SUPREME COURT OF THE UNITED STATES

Supreme Court U.S.
FILED
DEC 4 2003

In Re Fazal Raheman 03-7822 Original Habeas Corpus Petition
No _____

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Now comes the Habeas petitioner in the above captioned cause and moves this honorable court, in compliance with Supreme Court Rule 39, for leave to proceed in Forma Pauperis. As reasons therefore, he files his affidavit with the proof of indegency attached to the instant motion. Exhibit A. He respectfully submits that as an indigent, the District Court and the First Circuit court of appeals had afforded him counsel pursuant to Criminal Justice Act of 1964. He further submits that the petition can be decided on the Brief and no oral arguments are necessary.

For all the above reasons this honorable court may be pleased to grant petitioner leave to proceed in Forma Pauperis without payment of filing fee

Respectfully submitted,

Carmen Alvidrez December 2, 2003

CARMEN ALVIDREZ
Notary Public
Commonwealth of Massachusetts
My Commission Expires
April 14, 2006

Fazal Raheman, Pro Se,
Reg No. 46236-008
Federal Medical Center, Devens,
P Box 879
Ayer, MA 01432

Certificate of Service

The foregoing pleading was served on the Warden, FMC, Devens, Ayer MA 01432, by depositing in the FMC mailing system, and on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW Washington DC 20530-001, through FMC mailing system, first class postage prepaid on December 3, 2003.

Fazal Raheman, Pro Se

EXTRAORDINARY WRIT FOR HABEAS CORPUS

QUESTIONS PRESENTED FOR REVIEW

1. Whether Supreme Court Will Exercise Its Discretionary Extraordinary Original Habeas Jurisdiction, When A Factually And Legally Innocent Petitioner Claims No Other Adequate Remedy Of Immediate Relief From The Continuing Cruel And Unusual Punishment Of His Illegal Incarceration?

2. Whether Explicit Adoption Of The State Law By International Parental Kidnapping Crimes Act, For The Purpose Of Defining The Elements Of The Offense, Is Jurisdictional?

3. Whether An IPKCA Court Can Deliberate On A Ceased Article III "Case" Or "Controversy" Over Parental When The Incorporated State Law Divested The Court Of Such Jurisdiction?

4. Whether An IPKCA Court Can Arbitrarily Create An Automatic Pre-Divorce "Joint Physical Custody" Presumption, When Massachusetts Law Explicitly Imposes Statutory Prohibition On Any Such Presumption?

denied any relief to [illegible]

[illegible] ¶6). Even after over 28 months [illegible] his entire sentence [A1.3, ¶6] the [illegible] innocence, and left with no other recourse to secure his release, must seek this extraordinary relief. Id

Summary Of The Arguments

The instant petition presents at least four questions of exceptional public importance, which seek to cure trial court's derogation of two plus centuries of Article III and Due Process jurisprudence. The first question establishes the "cause" for this honorable court's exercise of

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Statement Of The Case

Only so much of facts as relevant to the instant petition have been summarized in petitioner's affidavit annexed along with other relevant materials as Appendix A. See Appendix Index, note 1 ante. Petitioner discovered the proof of his actual innocence in November 2002, when he was for the first time afforded a meaningful access to legal resources. [A1.2, ¶5]. As a result he filed a petition to vacate the sentence pursuant to 28 USC §2255, in December 2002, while his appeal was still pending. Id. Ruling that, "**there are extraordinary circumstances here**", [A3.9, ¶3], the district court did chose to review the petition pending appeal. Petitioner however claiming actual innocence, still - after a lapse of one year - awaits court's disposition of his petition, which is unlikely prior to his forthcoming release within the next two months [A1.3, ¶6], or re-incarceration as threatened by government.

On May 22, 2003, like the district court, the First Circuit also ruled that, "**[t]he appeal is expedited**", [A3.13, ¶2], however, so far denied any relief to the petitioner, who is claiming actual innocence. [A1.2-3, ¶6]. Even after over 28 months of wrongful confinement, and on the verge of conclusion of his entire sentence [A1.3, ¶6] the petitioner is still incarcerated without any disposition of his claim of actual innocence, and left with no other recourse to secure his release than seek this extraordinary relief. Id

Summary Of The Arguments

The instant petition presents at least four questions of exceptional public importance, which seek to cure trial court's derogation of two plus centuries of Article III and Due Process jurisprudence. The first question establishes the "cause" for this honorable court's exercise of

its original Great Writ jurisdiction. See Schlup infra ("cause and prejudice standard"). The remaining three questions establish the grounds for the "prejudice" resulting from "cruel and unusual punishment for [no] crime" of a factually and legally innocent person. See Robinson infra at 769. Immediate release from illegal custody is the only adequate relief, which is not available to him in any other form or forum in the given exceptional circumstances of the case.

