NO. 05-6396

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOSE PADILLA,
PETITIONER-APPELLEE

v.

COMMANDER C.T. HANFT,
USN COMMANDER, CONSOLIDATED NAVAL BRIG,
RESPONDENT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

SUPPLEMENTAL BRIEF FOR THE APPELLANT

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INTRODUCTION

The Court has directed the parties to address whether, as a consequence of the criminal charges against petitioner Jose Padilla and his impending transfer from military to civilian custody, petitioner's habeas challenge to his military custody as an enemy combatant is now moot and the Court should recall the mandate in this case and vacate its opinion of September 9, 2005. For the reasons set forth below, the habeas action is moot, and this Court would act well within its discretion to recall the

mandate, vacate its September 9 opinion, and remand the case to the district court with instructions to dismiss the habeas petition as moot. At a minimum, however, the Court should grant the government's unopposed emergency transfer application.

STATEMENT

1. On June 9, 2002, the President directed the Secretary of Defense "to receive [petitioner] from the Department of Justice and detain him as an enemy combatant." That directive was based in part on the President's determination that "it is in the interests of the United States that the Secretary of Defense detain [petitioner] as an enemy combatant." Shortly thereafter, petitioner was transferred to the control of the Secretary of Defense for military detention as an enemy combatant.

On June 11, 2002, petitioner's counsel filed on his behalf a habeas corpus petition in the Southern District of New York. Rejecting the government's argument that the petition should have been filed in the District of South Carolina, the district court found that it had jurisdiction, *Padilla ex rel. Newman* v. *Rumsfeld*, 233 F. Supp. 2d 564, 575-587 (S.D.N.Y. 2003), but ultimately concluded on the merits that the President has legal authority to detain petitioner as an enemy combatant, *id.* at 587-599.

Both the jurisdictional and authority-to-detain issues were litigated before the

United States Court of Appeals for the Second Circuit, *Padilla* v. *Rumsfeld*, 352 F.3d 695, 702-724 (2d Cir. 2003), and the Supreme Court. The Supreme Court ultimately agreed with the government that the petition should have been filed in the District of South Carolina, *Rumsfeld v. Padilla*, 542 U.S. 426, 432-450 (2004), and, having found jurisdiction lacking, did not reach the question of the President's authority to detain petitioner as an enemy combatant, *id.* at 430.

2. On July 2, 2004, petitioner filed this habeas action challenging his detention by the military as an enemy combatant and seeking that he be released from military custody or charged with a crime. Pet. 7, Joint Appendix (JA) 13. On February 28, 2005, the district court granted the habeas petition on the ground that the President lacked the authority to detain petitioner as an enemy combatant. 389 F. Supp. 2d 678. Consistent with the specific relief requested in the petition, the court ordered the government to release petitioner or charge him with a crime. *Id.* at 692 & n.14.

On September 9, 2005, this Court reversed the district court's decision and held that the President is authorized to detain petitioner militarily as an enemy combatant. 423 F.3d 386. At petitioner's request, the Court issued its mandate on October 7, 2005. On October 25, 2005, petitioner filed a petition for a writ of certiorari in the Supreme Court. That petition is pending; the government's response is due

December 16, 2005.[1] After this Court's mandate issued, petitioner asked the district court for an opportunity to brief several issues concerning how to proceed with a factual challenge to petitioner's military detention as an enemy combatant.

On November 17, 2005, a federal grand jury in the District Court for the Southern District of Florida returned a sealed indictment charging petitioner with conspiring to murder, maim, and kidnap individuals outside of the United States, in violation of 18 U.S.C. §§ 2 and 956(a)(1) (Count One); conspiring to provide material support to terrorists, in violation of 18 U.S.C. §§ 371 and 2339A(a) (Count Two); and providing material support to terrorists, in violation of 18 U.S.C. § 2339A(a) (Count Three). The indictment was unsealed on November 22, 2005.

On November 20, 2005, 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's Memorandum to that effect made clear that it "supersede[d]" the President's June 9, 2002, directive to the Secretary of Defense to detain petitioner militarily as an enemy combatant. The Memorandum directed the Secretary of Defense to release petitioner from the control

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[1] The government intends to oppose certiorari on several grounds, including that this habeas action is moot in light of intervening events.

of the Department of Defense and transfer him to the control of the Attorney General upon the request of the Attorney General. The Memorandum also provided that, upon such transfer, the authority of the Secretary of Defense to detain petitioner pursuant to the President's June 9, 2002, order "shall cease."

