

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

HEDELITO TRINIDAD y GARCIA,))	CA No. 09-56999
)	D.C. No. 08-CV-07719
Petitioner-Appellee,)	
)	APPELLEE’S
v.)	MOTION TO STAY
)	THE MANDATE
MICHAEL BENOY, Warden,)	PENDING THE FILING
Metropolitan Detention)	A PETITION FOR WRIT
Center - Los Angeles,)	OF CERTIORARI IN
)	THE SUPREME COURT
Respondent-Appellant,)	
)	

Pursuant to Federal Rules of Appellate Procedure 41(d)(2) and Ninth Circuit Rule 41-1, Appellee Hedelito Trinidad y Garcia hereby moves to stay the mandate for ninety (90) days pending the filing of a petition for a writ of certiorari. Respondent-Appellant intends to file a response to Petitioner’s motion.¹

This court will deny a stay of mandate where a “petition for certiorari would be frivolous or filed merely for delay.” Ninth Circuit Rule 41-1. As this case involves critical issues regarding the ability of a person facing torture to obtain meaningful judicial review -- and as

¹ Undersigned counsel was informed of the Government’s position by Department of Justice Attorney August Flentje on June 12, 2012.

three judges of this Court dissented from the narrow process set forth in the *per curiam* decision -- it is apparent that a certiorari petition would be neither frivolous nor filed merely for delay.

A petition for writ of certiorari in this case would present a substantial question. This case concerns whether and to what extent a person facing extradition may challenge the Secretary of State's denial of a torture claim through habeas corpus. The district court granted habeas relief and the prior panel affirmed, however, the *en banc* Court issued a highly splintered decision limiting that relief. *See Garcia v. Thomas*, No. 09-56999 (Jun. 8, 2012). In a *per curiam* opinion, the Court recognized that habeas jurisdiction was available to review claims under the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105, § 2242 U.S.C.C.A.N. (112 Stat. 2681). The *per curiam* opinion further held that the scope of review was limited to considering "a declaration that [the Secretary] has complied with her obligations" and determining whether "it has been signed by the Secretary or a senior official properly designated by the Secretary." *Garcia v. Thomas*, No. 09-56999, slip op. 6401-02. Three judges dissented from

the second holding, concluding that the district judge had the authority to conduct a more searching inquiry. *Id.*, slip op. 6451 (Berzon, J., with whom Fletcher, J., joins, concurring in part and dissenting in part); *id.*, slip op. 6482-94 (Pregerson J., with whom Fletcher, J., joins, concurring in part and dissenting in part).²

The Court's decision addresses separation of powers concerns and the availability of "the Great Writ" and undoubtedly presents "an important question of federal law." Sup. Ct. R. 10(c). Indeed, several Supreme Court justices have previously expressed their desire to address the issues presented in this case. In *Mohammed v. Obama*, three justices dissented from the denial of a stay pending review of Guantanamo detainee's transfer who alleged torture in the receiving country. *Mohammed v. Obama*, 131 S. Ct. 32, 177 L. Ed. 2d 1122

² It appears only three judges actually endorsed the declaration approach. See generally slip op. (Judge Graber did not join any concurring or dissenting opinion); slip op. at 6402 (Thomas, J., with whom Wardlaw, J., joins, concurring, and Berzon, J., joins as to Part I). Four dissenting judges agreed that habeas jurisdiction existed but concluded that the FARR Act imposed only a discretionary obligation and, thus, all review was barred under the Rule of Non-Inquiry. slip op. at 6429-45 (Tallman, J., with whom, Clifton, M. Smith, and Ikuta, J.J., joins dissenting). Chief Judge Kozinski dissented fully, concluding that habeas jurisdiction did not lie. slip op. at 6495-506.

(2010) (Ginsburg, J., with whom Breyer and Sotomayor, J.J, joins, dissenting). These justices would have granted the stay to “consider, in the ordinary course, important questions raised in this case and not resolved in *Munaf v. Geren*, 553 U. S. 674 (2008).” *Id.* In *Khadr v. Obama*, which also involved a Guantanamo detainee asserting a torture claim, two justices would have granted certiorari. *Khadr v. Obama*, 131 S. Ct. 2900, 179 L. Ed. 2d 1262 (2011) (noting that Justices Breyer and Sotomayor would grant the petition for certiorari).³

There is good cause for a stay here. This Court’s opinion orders the case remanded to the district court “for proceedings consistent with this opinion.” *Garcia v. Thomas*, No. 09-56990, slip op. 6402. Absent relief from the Supreme Court on a writ of certiorari, such proceedings would mean the termination of the case in district court. As the Court noted, “[c]ounsel for the government represented that the Secretary would provide such a declaration if the court so instructs.” *Id.* Once

³ In a similar case, two different justices have expressed interest in addressing the availability and scope of habeas review where a relator challenges extradition as a violation of international law. *Noriega v. Pastrana*, 130 S. Ct. 1002 (2010) (Thomas, J., with whom Scalia, J., joins, dissenting from denial of certiorari).

the Government makes its anticipated submission, “the court’s inquiry shall have reached its end.” *Id.* Mr. Trinidad will be surrendered to the Philippines and will likely suffer torture. The consequences could not be more grave.

Therefore, to preserve Mr. Trinidad’s ability to obtain meaningful relief on a certiorari petition, a ninety-day stay should be granted.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: June 14, 2012

By /s/ Craig A. Harbaugh
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HEDELITO TRINIDAD y GARCIA

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/S/ Craig A. Harbaugh

Craig A. Harbaugh