No-_____

IN THE SUPREME COURT OF THE UNITED STATES

In re Abdul Hamid Al-Ghizzawi,

Petitioner.

PETITION FOR ORIGINAL
WRIT OF HABEAS CORPUS

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PARTIES TO THE PROCEEDING

Petitioner here is Abdul Hamid Al-Ghizzawi , Internment Serial Number ("ISN") 654.

Respondents here and in the District Court, or their successors, are Barack Obama, President; Robert M. Gates, Secretary of Defense; Rear Admiral Harry B. Harris, Commander, Joint Task Force-GTMO; and Colonel Wade F. Davis (United States Army), Commander, Joint Detention Operations Group.

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JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1651(a), 2241(a), 2241 (b) and 2242, and Article I and III of the U.S. Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S Constitution article I, § 9, cl. 2 provides:

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

PRELIMINARY STATEMENT and PROCEDURAL HISTORY

This is the second original habeas petition filed in this Court by Abdul Hamid Al-Ghizzawi, a prisoner who has now been held for almost eight years at Guantánamo Bay, Cuba after being apprehended by bounty hunters in Afghanistan where he was a shopkeeper living with his Afghani wife and then infant child. In July 2007 Al-Ghizzawi filed an original habeas Petition with this Court, Docket No. 07-6827. That petition was denied without prejudice on June 27, 2008 after this court's decision in *Boumediene v. Bush*, 553 U.S. ___; 128 S. Ct. 2229; 2008 WL 2369628; 2008 U.S. LEXIS 4887 (2008), subject to proceeding and/or for refilling in the United States District Court for the District of Columbia.As Al-Ghizzawi had a habeas petition filed and pending in the District Court since 2005 he was not required to refile (Docket no. 05-2378).

Immediately upon filing his habeas petition in 2005 the petition was stayed by

the District Court pending decisions from this Court and the United States Court of Appeals for the District of Columbia Circuit. That stay was not lifted until November 2008 and as further described below a new stay was entered by the District Court in May 2009 and to this day that stay has not been lifted despite numerous requests by Al-Ghizzawi's counsel (as further described below). In addition, in April 2007 Al-Ghizzawi filed a Petition under the Detainee Treatment Act with the DC Court of Appeals, (Docket no. 07-1089) which was held in abeyance from the time it was filed until this Court entered its decision in *Boumediene* as which time the Circuit Court dismissed that proceeding, ostensibly because of the *Boumediene* decision, for lack of jurisdiction.

A. THE DISTRICT COURT STAY OF 2009

As mentioned above Al-Ghizzawi's habeas case at the District Court continued to languish until after Election Day of 2008, six months after this Court ruled in *Boumediene*. In November 2008 the Government was finally ordered to file a Return to the habeas petition pending and subsequently Al-Ghizzawi was allowed to seek limited discovery from the Government. In May of 2009 the Government sought a short stay by agreement in Al-Ghizzawi's case so that its executive review task force could conduct a review of his file. Counsel for Al-Ghizzawi agreed to that request in return for expedited consideration and in short order the executive branch determined that Al-Ghizzawi was "cleared for release." Counsel learned of that determination in mid June, 2009.

Al-Ghizzawi cannot return to home to his native Libya because of a very real risk

of imprisonment, torture and/or even death. In addition, it would not be safe for Mr. Al-Ghizzawi to return to his adopted homeland of Afghanistan because of the ongoing war there, and general feelings of ill-will towards those of Arab origin, such as Mr. Al-Ghizzawi. Therefore Al-Ghizzawi needs to either be released into the United States or to a third country that volunteers to take him.

After the executive review team determined that Al-Ghizzawi was "cleared for release" the District Court continued to stay his Habeas Petition and asked counsel for both sides for status reports to be filed on July 20, 2009. In the status report of that date, the Government claimed it was making efforts to find a third country to offer asylum to Al-Ghizzawi. Al-Ghizzawi asked the District Court for a prompt habeas hearing. The District Court, evidently concluding that being "cleared for release" means that Al-Ghizzawi no longer needs a habeas hearing, continued to stay the case over the objection of Al-Ghizzawi and directed the filing of yet a further status report on or about September 20, 2009. On that date the Government, having nothing additional to report except for purportedly (though artfully unspecified) ongoing efforts to find a third country for Al-Ghizzawi, once again asked the Distrit Court to continue the stay. Al-Ghizzawi once again asked the District Court to lift the stay and promptly schedule his habeas hearing. To date no hearing has been scheduled and there is no indication that a hearing will, in fact, ever be scheduled.