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 29, 2005, petitioner filed a motion in the district court to stay further proceedings until after the Supreme Court resolves the petition for a writ of certiorari. The district court denied that motion as moot "[i]n light of * * * the indictment of [petitioner] on criminal charges in the Southern District of Florida." Likewise, the court "relieved" the parties of their obligation to file briefs addressing the question of how to proceed with the disposition of the habeas petition.

On November 30, 2005, in response to the unopposed transfer application, this Court directed the parties to address whether, in light of the criminal charges against petitioner and his impending transfer from military to civilian custody, the mandate in this case should be recalled and the Court's opinion vacated.

DISCUSSION

Petitioner's habeas challenge to his military detention as an enemy combatant is moot in light of the intervening events. Accordingly, it would be an appropriate

exercise of this Court's discretion to recall the mandate in this case, vacate its September 9, 2005, opinion, and remand the case to the district court with instructions to dismiss the habeas petition as moot.

1. Under Article III of the Constitution, federal courts lack jurisdiction to consider cases that no longer present live controversies. *See, e.g.*, *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998); *St. Pierre* v. *United States*, 319 U.S. 41, 42 (1943) (per curiam); *Friedman's, Inc.* v. *Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002). "This means that, throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.' " *Spencer*, 523 U.S. at 7 (quoting *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990)). In light of the intervening events, that fundamental constitutional requirement is no longer satisfied in this case.

Petitioner's habeas petition is explicitly and exclusively addressed to his detention by the *military* "without criminal charges." Pet. 4, JA 10. In addition, each of the claims in the petition is addressed to or necessarily dependent on petitioner's *military* detention as an enemy combatant during wartime. This Court's opinion is similarly limited to petitioner's military detention as an enemy combatant: it addresses itself to and decides only the question of whether "the President of the United States possesses the authority to detain *militarily* a citizen of this country who

is closely associated with al Qaeda, an entity with which the United States is at war; who took up arms on behalf of that enemy and against our country in a foreign combat zone of that war; and who thereafter traveled to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets." 423 F.3d at 389 (emphasis altered).

The predicate for this habeas action, however, no longer exists. On November 17, 2005, petitioner was criminally charged. In addition, on November 20, 2005, 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's November 20, 2005, Memorandum expressly "supersedes" the President's June 9, 2002, directive to the Secretary of Defense to detain petitioner militarily as an enemy combatant and mandates that upon petitioner's release from military custody and transfer to the control of the Attorney General for criminal proceedings, the authority of the military to detain petitioner as an enemy combatant provided in the President's June 9, 2002, order "shall cease." The President's November 20, 2005, Memorandum therefore explicitly eliminates the directive that provided the authority to detain petitioner as an enemy combatant.

Because petitioner has been criminally charged and the President has directed that petitioner's military detention "shall cease," petitioner has received the relief that he sought in the petition, Pet. 7, JA 13, and this habeas action therefore no longer meets the core jurisdictional requirements of Article III. It is settled law that "when the claimant receives the relief he or she sought to obtain through the claim," "the controversy is no longer live and must be dismissed as moot." *Friedman's*, 290 F.3d at 197; *see also Weinstein* v. *Bradford*, 423 U.S. 147, 148 (1975) (per curiam); *St. Pierre*, 319 U.S. 42-43. Accordingly, this Court has repeatedly held that the release or transfer of a prisoner generally moots a prisoner's claim for prospective relief—the only type of relief sought here—based on his detention or on the conditions of his confinement. *See, e.g.*, *Slade* v. *Hampton Roads Regional Jail*, 407 F.3d 243, 249 (4th Cir. 2005); *Williams* v. *Griffin*, 952 F.2d 820, 823 (4th Cir. 1991); *Magee* v. *Waters*, 810 F.2d 451, 452 (4th Cir. 1987).

