

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PIERRE PAUL CLESCA,)	
A 27 910 149)	
)	
Petitioner,)	
)	
v.)	CIVIL ACTION NO. 09-00178-KD-N
)	
TOMMY BUFORD, et al.,)	
)	
Respondents.)	

REPORT AND RECOMMENDATION

This is an action under 28 U.S.C. § 2241 by Pierre Paul Clesca, a citizen and native of Haiti, who has been detained by the U.S. Department of Homeland Security (hereinafter *DHS*) (Doc. 1). This action has been referred for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.1(c) and is now ready for consideration. The record is adequate to determine Petitioner's claims; no evidentiary hearing is required. It is recommended that the instant petition be dismissed as moot.

In his petition, Clesca asserts that he was taken into custody by agents of the U.S. Bureau of Immigration and Customs Enforcement (hereinafter *ICE*), on July 11, 2008, and was served with an I-851 Notice of Intent to Issue Final Administrative Removal Order and an I-851A Final Administrative Removal Order which became final on July 25, 2008. (Doc. 1, ¶ 6). Petitioner was charged under § 237(a)(2)(A)(iii) of the INA. (*Id.*). Petitioner did not appeal his order of removal from the United States. (*Id.* at ¶ 13). On July 29, 2008, a travel document request was made to Headquarters Travel Documents Unit to complete Petitioner's removal. (*Id.* at ¶ 14). On August 25, 2008, the Petitioner was scheduled to depart the United States on an Haitian charter flight. (*Id.* at ¶ 15). On August 27, 2008, the charter flight was suspended but was,

according to ICE, to be rescheduled in the near future. (*Id.*) Petitioner asserts that he has cooperated fully and provided all the correct information to ICE to effectuate his deportation but that ICE has failed to remove him to Haiti. (*Id.* at 15-16).¹ Petitioner's custody status was last reviewed on or about November 19, 2008, and, at the time his petition was filed, he remained in custody at the Perry County Correctional Center. (*Id.* at ¶ 17).

Respondents have now filed a Response to Petition for Habeas Corpus, stating that Petitioner was removed from the United States to Haiti, his country of origin, on May 13, 2009 (Doc. 7). Attached to that Response is a document establishing that the Petitioner was removed from the United States and from ICE custody under a Warrant of Removal on May 13, 2009. (Doc. 7-2). Respondents assert that because Pierre Paul Clesca is no longer in the custody of ICE or DHS, Petitioner's request is moot and this action should be dismissed (Doc. 7).

The Eleventh Circuit Court of Appeals has directly answered the question posed in this action, stating as follows:

As we have explained on many occasions, Article III of the Constitution limits the jurisdiction of federal courts to the consideration of "Cases" and "Controversies." U.S. Const. art III, § 2. In turn, the "case or controversy" constraint imposes on federal courts a "dual limitation" known as "justiciability." *United States v. Fla. Azalea Specialists*, 19 F.3d 620, 621 (11th Cir. 1994). "The doctrine of justiciability prevents courts from encroaching on the powers of the elected branches of government and guarantees that courts consider only matters presented in an actual adversarial context." *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1335 (11th Cir. 2001). Article III's case or controversy requirement provides "an important restriction on the power of the

¹Petitioner acknowledges that, during this time, the Haitian Government had ceased to accept deporters from the United States because of the devastating hurricanes of August and September 2008. (Doc. 1 at ¶ 15).

federal courts,” which is necessary “[b]ecause the judiciary is unelected and unrepresentative.” *Id.* (quoting *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1244 (11th Cir.1998)) (internal quotations omitted); *see also Allen v. Wright*, 468 U.S. 737-38, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984) (“[T]he ‘case or controversy’ requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded.”).

The doctrine of mootness derives directly from the case or controversy limitation because “an action that is moot cannot be characterized as an active case or controversy.” *Adler v. Duval County Sch. Bd.*, 112 F.3d 1475, 1477 (11th Cir. 1997). “[A] case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969). As this Court has explained, “[p]ut another way, ‘a case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief.’” *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health and Rehab. Servs.*, 225 F.3d 1208, 1216-17 (11th Cir. 2000) (quoting *Ethredge v. Hail*, 996 F.2d 1173, 1175 (11th Cir. 1993)). Therefore, “[i]f events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give the plaintiff or appellant meaningful relief, then the case is moot and must be dismissed.” *Al Najjar*, 273 F.3d at 1336. In fact, “dismissal is required because mootness is jurisdictional.” *Id.* (citing, *e.g.*, *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971) (“The question of mootness is . . . one which a federal court must resolve before it assumes jurisdiction”)). “Any decision on the merits of a moot case or issue would be an impermissible advisory opinion.” *Florida Ass'n of Rehab. Facilities*, 225 F.3d at 1217.