Upon information and belief, every District Court judge hearing the Guantanamo cases has stayed the cases of the men who have been "cleared for release" even though, of course, only a handful have actually been released and most of those because their

habeas petitions had been granted rather than because they had been "cleared" for release. The Executive Review Task Force has cleared more than 80 such men and almost all of them remain imprisoned at Guantanamo Bay in exactly the same manner as if they had not been "cleared."

"Cleared for release" is not legally the same as having the Great Writ entered. If it were, in fact, legally the same, then the Writ for Habeas Corpus should have been entered immediately, and the Government could have no objection to such relief given its legal posture. However, it is not the same, and for that reason a habeas hearing should be held immediately, as was held to be Petitioner's right pursuant to this Court's decision in *Boumediene*. Unfortunately the District Court judges refuse to address the habeas petitions of these men or articulate a reason for their continued failure to schedule those habeas hearings except to say that the cases are stayed because the executive has said that the men have been "cleared for release."

STATEMENT OF THE CASE

Petitioner Abdul Hamid Al-Ghizzawi is a prisoner incarcerated at the United States Naval Station at Guantánamo Bay, Cuba since early 2002. Petitioner is a citizen of Libya who was living in Afghanistan when abducted by bounty hunters, sold to the United States military and then imprisoned at Guantánamo. He has been under Respondents' exclusive custody and control since that time. Petitioner's jailers refer to him, and to all other inmates at Guantánamo, by a number, and not a name. Mr. Al-Ghizzawi's number is 654.

Mr. Al-Ghizzawi is now forty-six years of age and had been living in Afghanistan

for approximately 10 years (since shortly after the Soviet military left that country) prior to his being abducted by Afghani tribesmen and turned over first to the Northern Alliance and then to the American military forces in the late fall of 2001, in return for a cash bounty. Mr. Al-Ghizzawi is married to an Afghani woman[1] and has a young daughter who was only a few months old when he was abducted. He and his wife owned and ran a small shop in Jalalabad where they sold honey and spices and later expanded to include a bakery. In the fall of 2001 when the United States military began bombing areas close to their city, Mr. Al-Ghizzawi took his wife and months old baby and fled their home and shop in Jalalabad, seeking safety in a rural area where his in-laws lived.

Not long after Mr. Al-Ghizzawi and his family arrived at his in-laws (approximately December of 2001) armed men came to the home and told the family to turn over "the Arab" (Al-Ghizzawi). Mr. Al-Ghizzawi cooperated with the bounty hunters to avoid any harm to his family. Mr. Al-Ghizzawi was first turned over to the Northern Alliance, then, in turn, sold to the US forces in return for a bounty under a U.S. program that provided large bounties in return for "terrorists and murderers." Mr. Al-Ghizzawi is neither a terrorist nor a murderer but was instead the victim of greed in an impoverished nation. He has been held at Guantánamo since the spring of 2002 simply on the basis of being an Arab man in the wrong place at the wrong time, when

[1] Unfortunately Al-Ghizzawi's wife now seeks a divorce because seven years with no end in sight is too difficult.

the United States military indiscriminately provided a financial incentive to round up such men. Since his detention at Guantánamo, Mr. Al-Ghizzawi's health has steadily deteriorated. Mr. Al-Ghizzawi suffers from both hepatitis B and tuberculosis and has not been treated for either condition while being held at Guantánamo despite repeated requests for medical help. Counsel for Al-Ghizzawi had sought his medical records and medical treatment for his life threatening illnesses, but the District Court has declined to grant the requested relief and the Circuit Court affirmed that decision without comment and this Court declined review.