Nothing counsels a different conclusion in this case. To the contrary, further review of the habeas petition in the district court, this Court, or the Supreme Court would be wholly imprudent in light of the extremely sensitive constitutional issues raised by the petition. It is axiomatic that courts should avoid the resolution of constitutional questions wherever possible. *See, e.g.*, *Ashwander* v. *TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring). As the Supreme Court made clear in

Hamdi v. *Rumsfeld*, 542 U.S. 507 (2004) (plurality), that principle applies with full force to enemy-combatant cases. *See id.* at 539 (instructing the lower courts to "proceed with the caution that we have indicated is necessary in this setting" by "engaging in a [litigation] process that is both prudent and incremental").[2]

As reflected in the President's recent Memorandum, the Executive has determined that the demands of national security can now be adequately satisfied by charging petitioner criminally. The fact that those charges involve different facts from those relied upon by the President in ordering petitioner's military detention is not consequential. The President's authority to detain enemy combatants during ongoing hostilities is wholly distinct from his ability to charge them for criminal conduct. In some cases, the underlying conduct that justifies detention as an enemy combatant could also form the basis of criminal charges; in other cases there will be a wide variety of conduct justifying military detention, only some of which, whether because of evidentiary issues, national security concerns, or the scope of the relevant criminal laws, may form the basis for a criminal prosecution. The President's

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[2] Indeed, the sensitivity of proceeding in this case is underscored by the briefing that petitioner requested before the district court following this Court's decision. Petitioner seeks to have the court resolve numerous sensitive constitutional issues concerning how to proceed with a factual challenge to petitioner's detention as an enemy combatant. It would be particularly imprudent for a court to opine on those novel constitutional issues in light of the fact that the President has determined that petitioner no longer should be detained as an enemy combatant.

decision here to terminate the military detention and prosecute petitioner for discrete criminal conduct does not make the challenge to petitioner's military custody any less moot.

Although the facts underlying the criminal indictment against petitioner differ from those in the President's June 9, 2002, order, they are gravely serious offenses. If convicted of the charges, petitioner could face life imprisonment. It is well within the appropriate exercise of prosecutorial discretion to limit the charges in the indictment to those that will satisfy the interests of justice, particularly when, as here, narrowing the charges would avoid sensitive evidentiary issues that may implicate core national security concerns and constitutional interests. And it should not be surprising that the scope of information that the President as Commander in Chief may consider in determining whether to detain an individual as an enemy combatant during wartime is much broader than the information that the Executive might use to form the basis for a criminal prosecution subject to the Federal Rules of Evidence. Those types of judgments, like the decision to charge petitioner in an ongoing criminal prosecution involving co-conspirators that is already scheduled for trial next year, are generally committed to the discretion of the Executive. *See United States* v. *Armstrong*, 517 U.S. 456 (1996).

Lastly, any concern that the President could later decide, based on an independent determination, to redesignate petitioner as an enemy combatant is entirely speculative and thus insufficient to meet the constitutional case-or-controversy requirement or come within the mootness exception for cases capable of repetition yet evading review. To be clear, as evidenced by the President's November 20, 2005, Memorandum, the Secretary of Defense's authority to detain petitioner as an enemy combatant will cease upon petitioner's transfer to the control of the Attorney General. While it is theoretically possible that the President could redesignate petitioner for detention as an enemy combatant—just as he could theoretically designate criminal defendants whose conduct, either within or outside the four corners of the indictment, would suffice to justify detention as an enemy combatant—in that unlikely event, petitioner would have ample opportunity to challenge any such military custody at that time.

That hypothetical scenario, moreover, would not fit within the narrow exception to the mootness doctrine for actions that are capable of repetition yet evading review. First coined by the Supreme Court in *Southern Pacific Terminal Company* v. *ICC*, 219 U.S. 498, 515 (1911), the "capable of repetition yet evading review" exception is limited to cases where: (1) the challenged action would be too short in duration to be fully litigated prior to cessation or expiration; *and* (2) there is

a reasonable expectation or "demonstrated probability" that the plaintiff will be subject to the same action again. *See Spencer*, 523 U.S. at 17-18; *Honig* v. *Doe*, 484 U.S. 305, 320 n.6 (1988); *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983) (named plaintiff must "make a reasonable showing that he will again be subjected to the alleged illegality."). For these reasons, the Supreme Court has cautioned that "the capable-of-repetition doctrine applies only in exceptional situations." *Lyons*, 461 U.S. at 109.

