

IN THE SUPREME COURT OF THE UNITED STATES

No.

DANIEL SPAGONE, UNITED STATES NAVY COMMANDER,
CONSOLIDATED NAVAL BRIG, APPLICANT

v.

ALI SALEH KAHLAH AL-MARRI

**APPLICATION RESPECTING THE CUSTODY AND TRANSFER
OF PETITIONER ALI SALEH KAHLAH AL-MARRI**

The Acting Solicitor General, on behalf of respondent Commander Daniel Spagone, respectfully applies for an order facilitating the release and transfer of custody of Ali Saleh Kahlah al-Marri from respondent Daniel Spagone to the Attorney General.¹ Petitioner has been indicted by a grand jury in the Central District of Illinois, and, consistently with the determination of the President, respondent seeks to release petitioner from military custody and transfer him to the custody of the Attorney General so that he can face the criminal charges against him. Respondent seeks an order from this Court

¹ Because this application concerns the habeas action that is before this Court as Al-Marri v. Daniel Spagone, United States Navy Commander, Consolidated Naval Brig, No. 08-368, this application refers to al-Marri as "petitioner" and to Daniel Spagone as "respondent."

acknowledging such release and transfer, or, to the extent that any judicial authorization is necessary, granting authorization to execute the transfer. Respondent further requests that this Court act on this application as expeditiously as possible.

STATEMENT

Petitioner brought a habeas corpus action to challenge his detention by the military as an enemy combatant. He contends that the President does not have statutory or constitutional authority to detain him in military custody as an enemy combatant, and he seeks an order "directing Respondent to charge Petitioner with a criminal offense or to release him." C.A. App. 25. On July 15, 2008, the United States Court of Appeals for the Fourth Circuit, sitting en banc, rejected petitioner's argument that the President lacks the authority to detain petitioner as an enemy combatant. Pet. App. 6a-7a. Petitioner sought certiorari from that decision, and this Court granted a writ of certiorari on December 5, 2008. 129 S. Ct. 680. The parties are in the process of briefing that case, and oral argument is scheduled for April 27, 2009.

On February 26, 2009, a federal grand jury in the Central District of Illinois returned a sealed indictment against petitioner for conspiring to provide material support and resources to a foreign terrorist organization, and providing material support and resources to a foreign terrorist organization, in violation of 18 U.S.C. 2339B(a)(1). That indictment was unsealed on February

27, 2009. (A copy of the indictment is attached as Addendum A.)

On February 27, 2009, the President determined that "it is in the interest of the United States that [petitioner] 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 February 27, 2009 Memorandum for the Secretary of Defense is attached as Addendum B.)

To execute the President's 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 Daniel Spagone at the Naval Brig in Charleston, South Carolina, to the custody of the Attorney General. Petitioner will then face the criminal charges pending against him. Respondent respectfully asks this Court to grant this application as expeditiously as possible in order to facilitate the government's ability to implement the President's determination that petitioner should face criminal charges -- a result, notably, that petitioner himself has requested as relief in this case.

DISCUSSION

1. Pursuant to the President's determination that it is in the national interest that petitioner be released from military custody to face criminal charges, respondent seeks to implement petitioner's release and transfer to the Attorney General. Rule 36 of the Rules of this Court, which governs judicial authorization for routine transfers of habeas petitioners whose detention that is the subject of the habeas action remains in force, does not appear to contemplate situations in which the petitioner is being released from the very custody that he challenges. Rule 36 provides that "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, and it 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.

Rule 36 is functionally identical to Federal Rule of Appellate Procedure 23, in that it operates as a "technical and procedural rule" that ensures that the proper custodian will be substituted when a petitioner's location changes, but his detention remains in force. See O.K. v. Bush, 377 F.Supp. 2d 102, 116-117 (D.D.C. 2005); see Eugene Gressman et al., Supreme Court Practice § 17.21, at 894-895 (9th ed. 2007) (noting that Rule 36 was intended to alleviate procedural problems that arose when a habeas petitioner

was transferred to another district, but the petitioner wanted to continue challenging his detention). The Rule thus serves the modest purpose of ensuring that, upon a transfer of custody that does not affect the authority for (or character of) the underlying detention, the petitioner may continue to challenge that ongoing detention.

Here, in contrast, the President has ordered that petitioner be released from military custody altogether upon the request of the Attorney General, and then transferred to the custody of federal law enforcement officials to face criminal charges. Petitioner's habeas petition challenges only his detention "in military custody * * * without charge." C.A. App. 13. That custody will cease altogether once petitioner is released from military custody.