Mr. Al-Ghizzawi is one of those extraordinarily unfortunate individuals who should never been held at Guantanamo. In fact, back in 2004 when in response to this Court's ruling in *Rasul v. Bush*, 542 U.S. 466 (2004) the military was forced to conduct Combatant Status Review Tribunals ("CSRT's) to determine whether the men at Guantanamo were properly held as "enemy combatants" Petitioner Al-Ghizzawi was subject to *two* CSRT's because the first CSRT panel determined that in fact Al-Ghizzawi was not properly being held as an enemy combatant. Mr. Al-Ghizzawi's case also brings forth the extraordinary additional fact that a member of his first CSRT panel, the panel that found Mr. A1-Ghizzawi to *not* be an enemy combatant included panel member Lt. Col. Stephen Abraham. Lt. Col; Abraham provided an affidavit to this Court in June 2007 in that Petitioner's successful Motion to Reconsider the denial of Certiorari in *Boumediene v. Bush*,---S.Ct.---,2007 WL 1854132, 75 USLW 3705, 75 USLW 3707 (U.S. Jun 29, 2007) (NO. 06-1195). In his affidavit Lt. Col. Abraham described not only the failed CSRT process and the pressure put on the CSRT panels to find the

prisoners "enemy combatants" but he also described in detail the only panel that he sat on (panel 23) and the paucity of evidence against that detainee, Mr. Al-Ghizzawi, petitioner herein.

Al-Ghizzawi was in fact one of the more than 30 detainees who were originally found not to be an enemy combatant in the CSRT process. Declaring that Panel 23's CSRT's determination as to Petitioner was in error, Assistant Secretary of Defense for Detainee Affairs Matthew Waxman immediately directed that Al-Ghizzawi's (and other detainees) classification be reconsidered. In response - and, Petitioner submits, contrary to CSRT procedures for non-enemy combatant designations and now confirmed by the Affidavit of Lt. Col. Stephen Abraham - the authorities undertook an "inculplery search "for information that would justify the continued holding of Mr. Al-Ghizzawi. On January 18, 2005, the military officer charged with conducting that search, submitted the results of his search which included no new information. On January 21, 2005, a new CSRT Panel (32) was convened for the express purpose of reassessing Petitioner's non-enemy combatant status until it came to the conclusion desired by the Pentagon, and sometime thereafter redesignated Mr. A1-Ghizzawi as an "enemy combatant", again, even though the panel had *no new evidence*.

In an email chain (which included mention of Mr. Al-Ghizzawi's non enemy combatant status) culminating in a message to the Chair of the newly convened CSRT Panel 32, the following text appeared:

> * Please note that I did everything I could to ensure this was new evidence, but in fact the reconciliation the various exhibits on the G drive with the DAB

folders and my inculplery search may have duplicated some of the references.

* Inconsistencies will not cast a favorable light on the CSRT process or the work done by OARDEC. This does not justify making a change in and or (sic) itself but is a filter by which to look .....By properly classifying them as EC, then there is an opportunity to (1) further exploit them here in [G] TMO and (2) when they are transferred to a third country, it will be controlled transfer in status.."

Mr. Al-Ghizzawi had been desperately seeking legal counsel since early 2005 so that he could pursue his case in federal court and so that he could obtain medical treatment. (A282-85) In December 2005, upon retaining counsel, Mr. Al-Ghizzawi filed a habeas petition in the United States District Court for the District of Columbia (05-cv-2378). Two weeks after Mr. Al-Ghizzawi filed his habeas petition in the District Court, the President signed the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No.109-148, 119 Stat. 2739 (2005) into law. The Government thereupon asserted and argued in *Boumediene* and *al Odah*, that DTA § 1005(e) deprived the Court of Appeals of jurisdiction over the pending appeals. The government's outrageous position prompted two rounds of supplemental briefing and a second oral argument in that appeal, further extending the litigation quagmire that has plagued these cases.