Here, petitioner could not establish either prong of the exception. As indicated, it is entirely speculative whether petitioner would ever again face military detention as an enemy combatant, and even if he did, there is no reason to believe that such detention would be too brief to allow him to challenge fully that detention in court. Indeed, if, as respondents urged at the time, petitioner had filed his habeas action in the appropriate court in the first instance, the issues decided in this Court's September 9, 2005, opinion not only could have been decided, but would have been finally resolved by the Supreme Court in June of 2004. It is therefore implausible, to say the least, to believe that any hypothetical future military detention of petitioner would somehow evade meaningful judicial review. *Cf. Spencer*, 523 U.S. at 17-18 (holding that habeas petitioner "ha[d] not shown (and we doubt that he could) that the time between parole revocation and expiration of sentence is always so short as to

evade review. Nor has he demonstrated a reasonable likelihood that he will once again be paroled and have that parole revoked.").

2. In light of the intervening events, there is no obstacle to this Court's exercise of its equitable authority to recall the mandate and vacate its September 9, 2005, opinion. Under *United States* v. *Munsingwear*, 340 U.S. 36 (1950), and its progeny, the "established practice" of appellate courts "in dealing with a civil case * * * which has become moot while on its way to [the Supreme Court]" has been to "vacate the judgment" if review of that judgment "was prevented through happenstance." *Id.* at 39-40. Vacatur under the *Munsingwear* doctrine rests on the principle that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mtge. Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 25 (1994).

The statutory authority for this "equitable tradition of vacatur," *ibid.*, is found in 28 U.S.C. § 2106, which provides that

> [t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Construing Section 2106, this Court has emphasized that "the principal consideration in determining whether the extraordinary relief of appellate vacatur is warranted is whether the party seeking relief from the judgment caused the mootness by voluntary action." *Valero Terrestrial Corp.* v. *Paige*, 211 F.3d 112, 117 (4th Cir. 2000) (quotations omitted); *see U.S. Bancorp Mtge. Co.*, 513 U.S. at 24 ("From the beginning we have disposed of moot cases in the manner most consonant to justice in view of the nature and character of the conditions which have caused the case to become moot." (quotations and ellipses omitted)).

In this case, for the reasons just described, the criminal indictment of petitioner and the President's Memorandum directing that petitioner be released from military custody and providing that, upon transfer to the Department of Justice, the military's authority to detain petitioner as an enemy combatant under the President's June 9, 2002, order "shall cease" have mooted the claims set forth in the habeas petition. Because the mooting events are not attributable to petitioner, the Executive has no objection to this Court's vacatur of its opinion under *Munsingwear*. *See U.S. Bancorp Mtge. Co.*, 513 U.S. at 25; *Valero Terrestrial Corp.*, 211 F.3d at 117.[3]

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[3] Application of the *Munsingwear* doctrine and recall of the mandate are particularly appropriate in this case in light of the fact that the appeal involved an *interlocutory order*. Although the case is now pending before the Supreme Court on certiorari, the interlocutory nature of the case means that the lower courts may continue to act in the case. Indeed, as discussed, at petitioner's request, the district

Although this Court has cautioned that recalling the mandate "is an extraordinary remedy that may be used only in unusual circumstances," it has also made clear that the "well-established" and "inherent" authority to recall "may be exercised for good cause or to prevent injustice." *Butler* v. *Academy Ins. Group, Inc.*, 1994 WL 483413, at *2 (4th Cir. 1994) (per curiam) (recalling the mandate);[4] *see Alphin* v. *Henson*, 552 F.2d 1033, 1035 (4th Cir.), *cert. denied*, 434 U.S. 823 (1977); *see also Zipfel* v. *Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988) (recalling the mandate and noting that "the power [to do so] falls within the discretion of the court"). In this case, the well established equitable principles that support vacatur also would appear to satisfy the "good cause" requirement for recall of the mandate. *See* Wright & Miller, 13A *Federal Practice & Procedure* § 3533.10, at 435 (noting that "generally it is appropriate for a court of appeals to vacate its own judgment if it is made aware of events that moot the case during the time available to seek certiorari"). That is particularly true in light of the sensitive constitutional questions

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court ordered briefing on how to proceed with a factual challenge to petitioner's enemy combatant determination. For the same reasons that the lower courts could proceed with that inquiry while the case is pending before the Supreme Court, they may take action to address the intervening events that have mooted the case while it is pending before the Supreme Court.

[4] A copy of the unpublished decision in *Butler* is included in the addendum pursuant to 4th Cir. R. 28(b) and 36(c).

implicated by petitioner's habeas challenge and the Supreme Court's directive that courts handling such challenges engage in a "process that is both prudent and incremental." *Hamdi*, 542 U.S. at 539 (plurality opinion).