Although there is an exception to the mootness doctrine when the action being challenged by the lawsuit is capable of being repeated and evading review, we have held that “this exception is ‘narrow,’ and applies only in ‘exceptional situations.’” *Al Najjar*, 273 F.3d at 1336 (quoting *Dow Jones & Co. v. Kaye*, 256 F.3d 1251, 1256 (11th Cir. 2001)) (internal quotations omitted). In particular, the exception can be invoked only when “(1) there [is] a reasonable expectation or a demonstrated probability that the *same* controversy will recur involving the *same* complaining party, and (2) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration.” *Sierra Club v. Martin*, 110 F.3d 1551, 1554 (11th Cir. 1997) (emphasis added). Simply put, “[t]he remote possibility that an

event might recur is not enough to overcome mootness, and even a likely recurrence is insufficient if there would be ample opportunity for review at that time.” *Al Najjar*, 273 F.3d at 1336.

Soliman v. U.S. ex rel. INS, 296 F.3d 1237, 1242-1243 (11th Cir. 2002).

Under these legal principles, it is clear that Clesca’s petition is now moot because there is no case or controversy. As Petitioner was removed from this country on May 13, 2009, he is no longer being held by ICE, the DHS, or, presumably, any other U.S. Government entity. *See Soliman*, 296 F.3d at 1243. Furthermore, there is no reason to believe that Clesca will be detained again in the future, so this is not a case that meets “the narrow exception for cases that are capable of repetition yet evading review.” *Id.*

Because no case or controversy now exists with regard to this petition, it is recommended that this action be dismissed as moot. It is further recommended that Judgment be entered in favor of Respondents Eric Holder, Janet Napolitano, and Tommy Buford and against Petitioner Pierre Paul Clesca.

Done this 24th day of June, 2009.

/s/ Katherine P. Nelson
KATHERINE P. NELSON
UNITED STATES MAGISTRATE JUDGE

MAGISTRATE JUDGE’S EXPLANATION OF PROCEDURAL RIGHTS
AND RESPONSIBILITIES FOLLOWING RECOMMENDATION
AND FINDINGS CONCERNING NEED FOR TRANSCRIPT

1. **Objection.** Any party who objects to this recommendation or anything in it must, within ten days of the date of service of this document, file specific written objections with the clerk of court. Failure to do so will bar a *de novo* determination by the district judge of anything in the recommendation and will bar an attack, on appeal, of the factual findings of the magistrate judge. *See* 28 U.S.C. § 636(b)(1)(C); *Lewis v. Smith*, 855 F.2d 736, 738 (11th Cir. 1988); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. Unit B, 1982)(*en banc*). The procedure for challenging the findings and recommendations of the magistrate judge is set out in more detail in SD ALA LR

72.4 (June 1, 1997), which provides that:

A party may object to a recommendation entered by a magistrate judge in a dispositive matter, that is, a matter excepted by 28 U.S.C. § 636(b)(1)(A), by filing a “Statement of Objection to Magistrate Judge’s Recommendation” within ten days after being served with a copy of the recommendation, unless a different time is established by order. The statement of objection shall specify those portions of the recommendation to which objection is made and the basis for the objection. The objecting party shall submit to the district judge, at the time of filing the objection, a brief setting forth the party’s arguments that the magistrate judge’s recommendation should be reviewed de novo and a different disposition made. It is insufficient to submit only a copy of the original brief submitted to the magistrate judge, although a copy of the original brief may be submitted or referred to and incorporated into the brief in support of the objection. Failure to submit a brief in support of the objection may be deemed an abandonment of the objection.

A magistrate judge’s recommendation cannot be appealed to a Court of Appeals; only the district judge’s order or judgment can be appealed.

2. **Transcript (applicable where proceedings tape recorded)**. Pursuant to 28 U.S.C. § 1915 and Fed.R.Civ.P. 72(b), the magistrate judge finds that the tapes and original records in this action are adequate for purposes of review. Any party planning to object to this recommendation, but unable to pay the fee for a transcript, is advised that a judicial determination that transcription is necessary is required before the United States will pay the cost of the transcript.

Done this 24th day of June, 2009.

/s/ Katherine P. Nelson
UNITED STATES MAGISTRATE JUDGE