The District Court immediately stayed Mr. Al-Ghizzawi's case after his habeas petition was filed and while the Court of Appeals for the District of Columbia Circuit considered the effect of the DTA in *Boumediene* and *al Odah*. From that time until the present Al-Ghizzawi has continuously sought a habeas hearing (agreeing only to the

short stay in the spring of 2009 so that the Obama Administration could review his file as part of its vaunted executive review process). Indeed, while that process has purported to "clear" Al-Ghizzawi, its "clearance" has proven meaningless in real terms. Despite Al-Ghizzawi's many requests for a hearing, the District Court still refuses to grant him a hearing but instead has tacitly decided that the executive branch should be given all of the time it needs to access Al-Ghizzawi's situation and determine how it would like to proceed, potentially even if this amounts to a life sentence for Al-Ghizzawi and others in his predicament.

The almost eight years of incarceration that Mr. Al-Ghizzawi has been forced to suffer without so much as habeas hearing has made a mockery of habeas corpus as "an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person" *Carafas* v. *LaVallee*, 391 U.S. 234, 238 (1968) and this Court's admonition in *Boumediene* that the men at Guantanamo have waited long enough and should be given prompt hearings. Mr. Al-Ghizzawi respectfully asks this Court to show the lower courts and the executive branch once and for all that there is a bottom line constitutional limit implicated here, and to provide a bright line guide as to how the lower courts should proceed. Unless this Court provides that guidance the legal limbo that has lasted these many years will continue indefinitely for men like Al-Ghizzawi who have been cleared for release but have no real prospect for release, and more and more of these cases will languish until they reach this Court for review again and again. In the alternative, Mr. Al-Ghizzawi asks this Court to treat the present petition as one seeking relief in the nature of mandamus and direct the District Court to immediately

schedule a hearing and proceed to the merits of his petition and to provide specific guidance to the District Court for that relief.

"The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned." *Price* v. *Johnston*, 334 U.S. 266, 291 (1948) but habeas review "must be speedy if it is to be effective." *Stack* v. *Boyle*, 342 U.S. 1, 4 (1952).

As these Kafkaesque proceedings drag on below, Petitioner Al-Ghizzawi is being held in the cruel confines of Camp 6 (since December 2006), a "super-max" style prison that until very recently had the men sitting in solitary confinement 22 hours a day, seven days a week. Mr. Al-Ghizzawi has not seen or talked to his wife and young daughter in almost eight years and his health has deteriorated to an alarming degree. In fact, just recently Al-Ghizzawi's wife sent divorce papers to her husband, telling him that seven plus years and with no end in sight has been too difficult and respectfully asked him to grant her wish for a divorce. The cruelty that continues for Mr. Al-Ghizzawi must come to an end...and not on the executive's own unilateral terms.

As this Court held, even convicted murderers cannot be made to endure conditions like these without first providing them the benefit of due process-*Wilkinson* v. *Austin*, 545 U.S. 209, 224 (2005), let alone a man such as Mr. Al-Ghizzawi who has been charged with no wrongdoing and for whom there is absolutely no evidence that he has ever been a threat to the United States or anyone else (and a man whom the Government has "cleared for release" and hence no longer contests is even an "enemy combatant" or should continue to be detained). Until this Court acts, Mr. Al-Ghizzawi and the other prisoners in his circumstance are forced to endure conditions that are not

permitted for prisoners of war under the Geneva Conventions or Army regulations, for convicted criminals in federal prisons, or for caged animals under Humane Society guidelines.

SUMMARY OF ARGUMENT

Petitioner Al-Ghizzawi has been imprisoned for more than seven years – without having been afforded due process of law or other fundamental rights – by a Government that professes justice and adherence to the rule of law but has instead delivered him into a penal hell of potentially infinite duration, or, as British jurist Lord Goldsmith has termed it, "a legal black hole". Despite this Court's strong ruling in *Boumediene* admonishing the lower courts to move promptly on the pending habeas petitions of the Guantanamo prisoners, Al-Ghizzawi continues to be denied a habeas hearing. The fact that the District Court judges have all decided that a finding by the executive that a prisoner is "cleared for release" is all the prisoners are entitled to is contrary to the purpose and meaning of habeas corpus, and every other Constitutional value of our nation and the values of civilized nations. This Court has the authority to redress this injustice and affront to American values, and this Court should enter the writ requested by Mr. Al-Ghizzawi. This Court should use his case as a vehicle to provide a bright line guide to the lower courts, showing them how to move forward on the merits and granting some form of relief to Mr. Al-Ghizzawi and the many men at Guantánamo who continue to be imprisoned in a gross miscarriage of justice.