In any event, regardless of whether the Court recalls its mandate and vacates its decision, the Court should grant the government's transfer application without further delay. The President has ordered the Secretary of Defense, upon the Attorney General's request, to transfer petitioner to the control of the Attorney General to face the criminal charges against him. Petitioner has consented to that transfer. And, whatever this Court concludes is the appropriate response to the legal effect of the intervening events discussed above, it should grant the government's unopposed transfer application as soon as possible.

CONCLUSION

For the foregoing reasons, the habeas petition is moot and the government has no objection to this Court's exercise of its discretion to recall the mandate, vacate its opinion of September 9, 2005, and remand the case with instructions to dismiss the habeas petition as moot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), the undersigned counsel of record certifies that the foregoing Supplemental Brief for the Appellant was this day delivered by electronic mail and by overnight mail to counsel for the petitioner-appellee, Jose Padilla, at the following addresses:

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ADDENDUM

H

Briefs and Other Related Documents

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Fourth Circuit.
James R. BUTLER, Plaintiff-Appellant,
v.
ACADEMY INSURANCE GROUP, INC.; Academy Life Insurance Co.; Pension Insurance Group of America, Inc.; Pension Life Insurance Company of America, Defendants-Appellees.
James R. BUTLER, Plaintiff-Appellee,
v.
ACADEMY INSURANCE GROUP, INC.; Academy Life Insurance Co.; Pension Insurance Group of America, Inc.; Pension Life Insurance Company of America, Defendants-Appellants.
Nos. 92-1916, 92-1955.
Argued June 11, 1993.
Decided September 8, 1994.

Appeals from the United States District Court for the District of South Carolina, at Columbia. Joseph F. Anderson, Jr., District Judge. (CA-86-2404-3-17).

D.S.C.

AFFIRMED IN PART AND REMANDED.

Argued: Thomas C. Salane, Turner, Padger, Graham & Lane, P.A., Columbia, SC. On brief: C. Ansel Gantt, Jr., Allen & Gantt, Columbia, SC, for Appellant.

Argued: James Wright Crabtree, Smathers & Thompson, Charlotte, NC. On brief: Charles E. Baker, Baker, Barwick, Ravenel & Bender, Columbia, SC, for Appellees.

Before RUSSELL, Circuit Judge, and BUTZNER and PHILLIPS, Senior Circuit Judges.

OPINION

PER CURIAM:

**1 Appellant James R. Butler ("Butler") appeals the district court's judgment, seeking incorporation of the court's alternate findings of fact into the judgment. For the reasons stated herein, we grant Butler's request and affirm the district court's judgment as modified.

I.

The facts of this complex dispute between Butler, a former insurance agent, and his employers are presented fully in the opinion of the district court, *Butler v. Academy Ins. Group, Inc.*, No.3:86-2404-16 (D.S.C. May 1, 1992). We summarize them here.

Butler, a former major in the United States Army, took a position with Academy Insurance Group ("Academy") as an insurance salesman. Academy markets insurance policies primarily to military personnel and their dependents. During his tenure with Academy, Butler rose through the ranks and eventually became the "Managing General Agent" ("MGA") for Academy's operation in Europe in January 1982. Butler held this position until April 1, 1986, when he resigned and was replaced by

Monte Dennett ("Dennett").

As MGA, Butler was authorized to advance Academy monies to agents who worked in his territory and to recoup these funds from commissions later earned by the agents. Pursuant to his contract with Academy, Butler was personally liable for those advances that he did not recover.

When Butler left the European MGA position, questions arose concerning the extent of Butler's liability for advances he had authorized and whether certain commissions earned by the European agents would be applied towards those past advances. That controversy resulted in the instant lawsuit, with Butler suing for unpaid commissions due him, and Academy counterclaiming for advances made by Butler that allegedly had not been repaid.

Butler's case was originally tried before the Honorable Karen L. Henderson without a jury and resulted in a judgment for Academy on its counterclaim in the amount of $566,922.73. At the end of the trial, Judge Henderson posed certain written questions to both sides in an attempt to resolve the issue of damages. On initial appeal to this court, Butler contended, among other things, that this procedure deprived him of his right to challenge Academy's responses. We agreed and accordingly remanded the case to the district court with instructions that it allow Butler to introduce evidence and cross-examine witnesses concerning the amount Academy was entitled to recover on its counterclaim. *Butler v. Academy Ins. Group, Inc.*, No.88-2600 (4th Cir. Oct. 25, 1990) (unpublished disposition).

