeas corpus is the only method of review of an order certifying
3 extradition.” *Artukovic v. Rison*, 784 F.2d 1354, 1355 (9th Cir. 1986); *see also Collins v. Miller*,
4 252 U.S. 364, 369 (1920); *Caplan v. Vokes*, 649 F.2d 1336, 1340 (9th Cir. 1981). Habeas review
5 of an extradition order is “severely limited.” *Artukovic*, 784 F.2d at 1355. “The petition may
6 challenge the order only in the narrow grounds of whether the extradition court had jurisdiction
7 over the proceedings and the fugitive; whether the offense charged is within the extradition treaty;
8 and whether there was *any* evidence warranting the finding that there was reasonable ground to
9 believe the accused guilty.” *Id.* at 1356 (quoting *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925)
10 (emphasis added)).

11 Petitioner does not challenge his extradition order on any of these three bases, but seeks to
12 set it aside based on its violation of the United Nations Convention Against Torture. Neither the
13 habeas petition nor the brief submitted in support of the pending stay motion articulates the
14 provisions of the Convention or explains how the Convention interacts with the extradition treaty
15 on which the order for Petitioner’s extradition is based.

16 **3. United Nations Convention Against Torture**

17 The Convention is a treaty signed and ratified by the United States, 136 Cong. Rec.
18 36,198 (1990), and implemented by statute as part of the Foreign Affairs Reform and
19 Restructuring Act of 1998 (“FARRA”), 8 U.S.C. § 1231 note. The statute declares that it is “the
20 policy of the United States not to . . . extradite . . . any person to a country in which there are
21 substantial grounds for believing the person would be in danger of being subjected to torture.” *Id.*
22 The statute requires that “the appropriate agencies . . . prescribe regulations to implement the
23 obligations of the United States under Article 3 of the United Nations Convention Against
24 Torture.” *Id.*

25 The Convention and its implementing regulations are binding domestic law, which means
26 that the Secretary of State must make a torture determination before surrendering an extraditee
27 who makes a claim under the Convention. FARRA and its regulations generate interests
28 cognizable as liberty interests under the Due Process Clause. *Trinidad y Garcia*, 683 F.3d at 956-

1 57 (citing U.S. Const. amend. V); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*,
2 397 U.S. 254 (1970)). As noted by the Ninth Circuit:

3 The process due here is that prescribed by the statute and
4 implementing regulation: The Secretary must consider an
5 extraditee's torture claim and find it not "more likely than not" that
6 the extraditee will face torture before extradition can occur. An
7 extraditee thus possesses a narrow liberty interest: that the Secretary
8 comply with h[is] statutory and regulatory obligations.

9 *Trinidad y Garcia*, 683 F.3d at 957 (quoting 22 C.F.R. § 95.2).

10 Petitioner's "liberty interest under the federal statute and federal regulations entitles him
11 to *strict compliance* by the Secretary of State with the procedure outlined in the regulations." *Id.*
12 (emphasis added). Petitioner does not allege that the Secretary of State failed to comply with the
13 statutory procedure, but that the Secretary of State erred by failing to agree with petitioner's
14 contention of his likely torture following extradition to Mexico. Review of the extradition
15 magistrate judge's decision on this ground is outside the scope of this Court's habeas review. *See*
16 *Fernandez*, 268 U.S. at 312 (stating that "habeas corpus is available only to inquire whether the
17 magistrate had jurisdiction, whether the offense charged is within the treaty and . . . whether there
18 was any evidence warranting the finding that there was reasonable ground to believe the accused
19 guilty"); *Sindona v. Grant*, 619 F.2d 167, 175 (2d Cir. 1980) (stating that "the degree of risk to
20 [petitioner]'s life from extradition is an issue that properly falls within the exclusive purview of
21 the executive branch" and that "[r]eview by habeas corpus . . . tests only the legality of the
22 extradition proceedings; the question of the wisdom of extradition remains for the executive
23 branch to decide") (quoting *Wacker v. Bisson*, 348 F.2d 602, 606 (5th Cir. 1965)).

24 **4. Conclusion**

25 The petition for habeas corpus is unlikely to prevail on its merits.

26 **B. Irreparable Injury**

27 "[S]imply showing some 'possibility of irreparable injury' fails to satisfy the second
28 factor." *Nken*, 556 U.S. at 434-35. "A proper showing of irreparable injury was, and remains, a
necessary but not sufficient condition for the exercise of judicial discretion to issue a stay."

1 *Leiva-Perez*, 640 F.3d at 965. “Even certainty of irreparable harm has never *entitled* one to a
2 stay.” *Id.*

3 Petitioner’s sole argument is that he would lose the ability to prosecute his habeas claims
4 if he were extradited to Mexico. “[T]he burden of removal alone cannot constitute the requisite
5 irreparable injury.” *Nken*, 556 U.S. at 435.

6 Petitioner argues that he has proven irreparable injury in that he will be tortured or killed
7 if he is returned to face prosecution in Mexico. As discussed in the analysis of Petitioner’s
8 likelihood of prevailing in the pending habeas action, whether Petitioner may face torture upon
9 his return to Mexico is outside this Court’s habeas jurisdiction.

10 **C. Public Interest**

11 The third and fourth factors merge when the Government is the opposing party. *Leiva-*
12 *Perez*, 640 F.3d at 970. “While we consider ‘the public interest in preventing aliens from being
13 wrongfully removed, particularly to countries where they are likely to face substantial harm,’ we
14 are also mindful of the fact that there is also a public interest ‘in prompt execution of removal
15 orders,’ which ‘may be heightened’ in certain circumstances, such as those involving ‘particularly
16 dangerous’ noncitizens.” *Id.* (quoting *Nken*, 556 U.S. at 436). The public interest is also served
17 through compliance with an existing extradition treaty. *Artukovic*, 784 F.2d at 1356. “[P]roper
18 compliance [with an existing extradition treaty] promotes relations between the two countries,
19 and enhances efforts to establish an international rule of law and order.” *Id.*

20 The Court cannot disregard the Government’s interest in preserving an extradition treaty
21 that also returns fugitives from American justice to the United States. Individuals facing
22 homicide charges flee the law by crossing the border between the United States and Mexico in
23 both directions.

24 “The surrender of a fugitive, duly charged in the country from which he has fled with a
25 nonpolitical offense and one generally recognized as criminal at the place of asylum, involves no
26 impairment of any legitimate public or private interest.” *Factor v. Laubenheimer*, 290 U.S. 276,
27 298 (1933). The public interest in the extradition of an accused murderer in compliance with an
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1 existing extradition treaty with a country with whom the United States shares a border weighs
2 against the grant of a stay of extradition.

3 **D. Summary**

4 Because Petitioner (1) is unlikely to succeed on the merits and (2) has failed to
5 demonstrate irreparable injury absent a stay, and (3 and 4) the public interest weighs against
6 granting a stay in this case, the Court will deny a stay of the extradition order.

7 **III. Conclusion and Order**

8 Petitioner's motion for a stay of the extradition order pending resolution of his petition for
9 writ of habeas corpus is hereby DENIED.

10 IT IS SO ORDERED.

11 Dated: January 25, 2017

12 /s/ Sheila K. Oberto
13 UNITED STATES MAGISTRATE JUDGE

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