ARGUMENT

I. HABEAS REVIEW "MUST BE SPEEDY IF IT IS TO BE EFFECTIVE."

"The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless [government] action." *Harris* v. *Nelson*, 394 U.S. 286, 290-91 (1969). As the Court stated:

> The scope and flexibility of the writ - its capacity to reach all manner of illegal detention - its ability to cut through barriers of form and procedural mazes - have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justices *within* its reach are surfaced and corrected.

Id. at 291. "Since habeas is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." *Hensley* v. *Man. Court*, 411 U.S. 345, 351 (1973). See also *Peyton* v. *Rowe*, 391- U.S. 54, 5860 (1968).

Precisely because the use of habeas is 'limited to cases of special urgency," *Hensley*, 411 U.S. at 351, and because "a principal aim of the writ is to provide for swift judicial review of alleged unlawful restraints on liberty," *Peyton*, 391 U.S. at 63, see also *Harris*, 394 U.S. at 291 ("the office of the writ is 'to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints"), the Court has emphasized time and again the writ's demand for "speed, flexibility, and simplicity." *Hensley*, 411 U.S. at 350. Especially pertinent here, the Court has made plain that "a habeas corpus proceeding must not be allowed to flounder in a 'procedural morass."

Harris 394 U.S. at 291-92 (quoting *Price* v. *Johnston*, 334 U.S. 266, 269 (1948) and that the Guantanamo detainees have waited long enough for habeas hearings (*Boumediene v. Bush*, 553 U.S. ___; 128 S. Ct. 2229; 2008 WL 2369628; 2008 U.S. LEXIS 4887 (2008). Thus far, morass, quagmire, or a synonym thereof is the only possible description of proceedings that have languished for over seven years, without so much as the scheduling of a hearing on the merits of Mr. Al-Ghizzawi's habeas petition.

II. AL-GHIZZAWI HAS EXHAUSTED EVERY OTHER REMEDY AVAILABLE TO HIM DESPITE THE GOVERNMENT'S ATTEMPTS TO CHANGE THE RULES AT EVERY STEP

As explained above Al-Ghizzawi has exhausted every remedy available to him under American law. Despite these efforts, he has suffered at Guantanamo Bay for almost eight years without being charged with a single offense (and indeed, he continues to be held in identically harsh conditions despite expressly being "cleared for release") and without a single hearing on the merits of the legality of his detention. The fact that the executive has declared A-Ghizzawi to be "cleared for release" is a meaningless gesture that cannot be permitted to supercede the substantive rights to which this Court has found him and others similarly situated entitled in *Boumediene*.

III. THIS COURT MAY EXERCISE ITS ORIGINAL HABEAS JURISDICTION TO END THE LEGAL LIMBO IN THE COURTS BELOW.

A. This Court Has Jurisdiction To End The Limbo Below.

This Court's jurisdiction is sufficiently broad to remedy the injustice that has befallen Mr. AL-Ghizzawi and others in his predicament. In *Boumediene* this Court held

that Petitioner and other men imprisoned at Guantánamo Bay have the right to habeas corpus and that because they have already waited so terribly long the habeas petitions must move swiftly. Al-Ghizzawi was entitled to the writ under the common law, and would have been entitled to the writ as of 1789 when the Constitution was adopted. *Id.* at 479-82. "[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789." *INS v. St Cyr*, 533 U.S. 289, 301 (2001) (internal quotations omitted). Accordingly, Petitioner has a right to the writ "as it existed in 1789." Even without this Court's decision in *Boumediene* this right exists for Mr. Al-Ghizzawi in this Court itself as of 1789 and that right is protected by the Suspension Clause.

