

September 9, 2005, this Court rejected petitioner's argument that the President lacks the authority to detain petitioner as an enemy combatant. 423 F.3d 386. At petitioner's request, this Court issued the mandate in this case on October 7, 2005. Petitioner then asked the District Court to proceed with briefing on the framework for resolving petitioner's factual challenge to his military detention. The first round of briefing on that question is currently due in the district court on November 29, 2005. On October 25, 2005, petitioner filed a petition for a writ of certiorari in the Supreme Court. That petition is now pending before the Supreme Court.

On November 17, 2005, a federal grand jury in the District Court for the Southern District of Florida returned a sealed indictment against petitioner for one count of conspiring to murder, maim, and kidnap individuals outside the United States under Title 18, United States Code, Section 956 (Count One); one count of conspiracy to provide material support to terrorists under Title 18, United States Code, Section 2339A (Count Two); and one count of providing material support to terrorists, also in violation of Title 18, United States Code, Section 2339A (Count Three). That indictment was unsealed today. (A copy of the indictment is attached as Attachment A.)

On November 20, 2005, the President determined that "it is in the interest of the United States that Jose Padilla be released from detention by the Secretary of Defense and transferred to the control of the Attorney General for the purpose of criminal proceedings against him." The President therefore directed the Secretary of Defense to release petitioner from detention by the Department of Defense and to transfer him to the control of the Attorney General, upon the Attorney General's request. (A copy of the President's November 20, 2005 Memorandum for the Secretary of Defense is attached as Attachment B.)

To execute that presidential order, the Department of Defense and the Department of Justice

have made arrangements to transfer petitioner as expeditiously as possible from the custody of Commander C.T. Hanft at the Naval Brig in Charleston, South Carolina, to the custody of Loren Grayer, Warden of the Federal Detention Facility in Miami, Florida, where petitioner will immediately face the criminal charges now pending against him. We respectfully ask this Court to grant this application as expeditiously as possible regarding that release and transfer.

DISCUSSION

Rule 36 of the Rules of the Supreme Court of the United States provides that when a decision in a habeas corpus proceeding is pending before the Supreme Court, “the person having custody of the prisoner may not transfer custody to another person unless the transfer is authorized under this Rule.” Sup. Ct. R. 36.1. Rule 36 further states that “the court, Justice, or Judge who entered the decision under review may authorize transfer and the substitution of a successor custodian as a party.” Sup. Ct. R. 36.2. Because this Court entered the decision that is now “under review” in this case in the Supreme Court, an application pursuant to Rule 36, to the extent that such an application is necessary at all, is properly addressed to this Court.

Rule 36 does not appear to contemplate that an application would be required in the extraordinary circumstances presented by this case. The Rule appears to contemplate situations where an individual who is being held by law enforcement authorities in connection with criminal charges or a criminal conviction is transferred from one civilian detention facility to another civilian detention facility, as a means of facilitating an ongoing challenge to that civilian detention (which is not ended by the transfer). Our understanding is that this is the context in which the Rule has overwhelmingly been applied. Here, the President has ordered that an individual be released from military custody altogether, and be transferred to the custody of federal law enforcement officials to

face criminal charges. The only custody challenged in the habeas petition – military detention – will cease altogether once petitioner is released from military custody and transferred to the Attorney General for criminal proceedings.¹ Under those circumstances, the Rule would not appear to apply.²

In any event, although Rule 36 does not appear to apply to the extraordinary circumstances presented by this application, out of an abundance of caution respondent respectfully requests that this Court grant this application and recognize the release of petitioner from the custody of the Department of Defense and Commander C.T. Hanft at the Naval Brig in Charleston and transfer of petitioner to the custody of the Attorney General and Warden Loren Grayer at the Federal Detention Facility in Miami. Respondent further requests that the Court rule on this application as soon as possible. The President has determined that it is in the interests of the United States that petitioner be released from military custody and transferred to the control of the Attorney General so that he can face the criminal charges against him. That presidential order should be given effect. That is particularly true in light of the fact that the habeas petition in this case itself seeks petitioner's release from military custody and the filing of criminal charges, and that petitioner's counsel has indicated

¹ Petitioner's habeas petition is directed solely to his detention by military authorities. Indeed, the petition's prayer for relief specifically requests an "order that [petitioner] immediately be released *or charged with a crime.*" Pet. at 7 (emphasis added). Because Petitioner has been charged with a crime and is being released from military custody, this habeas action is now moot. Respondent will be filing a motion in the district court notifying the court of the release and transfer of petitioner. In addition, in the respondent's brief in opposition to petitioner's petition for certiorari, which is currently due on November 28, 2005, respondent will address the impact of these recent events on the certiorari petition.

² This is particularly true in light of the grave separation of powers concerns that would be created by applying a procedural rule to prevent the transfer of an individual detained as an enemy combatant out of military custody. Cf. *O.K. v. Bush*, 377 F. Supp. 2d 102, 116 (D.D.C. 2005) ("[I]t is implausible that Congress intended [Rule 23 of the Federal Rules of Appellate Procedure, which establishes a parallel mechanism to Supreme Court Rule 36 for cases on appeal] to block the movement of detainees captured in the course of ongoing military hostilities.").

that they consent to this transfer.

CONCLUSION

For the foregoing reasons, respondent respectively urges this Court to grant this application and recognize as expeditiously as possible the release and transfer of custody of petitioner from C.T. Hanft, the Commander of the United States Naval Brig in Charleston, South Carolina, to Loren Grayer, the Warden of the Federal Detention Facility in Miami, Florida.

Respectfully submitted,

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