Moreover, because petitioner sought in his habeas petition an order "directing Respondent to charge Petitioner with a criminal offense or to release him," C.A. App. 25, the President's action unequivocally provides petitioner with all of the relief he sought in his habeas petition. Thus, far from being a technical transfer of custody in the course of ongoing detention pursuant to a single source of legal authority, the transfer order by the President ends petitioner's challenged military custody and effectively grants his requested relief. Any further detention will be governed by the criminal procedure provisions pertaining to arrested and indicted

individuals. See, e.g., 18 U.S.C. 3141 et seq. In these circumstances, petitioner's transfer to the Attorney General for criminal proceedings -- after his release from the challenged military custody -- cannot be understood as a transfer of custody governed by Rule 36.² Cf. O.K., 377 F.Supp. 2d at 116 ("Nothing in [Federal Rule of Appellate Procedure 23, which establishes a parallel mechanism to Supreme Court Rule 36 for cases on appeal from the district court] indicates a desire to extend it to situations where the United States (or a state) is transferring an individual out of federal or state custody entirely.").

This Court has been presented with a request to recognize the release and transfer of an individual formerly held as an enemy combatant once before, in Hanft v. Padilla, 546 U.S. 1084 (2006) (No. 05A578). There, the government first requested that the court of appeals recognize Padilla's release from military custody, and the court declined to do so, deferring to this Court because Padilla's certiorari briefing was pending. Ibid. The government then filed an application in this Court, requesting that the Court clarify that Rule 36 did not apply to Padilla's release from

² Because petitioner's habeas petition challenges solely his detention by military authorities, and seeks that he be charged with a crime or released, C.A. App. 25, petitioner's release from military custody to face criminal charges will moot his habeas petition. Accordingly, respondent is also moving to dismiss petitioner's case. The fact that petitioner's habeas petition will be mooted by his release from military custody simply underscores that the release from military custody ordered by the President is not a "transfer" within the meaning of Rule 36.

military custody, or in the alternative, that the Court grant authorization for the release and transfer. This Court "granted" the "Government's application" without stating the grounds on which it did so. Ibid. Thus, the question whether Rule 36 requires authorization in the unique circumstances presented here -- where petitioner's release will effect the very relief that he has sought in his habeas petition -- remains an open question.

Respondent respectfully submits that Rule 36, properly construed, does not require judicial authorization to permit the Executive Branch to implement the President's determination that petitioner should be released from military custody. Respondent therefore requests that this Court acknowledge the release and transfer of custody of petitioner from the Secretary of Defense to the Attorney General.

2. To the extent that judicial authorization is necessary, this Court has jurisdiction to consider this application and fashion appropriate relief pursuant to the All Writs Act, 28 U.S.C. 1651(a). See S. Ct. R. 20.1.

The relief that respondent seeks -- authorization for petitioner's release and transfer -- is not available in any other court. The Fourth Circuit has definitively stated, in a published opinion, that it will not grant Rule 36 relief in a case that is pending before the Supreme Court. In Padilla v. Hanft, 432 F.3d 582, 584 (4th Cir. 2005), the court denied the government's request

to release Padilla from military custody and transfer him to civilian custody, on the ground that "that decision should be made not by this court but, rather, by the Supreme Court of the United States." The Fourth Circuit's conclusion is consistent with its expressed uncertainty whether Rule 36 even applies to a contemplated transfer that would end the challenged custody altogether, ibid., and, in this case, with the reality that the proceedings in the underlying habeas case are pending before this Court, not the court of appeals. The decision in Padilla v. Hanft remains binding on that court; thus, no Rule 36 relief is available to respondent in that forum.

Accordingly, to the extent that judicial authorization is needed, respondent respectfully requests that this Court grant the instant application. This Court's grant of the government's application in the closely analogous Padilla case establishes the appropriateness of relief here. In its application requesting relief in this Court, the government invoked the All Writs Act and Rule 36. After acknowledging that the Fourth Circuit had forsworn action on the government's application because the case was before this Court, this Court granted the application, enabling the Executive Branch to carry out the release and transfer. Padilla, 546 U.S. 1084 (No. 05A578).

