

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

<hr/>)	
JOSE PADILLA,)	
)	
Petitioner-Appellee)	
)	
v.)	No. 05-6396
)	
COMMANDER C.T. HANFT,)	
USN Commander, Consolidated Naval Brig,)	
)	
Respondent-Appellant)	
<hr/>)	

**RESPONSE TO THE MOTION OF JOSE PADILLA TO RECALL
THE MANDATE AND VACATE THE OPINION**

Appellant, the Commander of the United States Naval Brig in Charleston, South Carolina, respectfully submits this Response to the May 26, 2006, motion of Jose Padilla to recall the mandate and vacate the opinion issued by this Court on September 9, 2005.¹ As indicated in appellant's supplemental brief filed in response to this Court's November 30, 2005, Order, appellant's position is that the criminal indictment of petitioner and the President's Memorandum directing that petitioner be released from military custody and transferred to the Department of Justice -- and that upon such transfer, the military's authority to detain petitioner as an enemy combatant under the President's June 9, 2002 order "shall cease" -- has mooted the claims set forth in the habeas petition. Appellant's Supp. Br. 6-13. For that reason, appellant indicated in the supplemental brief in response to a question from this Court that the Court had discretion to recall the mandate and vacate its September 9, 2005 opinion. Ibid. Although that discretion still exists, the passage of time and

¹ Commander C. T. Hanft is no longer the commander at the Consolidated Naval Brig in Charleston, South Carolina. The new commander at the brig is Commander S. L. Wright.

intervening events, most notably the Supreme Court's orders granting the government's transfer application and denying the petition for a writ of certiorari without reaching the question of mootness and without vacating this Court's September 9, 2005 opinion, counsel against the exercise of such discretion at this time. For these reasons, the motion to recall the mandate and vacate this Court's September 9, 2005 opinion should be denied.

BACKGROUND

1. Petitioner brought this habeas corpus action to challenge his detention by the military as an enemy combatant and seeking that he be released from military custody or charged with a crime. On 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, so the case could return to the district court, where Padilla could contest the factual basis for his detention as an enemy combatant. Before the factual proceedings began, however, Padilla was indicted by a grand jury in the Southern District of Florida for conspiring to murder, maim, and kidnap individuals outside of the United States; conspiring to provide material support to terrorists; and providing material support to terrorists. The indictment was part of an ongoing federal case against other individuals involved in the same conspiracy with a trial currently scheduled for September 2006. Shortly after indictment, the President determined that it is in the interest of the United States that Padilla be released from detention by the Secretary of Defense and transferred to the control of the Attorney General to answer the criminal charges against him. The President thus directed the Secretary of Defense, at the request of the Attorney General, to release Padilla from military custody and transfer him to the control of the Attorney General. That presidential directive expressly superseded the President's June 9, 2002, directive to

the Secretary of Defense to detain Padilla militarily as an enemy combatant, and specifically provided that, upon transfer of Padilla to the Attorney General, the authority of the Secretary of Defense to detain Padilla pursuant to the President's June 9, 2002, order "shall cease."

2. On November 22, 2005, the government filed in this Court an Unopposed Emergency Application and Notice of Release and Transfer of Custody of Petitioner Jose Padilla. On November 30, 2005, this Court sua sponte directed the parties to address whether it should recall the mandate in the case and vacate its opinion addressing the legality of Padilla's military detention. On December 9, 2005, the government filed a supplemental brief in response to the court's order, explaining that petitioner's habeas challenge to his military detention was moot in light of the intervening events. Appellant's Supp. Br. 6-13. In addition, the government explained that, in light of the fact that this action was moot, the Court had discretion under the doctrine of United States v. Munsingwear, Inc., 340 U.S. 36 (1950), to recall the mandate and vacate its prior decision. Appellant's Supp. Br. 5-6, 13-16. But regardless of how the Court resolved the questions of mootness and vacatur, the government stressed, it should grant the government's unopposed transfer application. Id. at 16.

3. On December 21, 2005, this Court, in a divided opinion, denied the government's transfer application. The panel majority did not decide whether Rule 36 applied to Padilla's release from military custody and the transfer to the control of the Attorney General. Instead, it stated that "it is unclear * * * whether the rule even applies in a circumstance such as this," 12/21/05 Order 6, but held that to the extent the Court's authorization was needed, it would deny the motion. In particular, the panel majority emphasized that "the issue presented by the government's appeal to this court and Padilla's appeal to the Supreme Court is of sufficient national importance as to warrant consideration

by the Supreme Court, even if that consideration concludes only in a denial of certiorari.” 12/21/05 Order 10. It therefore concluded that any decision to authorize the transfer or otherwise “pretermi[t]” the litigation “should be made not by this court but, rather, by the Supreme Court of the United States.” Id. at 3.

Judge Traxler wrote separately. Although he agreed with the panel majority that a vacatur of the court’s earlier opinion was not warranted, he would have held that “Rule 36 is [not] applicable to this situation.” 12/21/05 Order 14.

4. On January 4, 2006, the Supreme Court granted appellant’s application respecting the custody and transfer of Padilla. In that order, the Court indicated that it would consider Padilla’s pending petition for certiorari in due course.

On April 3, 2006, the Supreme Court denied Padilla’s petition for a writ of certiorari, without addressing the question of mootness and without vacating this Court’s September 9, 2005, opinion. In a concurring opinion, Justice Kennedy, joined by the Chief Justice and Justice Stevens, explained that “[w]hatever the ultimate merits of the parties’ mootness arguments, there are strong prudential considerations disfavoring the exercise of the Court’s certiorari power.” 126 S. Ct. 1649, 1650. Justice Ginsburg, the only Justice to address the question of mootness, dissented from the denial of certiorari. She concluded that the filing of criminal charges against Padilla and the President’s order directing that he be released from military custody and transferred to the custody of the Department of Justice did not render Padilla’s habeas petition challenging his military confinement moot. Id. at 1651.