During the pendency of the first appeal, Judge Henderson was elevated to the United States Court of Appeals for the District of Columbia Circuit. Butler's case was transferred to the Honorable Joseph F. Anderson, Jr. and a bench trial on damages was held in January 1992. Judge Anderson, after considering the cross-examination of Academy's "damages" witness, determined that the accounting methodology used by Academy was flawed in several respects. Judge Anderson thus ordered a full accounting of commissions earned and credited.

**2 Upon submission of the complete accounting, Judge Anderson held that Butler was entitled to additional credits of principal and interest for recruiting commissions earned on policies issued before April 1, 1986, which were not considered in prior accountings, and for agent debts exonerated by Dennett and Academy. In addition, Judge Anderson found other commission credits due Butler which he determined were not within the literal remand instructions of this court. [FN1] These additional commission credits were made the subject of alternative findings of fact B.1A and B.3A in his order but were not included within the amount of the resulting judgment. Based upon the accounting corrections, the district court entered a judgment in favor of Butler in the amount of $39,016.40. [FN2]

Butler now appeals to this court, contending that we should recall the mandate we issued in *Butler v. Academy Ins. Group, Inc.*, No.88-2600 (4th Cir. Oct. 25, 1990) and reform it to permit the inclusion of the district court's alternate findings of fact within the judgment. Academy objects to the suggested recall and reformation of our mandate, which would impose on it additional liability of $383,389.46, and cross-appeals the district court's conclusion that certain of its practices exonerated $672,515.59 (including interest) of Butler's debt. [FN3]

II.

The power of a court of appeals to recall its mandate in appropriate instances is well-established. *E.g., Patterson v. Crabb,* 904 F.2d 1179, 1180 (7th Cir.1990); *Zipfel v. Halliburton Co.,* 861 F.2d 566, 565 (9th Cir.1988); *Dunton v. County of Suffolk,* 748 F.2d 69, 70 (2d Cir.1984); *Dilley v. Alexander,* 627 F.2d 407, 410 (D.C.Cir.1980); *Nat'l Sur. Corp. v. Charles Carter & Co.,* 621 F.2d 739, 741 (5th Cir.1980); *American Iron and Steel Institute v. EPA,* 560 F.2d 589, 592-93 (3d Cir.1977); *Alphin v. Henson,* 552 F.2d 1033, 1035 (4th Cir.1977) (recognizing that

"in exceptional cases, we may even recall our mandate to avoid injustice"), *cert. denied,* 434 U.S. 823 (1977); 16 Charles A. Wright et al., *Federal Practice and Procedure* § 3938 (ed.1977). *But see Boston and Maine Corp. v. Town of Hampton,* 7 F.3d 281, 282-83 (1st Cir.1993) (discussing troubling aspects of the power to recall a mandate). The source of this power has not been conclusively identified. Most courts of appeals, however, have rooted the authority to recall a mandate in the "inherent power" of a court, *American Iron and Steel,* 560 F.2d at 593, and have held that it may be exercised for good cause or to prevent injustice, *Zipfel,* 861 F.2d at 567. The courts of appeals caution, however, that this power is an extraordinary remedy that may be used only in unusual circumstances. *E.g., Greater Boston Television Corp. v. FCC,* 463 F.2d 268, 277 (D.C.Cir.1971), *cert. denied,* 406 U.S. 950 (1972).

We find that the case at bar warrants the use of our discretionary power to recall and reform our mandate to permit inclusion of alternate finding B.3A in the district court's judgment. In this alternate finding, the district court found that Butler had not received credit for recruiting commissions earned on policies written after April 1, 1986 because Dennett had changed the agent account numbers [FN4] when he took over as MGA in Europe. This change resulted in the payment of $175,544 in recruiting commissions to Dennett rather than Butler. It was represented by Academy in both the initial trial and appeal, however, that Butler had received full credit for these commissions. Judge Henderson's refusal to permit cross-examination concerning the issue of damages prevented discovery of the improperly credited recruiting commissions until remand and cross-examination of Academy's damages witness. Given these unusual circumstances, we find that recalling and reforming our mandate is required to prevent the gross injustice that would otherwise result if we allowed Academy to escape the extensive liability discovered by the district court on remand.