International Parental Kidnapping Crimes Act (IPKCA), 18 USC §1204, is unique and unprecedented criminal statute, in that, it adopts and incorporates a state's child custody laws to construct the elements of the offense. Such incorporation of State law is jurisdictional. Petitioner claims his factual and legal innocence on the following grounds, all of which challenge the District Court's jurisdiction[2].

Firstly, when Congress explicitly incorporates the State law by reference for determining parental rights, it does so by incorporating "all that is fairly covered by the reference", "including their limitations". Engel infra and DOE infra. The principle reason that IPKCA incorporates State law is to define the elements of the offense. Without the essential elements present there cannot be an offense and without an offense there is no 18 USC §3231 jurisdiction. Criminal jurisdiction cannot trigger unless the elements are defined. It is therefore clear that **IPKCA's incorporation of State law for determining parental rights is jurisdictional.**

Secondly, the lower court exercised jurisdiction over a subject matter which was divested by: a) the controlling state law, see MacDougall infra

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[2] As in Ground III post, a claim that the charge failed to state an offense challenges jurisdiction of the convicting court. United States v Osiemi, 950 F 2d 344 at 345 (5th Cir 1993) (A claim that the charge failed to state an offense challenges jurisdiction of the convicting court)

and Verizon Jurisdiction Test Post; and b) Article III "Case" or "Controversy" requirement of the United States Constitution. Bender infra and Stogner Analysis Post. The trial court's revival of a divested jurisdiction, resurrecting a ceased Article III "Case" or "Controversy", does not comport with the imports of Supreme Court decisions on destroyed jurisdiction.

Thirdly, even if trial court's exercise of subject matter jurisdiction was authorized, the jury charge of violating un-divorced parent's "joint physical custody" rights according to State law failed to state an offense, because the Massachusetts law explicitly prohibits such a pre-divorce "joint physical custody" presumption prior to any court order. Opinion of Justices infra and MGL c208 §31. Despite the explicit bar on such presumption government pleads such an implication is constitutional. This question is of exceptional public importance as Supreme Court has consistently held that, a constitutional right of one individual, cannot be violated by another individual. Morrison infra. The government's position derogates over two centuries of Fourteenth Amendment jurisprudence.

ARGUMENTS IN SUPPORT OF GRANTING THE WRIT

I. Exceptional Circumstances For Invoking Supreme Court's Original Jurisdiction For Extraordinary Writs

Although the original writ jurisdiction is rarely exercised, the Supreme Court does review if there are "exceptional circumstances justifying the issuance of writ," Felker v Turpin, 135 L Ed 2d 827, 841 (1996), and "reserve[s] for really extraordinary causes in which appeal is clearly an inadequate remedy." In Re McDonald, 103 L Ed 2d 158, 165 (1989). "[H]abeas corpus is an overriding remedy to test the jurisdiction of the [convicting court] to detain a person," and need not be deferred

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
v.	)	CRIMINAL ACTION NO. 01-10274-PBS
FAZAL-UR-RAHEMAN FAZAL, Defendant.	)	

ORDER

January 22, 2003

Saris, U.S.D.J.

On December 23, 2002, defendant Dr. Fazal Raheman filed three motions: (1) a motion for bail pending appeal; (2) a motion for staying execution of the judgment; and (3) a motion for expedited review of defendant's 28 U.S.C. §2255 motion to vacate judgment. The government filed an opposition.

I **DENY** the motion for bail on the ground that defendant is a flight risk. Further, the request for a stay of execution of the sentence of imprisonment pursuant to Fed. R. Crim. P. 38 is **DENIED**.

With respect to the habeas corpus petition pursuant to 28 U.S.C. § 2255, the Court **ALLOWS** the government's request for a continuance until January 31, 2003 to address it on the merits, particularly with respect to the ineffective assistance of counsel claim. The government points out it is unusual to permit a direct appeal to proceed simultaneously with habeas proceedings. However, there are extraordinary circumstances here

DOCKETED

[A3.9]

because of the immediate concerns about the custody of the children, which have not yet been resolved by the courts in India. As long as the federal claims are not fully resolved, proceedings in India may be delayed.

Patti B. Saris

PATTI B. SARIS
United States District Judge

[A3.10]