DISCUSSION

Appellant adheres to the view that Padilla's habeas petition challenging his military confinement is moot. This Court, thus, maintains the discretion to recall the mandate and vacate its September 9, 2005, opinion. Appellant's Supp. Br. 6-13. But while a court of appeals has the ability to recall a mandate and vacate an opinion issued in an interlocutory posture after subsequent events render the case moot, that authority is virtually never exercised. There are always costs associated with vacating decisions after the mandate has issued because of the strong institutional interests in repose. The passage of time -- it is now nine months since the opinion issued and eight months since the mandate issued -- further counsels against that course here. And the intervening actions of the Supreme Court in (1) authorizing Padilla's release from military custody and transfer to the control of the Department of Justice, and (2) denying Padilla's petition for a writ of certiorari without addressing the mootness question and without vacating this Court's opinion, likewise counsel against granting Padilla's belated motion to recall the mandate and vacate the opinion.

Any time a court of appeals resolves a legal issue in an interlocutory posture and subsequent events moot the case (such as when this Court hears an appeal at the preliminary injunction stage, remands the case, and subsequent events moot the case before a permanent injunction issues), it is possible to recall the mandate and vacate the opinion. But that rarely happens. Generally, once a mandate issues and the case returns to the district court, the question of mootness is addressed by the district court in the first instance. The more time that elapses between an opinion and mandate issuing, the more unusual a recall becomes. Here, it has been more than nine months since this Court issued its September 9, 2005, decision; more than eight months since this Court issued the mandate of that decision, at Padilla's request; more than five months since the Supreme Court authorized

Padilla's release from military custody and transfer to the custody of the Department of Justice; and more than two months since the Supreme Court denied Padilla's petition for a writ of certiorari, without deciding whether Padilla's habeas petition is moot and without vacating this Court's decision.

Moreover, this Court's December 21, 2005, order denying the government's application for release and transfer noted the importance of the legal issues resolved in this Court's September 9, 2005, opinion, and stated that "[i]f the natural progression of this significant litigation to conclusion is to be pretermitted at this late date under these circumstances, we believe that decision should be made not by this court but, rather, by the Supreme Court of the United States." The Supreme Court has now effectively resolved this litigation by authorizing Padilla's release from military custody and transfer to the control of the Department of Justice and by denying Padilla's petition for a writ of habeas corpus without deciding that the case is moot and without vacating this Court's September 9, 2005, opinion. The Supreme Court could -- and presumably would -- have vacated this Court's opinion if it thought the circumstances warranted vacatur, but it did not do so. Instead, it left this Court's opinion intact. Nothing in either the concurring opinion of Justice Kennedy or the dissenting opinion of Justice Ginsburg relating to the denial of certiorari suggests that the Supreme Court anticipated that this Court would recall its mandate and vacate its opinion.²

Padilla has pointed to no case recalling the mandate and vacating an opinion under circumstances remotely similar to this case, and appellant is unaware of any such authority. To the contrary, courts of appeals have generally pointed to the passage of substantial time and intervening

² The Supreme Court thus declined to address the mootness issue itself. Allowing the district court to address mootness in the first instance would be the path most consistent both with the Supreme Court's disposition and normal practice once the mandate has issued.

orders by the Supreme Court denying certiorari as important factors counseling in favor of repose and against recalling a mandate and vacating an opinion. See, e.g., Legate v. Maloney, 348 F.2d 164, 165 (1st Cir. 1965); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 276 (D.C. Cir. 1971); Lowe v. United States, 257 F.2d 408, 409 (8th Cir. 1958). For these reasons, although appellant believes the habeas petition is moot and that this Court has discretion to recall its mandate and vacate its opinion, on balance, the exercise of that discretion at this time would be unwarranted.

CONCLUSION

For the foregoing reasons, Padilla's motion to recall the mandate and vacate this Court's September 9, 2005, opinion should be denied.

Respectfully submitted,

PAUL D. CLEMENT
Solicitor General

JONATHAN S. GASSER
United States Attorney
District of South Carolina

GREGORY G. GARRE
Deputy Solicitor General

DAVID B. SALMONS
Assistant to the Solicitor General

/s/

KEVIN F. MCDONALD (I.D. #5934)
Assistant United States Attorney
1441 Main Street, Suite 500
Columbia, SC 29201
(803) 929-3079

June 12, 2006

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. **05-6396**

JOSE PADILLA,

Petitioner - Appellee,

v.

COMMANDER C.T. HANFT,

USN Commander, Consolidated Naval Brig,

Respondent - Appellant.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee in the Office of the United States Attorney for the District of South Carolina, Columbia, South Carolina, and on June 12, 2006, I caused to be served, one true and correct copy of the attached Response to Motion of Jose Padilla to Recall the Mandate and Vacate the Opinion by depositing the same in the United States mail, postage paid, on the following person:


Jenny S. Martinez
559 Nathan Abbott Way
Stanford, CA 94305

Andrew G. Patel
111 Broadway, 13th Floor
New York, NY 10006

Michael P. O'Connell
Stirling & O'Connell
145 King Street, Suite 410
Post Office Box 882
Charleston, SC 29402

Donna R. Newman
121 W. 27th Street, Ste. 1103
New York, NY 10001

Jonathan M. Frieman
Wiggins and Dana LLP
One Century Tower
P.O. Box 1832
New Hanen, CT 06508-1832



Kevin F. McDonald
ASSISTANT UNITED STATES ATTORNEY