

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Jose Padilla

Petitioner-Appellee,

vs.

C.T. Hanft, U. S. N. Commander

Consolidated Naval Brig.

Respondent-Appellant.

Case No. 05-6396

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

Petitioner-Appellee Jose Padilla, by and through his undersigned attorneys, respectfully moves for permission to recall the mandate and to vacate the opinion issued by the U.S. Court of Appeals for the Fourth Circuit in *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005). In support of his motion, Jose Padilla attaches a memorandum of law and states the following:

1. Pursuant to Fourth Circuit Local Rule 27(a), Counsel for Petitioner-Appellee has attempted but been unable to reach Counsel for the Respondent-Appellant and cannot ascertain whether Counsel for Respondent-Appellant consents to the granting of this motion.

2. As required by FRAP 27(a)(2)(B)(i) a supporting Affidavit of Counsel for Petitioner-Appellee is attached hereto at Tab A.

Relief Sought

WHEREFORE, Petitioner-Appellee Jose Padilla respectfully requests this Motion to Recall the Mandate and to Vacate the Opinion issued in 423 F.3d 386 (4th Cir. 2005) be Granted.

Dated: May 26, 2006

Respectfully submitted,

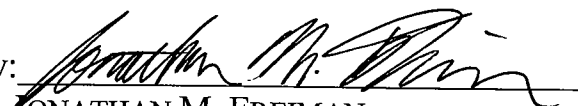
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**MEMORANDUM IN SUPPORT OF MOTION OF JOSE PADILLA
TO RECALL THE MANDATE AND TO VACATE THE OPINION**

On November 30, 2005, this Court directed both parties to address whether the mandate of this Court’s decision of September 9, 2005, *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), should be recalled and the opinion vacated. Order Directing Parties to Submit Briefs on Whether the Mandate Should Be Recalled and the Opinion Vacated, November 30, 2005 (No. 4295064-1). The respondent, Hanft, stated unequivocally that “this Court would act well within its discretion to recall the mandate” and “vacate its September 9 opinion.” Supplemental Br. of Resp’t at 1-2, *Padilla v. Hanft*, 432 F.3d 582 (4th Cir. 2005). Padilla likewise thought recall of the mandate and vacatur of this Court’s opinion of September 9, 2005 would be appropriate, in the event that the Supreme Court denied the then-pending petition for certiorari. Supplemental Br. of Pet’r at 1, *Padilla v. Hanft*,

432 F.3d 582 (4th Cir. 2005). As the Supreme Court has since denied certiorari, *Padilla v. Hanft*, 126 S.Ct. 1649 (2006), Padilla now renews his request to this Court to recall the mandate and to vacate its September 9, 2005 decision.

As this Court knows, Padilla has been transferred to civilian law enforcement custody and criminally indicted on the basis of alleged facts that are completely different from the various allegations that the government made after June 2002, allegations that the government argued justified Padilla's lengthy military detention. *See* Supplemental Br. for Pet'r at 13-16, *Padilla v. Hanft*, 432 F.3d 582 (4th Cir. 2005). This Court relied on those prior allegations in its opinion of September 9, 2005, and the government's "abrupt change in course" was the last of several governmental actions in the case that "left not only the impression that Padilla may have been held for these years . . . by mistake They have left the impression that the government may even have come to the belief that the principle in reliance upon which it has detained Padilla for this time . . . can, in the end, yield to expediency with little or no cost And these impressions have been left, we fear, at what may ultimately prove to be substantial cost to the government's credibility before the courts" *Padilla v. Hanft*, 432 F.3d 582, 587 (4th Cir. 2005).

A recall of the mandate and vacatur of the September 9, 2005 decision would accord with both parties' prior briefing that such an action is "well within"

this Court's discretion, *see* Supplemental Br. of Resp't at 1-2, *Padilla v. Hanft*, 432 F.3d 582 (4th Cir. 2005)¹, and would return the law of this Circuit to the *status quo ante*.

CONCLUSION

For the reasons set forth above, Petitioner-Appellee's Motion to Recall the Mandate and to Vacate the Opinion should be GRANTED.

Dated: May 26, 2006

Respectfully submitted,


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¹ Indeed, any effort by the government to abandon its prior position and instead argue that this Court should not recall its mandate and vacatur its opinion would be estopped. More importantly, any such effort would underscore the very concerns outlined by Judge Luttig in his opinion for this Court.

EXHIBIT A

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FOR THE FOURTH CIRCUIT**

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Petitioner-Appellee,	:	Case No. 05-6396
vs.	:	
	:	
C.T. Hanft, U. S. N. Commander	:	
Consolidated Naval Brig.	:	
Respondent-Appellant.	:	

**AFFIDAVIT OF JONATHAN M. FREIMAN IN SUPPORT OF MOTION
TO RECALL THE MANDATE AND TO VACATE THE OPINION**

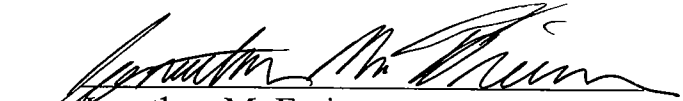
Jonathan M. Freiman affirms as follows:

1. I am an attorney with the law firm of Wiggin and Dana LLP, and am counsel for petitioner-appellee Jose Padilla in this appeal. In that capacity, I am personally familiar with the trial court's file and docket sheet in this lawsuit and the course of proceedings to date in this appeal. I make this affirmation in support of petitioner-appellee's motion to recall the mandate and to vacate the opinion.

2. I hereby affirm all factual statements and representations set forth in, and the authenticity of all documents attached to, this motion to recall the mandate and to vacate the opinion.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in New Haven, Connecticut, on this 26th day of May, 2006.


Jonathan M. Freiman
Wiggin and Dana LLP

Subscribed and sworn to before me this 26th day of May 2006.



Notary Public

My Commission Expires:
My Commission Expires Jan. 31, 2010

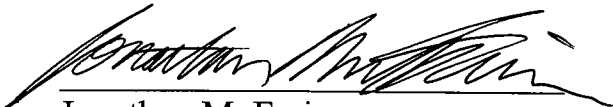
CERTIFICATE OF SERVICE

This is to certify that on this 26th day of May, 2006, a copy of the forgoing Motion to Recall the Mandate and to Vacate Fourth Circuit Opinion and supporting Memorandum, was sent by Federal Express overnight mail, postage prepaid to:

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Jonathan M. Freiman