****3** Turning to alternate finding B.1A, we decline to exercise our authority to recall and reform our mandate to permit the inclusion of this finding in the district court's judgment. In this alternate finding, the district court concluded that Academy's direct collection efforts with respect to the accounts of seven agents, which were settled via a promissory note signed by Butler, prejudiced Butler's right to proceed against those agents, causing him a loss of $154,510.09. Butler, who filed for bankruptcy during the pendency of the prior appeal, seeks incorporation of this finding primarily to avoid unnecessary relitigation of this issue before the bankruptcy court.

Our power to recall and reform a mandate is an extraordinary remedy that must be used sparingly so as not to undermine the finality of judgments. We see no reason to exercise this power here. The parties to the initial litigation filed no claims or counterclaims concerning the note; Butler's claims, therefore, can be adjudicated separately with no prejudice to either party beyond the cost of relitigation. To exercise our power merely to spare Butler the expense of additional litigation would, in our view, be an abuse of that power.

III.

For the foregoing reasons, we recall the mandate we issued in *Butler v. Academy Ins. Group, Inc.,* No.88-2600 (4th Cir. Oct. 25, 1990), and reform it to permit the inclusion of the district court's alternate finding of fact B.3A within its judgment. This case is accordingly remanded to the district court to modify its judgment to incorporate alternate finding of fact B.3A and its attendant legal conclusions, resulting in a $228,879.37 credit to Butler. [FN5]

AFFIRMED IN PART AND REMANDED WITH INSTRUCTIONS

> FN1. In remanding this case to the district court, this court instructed that
> [t]he district judge should allow Butler to introduce evidence and cross-examine witnesses on the question whether he has received proper credit for commissions

earned on policies issued *prior to April 1,* 1986, and, if not, the amount of those commissions. The district judge should also make findings and decide whether the company exonerated agents who owed advances while at the same time charging Butler with the exonerated advances....
Butler v. Academy Ins. Group, Inc., No.88-2600, slip op. at 14 (4th Cir. Oct. 25, 1990). The highlighted date restriction led Judge Anderson to conclude that he could not adjudicate Butler's entitlement to *post*-April 1986 commissions arising from his recruitment of the policy-writing agents. On the chance that this court did not agree with his literal interpretation of the remand instructions, however, Judge Anderson found, in alternate finding B.3A, that Academy owed Butler $228,879.37 in commissions from policies written after April 1986, because Butler recruited the agents who wrote the policies and was contractually entitled to a recruiting commission.
Alternate finding B.1A concerns a promissory note Butler signed in settlement of thirty-three of his agent accounts. Because the note did not become due until after the case was remanded, no claims or counterclaims on it were made by the parties to the initial litigation. Judge Anderson concluded that the note was, for that reason, beyond the scope of the remand and declined to enter judgment on his alternate finding that Academy's direct collection efforts with respect to some of the agents whose accounts were settled via the note prejudiced Butler's right to proceed against those agents.

FN2. Butler moved the district court to amend its order. Judge Anderson granted in part and denied in part this motion. Because the amendments Judge Anderson made related to the alternate findings only, they did not affect the amount of the final judgment.

FN3. We have reviewed Academy's contentions in its cross-appeal and find them to be without merit.

FN4. According to company practice, Academy pays all compensation due an agent into an individual escrow account from which the agent then receives the compensation in periodic increments.

FN5. In our remand order, we directed the district court to "either reduce the counterclaim or re-enter judgment for the sum it previously found." Academy thus contends that the district court has no authority under our mandate to enter judgment in favor of Butler. We agree. We note, however, that when we remanded the case to the district court to allow Butler to challenge the award of damages on Academy's counterclaim, we failed to envision a situation where Academy would end up owing Butler money. We see no reason to punish Butler for the cumulative effect of the district court's error and this court's lack of sufficient imagination by imposing this barrier to his recovery. We accordingly relax this portion of our mandate to allow the district court to enter judgment in favor of Butler.

36 F.3d 1091 (Table), 1994 WL 483413 (4th Cir.(S.C.)), Unpublished Disposition

Briefs and Other Related Documents (Back to top)

- 1993 WL 13122862 (Appellate Brief) Appellees/Cross Appellants' Reply Brief (Mar. 24, 1993)

- 1993 WL 13122861 (Appellate Brief) Reply and Answering Brief (Mar. 15, 1993)

• 1993 WL 13122863 (Appellate Brief) Appellees/Cross Appellants' Brief (Jan. 18, 1993)

• 1993 WL 13122860 (Appellate Brief) Appellant's Brief (Jan. 13, 1993)

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