The same course is called for here. The President of the United States has determined that it is in the country's interest

to release petitioner from his military detention so that he can face criminal charges. In order to do so, and to facilitate the initiation of the criminal process, the Attorney General and Department of Defense stand ready to execute petitioner's release and transfer forthwith. Respondent respectfully requests that this Court issue an order recognizing petitioner's release from military custody and transfer to the custody of the Attorney General. In light of the circumstances, the government requests expedited action to effectuate the President's order.

CONCLUSION

For the foregoing reasons, respondent respectfully urges this Court to grant this application, as expeditiously as possible, thereby acknowledging the release and transfer of custody of petitioner from Daniel Spagone, the Commander of the United States Naval Brig in Charleston, South Carolina, to the custody of the Attorney General. In the alternative, respondent requests that the Court authorize the release and transfer.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record

FEBRUARY 2009

Addendum A

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

FILED

FEB 26 2009

PAMELA E. ROBINSON, CLERK
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,)	No. 09-CR-100 <u>30</u>
)	
Plaintiff,)	Count 1: 18 U.S.C. § 2339B
)	Conspiracy to Provide Material Support and
v.)	Resources to a Foreign Terrorist
)	Organization (al-Qaeda).
ALI SALEH KAHLAH AL-MARRI,)	
)	Count 2: 18 U.S.C. § 2339B
Defendant.)	Providing Material Support and Resources
)	to a Foreign Terrorist Organization
)	(al-Qaeda)

INDICTMENT

The Grand Jury charges:

COUNT 1
Conspiracy to Provide Material Support and Resources to a
Foreign Terrorist Organization (al-Qaeda)

Beginning on an unknown date, but at least as early as July 2001, and continuing through on or about December 12, 2001, at Peoria, Illinois, in the Central District of Illinois, and elsewhere, the defendant,

ALI SALEH KAHLAH AL-MARRI,

knowingly conspired with others, unindicted herein, to provide material support and resources, as that term is defined in Title 18, United States Code, Section 2339A(b)(1), namely, personnel, to a foreign terrorist organization, namely al-Qaeda, which was designated by the Secretary of State as a foreign terrorist organization on October 8, 1999, pursuant to Section 219 of the Immigration and Nationality Act, and has remained so designated through and including the present time.

All in violation of Title 18, United States Code, Section 2339A(b)(1)

A TRUE COPY
 ATTEST:
 PAMELA E. ROBINSON, CLERK
 BY: H. Kallister
 DEPUTY CLERK
 U.S. DISTRICT COURT
 CENTRAL DISTRICT OF ILLINOIS
 DATE: 2/26/09

COUNT 2
Providing Material Support and Resources to a
Foreign Terrorist Organization (al-Qaeda)

From on or about September 10, 2001, and continuing through on or about December 12, 2001, at Peoria, Illinois, in the Central District of Illinois, and elsewhere, the defendant,

ALI SALEH KAHLAH AL-MARRI,

knowingly provided material support and resources, as that term is defined in Title 18, United States Code, Section 2339A(b)(1), namely, personnel, to a foreign terrorist organization, namely al-Qaeda, which was designated by the Secretary of State as a foreign terrorist organization on October 8, 1999, pursuant to Section 219 of the Immigration and Nationality Act, and has remained so designated through and including the present time.

All in violation of Title 18, United States Code, Section 2339B(a)(1).

A TRUE BILL 
s/ Foreperson

FOREPERSON

s/ Assistant U.S. Attorney

 for ~~RODGER A. HEATON~~
UNITED STATES ATTORNEY

s/ Officer

~~MICHAEL J. MULLANEY~~
CHIEF, COUNTERTERRORISM SECTION
NATIONAL SECURITY DIVISION
DEPARTMENT OF JUSTICE

DER

Addendum B

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

February 27, 2009

February 27, 2009

MEMORANDUM FOR THE SECRETARY OF DEFENSE

SUBJECT: Transfer of Detainee to Control of the
Attorney General

Based on the information available to me, * * *, I hereby determine that it is in the interest of the United States that Ali Saleh Kahlah al-Marri 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.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States, I hereby direct you to transfer Mr. al-Marri to the control of the Attorney General upon the Attorney General's request. This memorandum supersedes the Presidential directive of June 23, 2003, to the Secretary of Defense, which ordered the detention of Mr. al-Marri as an enemy combatant. Upon Mr. al-Marri's transfer to the control of the Attorney General, the authority to detain Mr. al-Marri provided to the Secretary of Defense in the June 23, 2003, order shall cease.

BARACK OBAMA

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