Despite this Court's holding in *Boumediene* the reality of his case is that the writ of habeas corpus is still not available to Al-Ghizzawi in the District Court, as apparently the District Court prefers to defer to the Executive rather than act on cases within its prerogative and jurisdiction. This Court has the authority to hear Mr. Al-Ghizzawi's case itself, and to use this extraordinary case to establish a bright line rule for the processes that should be recognized. While accepting such jurisdiction would be unusual, it represents the only means of ending the legal logjam and the attendant additional round of appeals and inevitable requests for review by this Court, once and for all.

B. The Court's Power Of Habeas Review Extends To This Case.

If this Court determines that it does not want to accept its own original habeas jurisdiction and hear Mr. Al-Ghizzawi's case itself, Petitioner asks that this Court accept the present filing as one seeking a relief in the nature of mandamus and in the

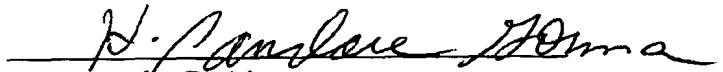
alternative, ordering the District Court to immediately set a hearing for Al-Ghizzawi's CASE. "[T]hat this court is authorized to exercise appellate jurisdiction by habeas corpus directly is a position sustained by abundant authority." *Ex parte Sieboid,* 100 U.S. 371, 374 (1880). This Court's habeas or habeas-equivalent jurisdiction stems from its jurisdiction over actions originally brought in the District Court (such as the habeas action filed by Petitioner) or the Court of Appeals (such as the DTA review and habeas action filed by Petitioner). *See generally* U.S. Const. art Ill, § 2, ci. 2; 28 U.S.C. §-~ 1254 and 2241; *Siebold,* 100 U.S. at 374 -375 ("having this general power to issue the writ, the court...may issue it in the exercise of appellate jurisdiction where it has such jurisdiction").

The District Court and the Court of Appeals have "allowed [this case] to flounder in a procedural morass." *Harris,* 394 U.S. at 292. All the while Petitioner continues, year after year, to be unlawfully and cruelly imprisoned at Guantánamo Bay. This Court has jurisdiction because each lower court has failed to act; and because the exceptional circumstances of this case warrant it (see Rule 204(a)). If this Court, declines to hear Mr. Al-Ghizzawi's habeas petition directly, as set forth above, Al-Ghizzawi ask this Court to direct the District Court, to immediately "relieve the prisoner from the unlawful restraint" that the paralysis of the lower courts force him to endure. *Ex parte Yerger,* 75 U.S. 85, 103 (1869).

CONCLUSION

More than fifteen months have passed since this Court decided *Boumediene*. Mr. Al-Ghizzawi remains at Guantanamo, has not had a habeas hearing and there is no apparent prospect of such a hearing on the horizon. Al-Ghizzawi asks this Court to step in and once and for all to provide him with the long overdue habeas hearing which has been denied to him these almost eight years and to which this Court, in *Boumediene*, held that he and the other men still held at Guantanamo Bay are entitled. Habeas Corpus is, at its core, the most fundamental component of our Constitutional system, but for Al-Ghizzawi and others in his predicament, that process has completely melted down, to the point of being nonexistent. The lower courts continue to defer to the vagaries of the executive branch rather than providing the relief that this Court held Al-Ghizzawi and others were not only entitled but held was long overdue well over a year ago. By remedying the extraordinary plight of Mr. Al-Ghizzawi this Court can once and for all confirm that there is a bottom line constitutional limit and at the same time guide the lower courts, not only as to the imperative that they *must* move on to the merits of these habeas petitions, but provide the clearest of guidance as to how to do it. This is exactly the situation under which both certiorari and the original writ were designed. Frankly, accepting jurisdiction of Al-Ghizzawi's present petition for this purpose will have the effect of reducing litigation that has resulted in not less than three rounds of landmark appeals to this Court. Notwithstanding this own Court's decisive, the logjam in the lower courts persists, as does the prospect of the Court being asked to intervene in these matters again, again, and again.

Respectfully submitted,



Attorney for Petitioner

CERTIFICATE OF SERVICE

I, H. Candace Gorman, hereby certify that on October 2, 2009, I filed the PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS, in the U. S. SUPREME COURT and that the petition was served upon the following individuals by the court security office, as indicated:

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