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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

OMAR DEGHAYES, et al.,)
)
Petitioners/Plaintiffs,)
)
v.)
)
GEORGE W. BUSH, et al.,)
)
Respondents/Defendants.)

Civ. No. 04-cv-02215 (RMC)

PETITIONER JAMAL KIYEMBA’S RESPONSE TO ORDER TO SHOW CAUSE

On October 28, 2005, Respondents filed a notice with the Court stating: “Respondents intend to transfer petitioner Jamal Kiyemba to the exclusive custody and control of his country of citizenship, Uganda, for any further detention, investigation, and/or prosecution deemed appropriate by that country under its laws.”

On December 6, 2005, the Court issued an Order to Show Cause, stating: “In view of Respondents’ Notice of intent to transfer Petitioner Jamal Kiyemba to Uganda, Petitioners shall show cause, on or before January 6, 2006, why this petition is not moot as to Jamal Kiyemba and his next friend Theresa Namuddu and, therefore, why those parties should not be dismissed from this action.” Petitioners respectfully file this response to that Order and request that the Court not dismiss Mr. Kiyemba and his next friend from this action.

Today, some 69 days after Respondents notified the Court that they intend to send Mr. Kiyemba to Uganda, Mr. Kiyemba remains in prison at Guantánamo Bay. Respondents are unwilling to provide a definite date for his release. Counsel for Mr. Kiyemba contacted

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Respondents' counsel on December 9, seeking clarification of Mr. Kiyemba's status.

Respondents' counsel e-mailed back on December 12, 2005, stating: "Given the sensitivities involved, we are not in a position to provide any information regarding the timing or status of Mr. Kiyemba's potential transfer from Guantánamo. That said, consistent with our practice throughout the Guantánamo litigation, we'll notify you once the transfer is complete."

If and when Mr. Kiyemba is actually transferred to the exclusive custody and control of Uganda, he and his next friend have no objection to being dismissed from this lawsuit.¹ However, Respondents' mere intent to transfer Mr. Kiyemba is insufficient to moot Mr. Kiyemba's claims. "The general rule concerning mootness has long been that a petition for habeas corpus becomes moot when a prisoner completes his sentence before the court has addressed the merits of his petition." Larche v. Simons, 53 F.3d 1068, 1069 (9th Cir. 1995) (noting exception for collateral legal consequences if conviction is permitted to stand)

¹ The nature of the transfer is critical. Petitioners do not object so long as the transfer actually gives exclusive custody and control to Uganda. Should Respondents impose restraints on Mr. Kiyemba in Uganda, Petitioners reserve the right to object to dismissal. As noted by Judge Walton in Almurbati v. Bush:

the Supreme Court has attached a liberal construction to the custody requirement for purposes of habeas corpus, for example, finding it unnecessary for a petitioner to be in actual physical control of the respondent to be considered in the respondent's custody, for a sovereign to be considered in custody of a person over whom it does not exercise "physical control," a court must be able to conclude that the sovereign is in "actual or constructive custody" of the petitioner "within the meaning of the habeas statute" as a result of the respondent being "responsible for significant restraints on the petitioner's liberty."

Almurbati v. Bush, 366 F.Supp.2d 72, 79 (D.D.C. 2005) (quoting Hensley v. San Jose Mun. Ct., 411 U.S. 345, 351, 93 S.Ct. 1571 (1973)). Cf. Spencer v. Kemna, 523 U.S. 1, 7, 118 S.Ct. 978 (1998) (holding it was error for District Court to conclude release from prison mooted case because prisoner was no longer "in custody;" incarceration at time petition was filed "is all the 'in custody' provision of 28 U.S.C. § 2254 requires;" real question is whether Petitioner has "suffered, or [is] threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.").

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(emphasis added); cf. Rasul v. Bush, 542 U.S. 466, 484, 124 S.Ct. 2686 (2004) (holding habeas statute confers jurisdiction to hear habeas corpus challenges to legality of detention at Guantánamo Bay).

This is not a situation where the prisoner will definitely be released before the Court could possibly reach the merits of his case. See, e.g., Ex parte Baez, 177 U.S. 378, 389, 20 S.Ct. 673 (1900) (holding habeas petition was moot because Court could not possibly have heard case by the date, six days later, when petitioner was due to be released from prison). We simply do not know when Mr. Kiyemba will leave Guantánamo. All we have is Respondents stating they intend to send Mr. Kiyemba back to Uganda. Until then, Mr. Kiyemba remains a prisoner of the United States military, held illegally without charge, in spartan and at times brutal conditions, virtually cut off from the outside world. The Court should not abandon him to the whims of the Executive.

Respondents have proven by example that their desire to release a prisoner does not mean he will actually be freed from Guantánamo. For instance, in Qassim v. Bush, 05-cv-497 (JR), Respondents informed the Court of their intent to release two prisoners from Guantánamo, Mr. A'Del Abdu Al-Hakim and Mr. Abu Bakker Qassim, after the men were determined not to be enemy combatants in March 2005. They remain in prison at Guantánamo today, because no country will take them. What happens if Uganda refuses to take Mr. Kiyemba back? Where then does he end up? Indeed, how would either Mr. Kiyemba or his counsel even know if Uganda did not want Mr. Kiyemba back? Again, Respondents have told Counsel that they will not provide any update as to Mr. Kiyemba's release, but will merely inform Counsel once Mr. Kiyemba has left Guantánamo. Dismissal from this action is premature.

“The essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal

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custody.” Preiser v. Rodriguez, 411 U.S. 475, 484, 93 S.Ct. 1827 (1973). Mr. Kiyemba continues to assert that his custody is illegal and he seeks release. Until either the Court orders his release or Respondents actually do transfer him to the exclusive custody and control of Uganda, this Court should not relinquish jurisdiction over Jamal Kiyemba and his next friend Theresa Namuddu.

Dated: January 5, 2006

Respectfully submitted,



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