05-0602-pr

To Be Argued By:
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-0602-pr

JEAN CARSON VOLGLY REMY,
Petitioner-Appellant,

-vs-

BRUCE CHADBOURNE, Interim Field Ofc. Dir. for New England Dist. ICE, CRAIG ROBINSON, Field Ofc Dir. LA ICE, ALBERTO GONZALEZ, Attorney General, Dept. of Homeland Security, MICHAEL GARCIA, Asst. Sect'y ICE
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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BRIEF FOR DEFENDANTS

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STATEMENT OF JURISDICTION

On December 21, 2004, Remy filed a petition for writ of habeas corpus under 28 U.S.C. § 2241. Government Appendix ("GA") 1 (docket entry). The district court dismissed the petition for lack of jurisdiction on December 29, 2004. GA 2 (docket entry); GA 20 (order). Remy filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a) on January 10, 2005. GA 2 (docket entry); GA 23. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and § 2253(a).

As explained *infra*, the district court's dismissal should be affirmed because the Attorney General is not the proper respondent to the petition, and the only proper respondent, the warden of his Louisiana detention facility, is not subject to personal jurisdiction in the District of Connecticut.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the district court in Connecticut properly concluded that it lacked jurisdiction in a "core" habeas proceeding in which a removable alien challenged only his present physical confinement in Louisiana, because the warden of his Louisiana detention facility, and not the Attorney General, was the proper respondent; and where neither the defendant's immigration proceedings nor his detention occurred in Connecticut.

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Preliminary Statement

This is a case about forum shopping. The petitioner, Jean Carson Volgly Remy ("Remy" or "Petitioner") is an alien who was ordered removed to Haiti in 2003 based on a Massachusetts conviction for assault and battery. Remy was not criminally charged or convicted in Connecticut,

did not go through any immigration proceedings in Connecticut, and has never been detained in Connecticut. Nevertheless, he has repeatedly sought habeas relief in the District of Connecticut (and elsewhere) in connection with his immigration proceedings – first to challenge the validity of his removal order, and now to challenge the length of his detention. The district court in Connecticut has twice directed Remy to the appropriate forums for his claims – federal courts in Louisiana, where he has been detained – once by transferring his claim, and once (in the present case) by dismissing his claim for failure to name a proper respondent.

To avoid precisely this sort of forum shopping, Remy's latest habeas action was properly dismissed for lack of jurisdiction over the proper respondent. His claim is a "core" habeas proceeding – that is, one in which an alien challenges only his present physical confinement, and not his underlying removal order. At the time of the district court's order of dismissal in December 2004, Remy was detained in the Middle District of Louisiana, which had jurisdiction over the proper respondent, the warden of his detention facility, who had control over his day-to-day custody. The district court below correctly concluded that it lacked jurisdiction because this petition had not been filed in the district of Remy's confinement and because the petition named an improper respondent, the Attorney General of the United States. Such a position has been adopted by a majority of appellate courts to consider the issue; it is most consistent with the Supreme Court's recent decision in *Rumsfeld v. Padilla,* 542 U.S. 426 (2004); and it comports with the decision of every district court in this Circuit to examine the question after *Padilla*

in cases involving a "core" habeas proceeding. For the reasons set forth below, the district court's decision should be affirmed.

Statement of the Case

On December 21, 2004, Remy filed a petition for a writ of habeas corpus in the District of Connecticut challenging his detention pending his removal from the United States. GA 1 (docket entry).

On December 29, 2004, the district court (Warren W. Eginton, Senior U.S. District Judge) dismissed the petition. GA 2 (docket entry); GA 20 (order). On the same day, judgment entered. GA 2. On January 10, 2005, Remy filed a motion for reconsideration with the district court. GA 2. On April 6, 2005, the district court adhered to its previous decision that it lacked jurisdiction. GA 2-3 (docket entry); GA 21-22 (ruling).

On January 10, 2005, Remy filed a timely notice of appeal in this court. GA 2 (docket entry); GA 23. On April 28, 2005, Remy filed an amended notice of appeal. GA 2 (docket entry); GA 25. Remy remains detained pending this appeal and his removal from the United States.[1]

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[1] On June 16, 2005, the Government moved to vacate the stay of removal entered by this Court. On February 2, 2006, this Court granted that motion and lifted its stay.

Since this Court has lifted its stay, immigration authorities have sought unsuccessfully to obtain travel authorization from (continued...)

STATEMENT OF FACTS

A. Remy's Immigration History and Removal Proceedings

Remy, a native and citizen of Haiti, entered the United States at Miami, Florida as an immigrant on or about February 21, 1993. GA 6. Remy was convicted in the West Roxbury District Court at West Roxbury, Massachusetts on April 2, 2001, for the offense of assault and battery in violation of Mass. Gen. Laws, Ch. 265, Subsection 13A. GA 6-7. Remy was sentenced to a term of imprisonment of one year. GA 7. To that end, Remy was served with a Notice to Appear on December 5, 2001, which specifically charged him with not being a citizen or national of the United States but a native and citizen of Haiti, and for being subject to removal from the United States under Section 237(a)(2)(A)(iii) of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony as that term is defined in INA § 101(a)(43)(F), namely a crime of violence. GA 4-5.

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[1] (...continued)
Haiti for Remy's removal from the United States. The Government is presently reviewing Remy's custody. The Government will promptly notify this Court of any change in Remy's detention status.

Remy's removal proceeding was conducted in Oakdale, Louisiana, where he was detained in INS [2] custody. GA 6-15. Remy made applications for withholding of removal, CAT[3] relief, and alternatively, for voluntary departure. On June 24, 2003, after a removal hearing, the IJ determined that Remy was deportable as charged, denied his applications for relief, and ordered him deported to his native Haiti. GA 6-15.

Remy appealed the IJ's decision to the BIA. He challenged only his deportability and that the IJ lacked jurisdiction because he was served with the notice to appear in Massachusetts but his proceedings took place in Louisiana. By decision dated December 8, 2003, the BIA affirmed the IJ's denial of relief and sustained the charge of deportability. GA 16-17.

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[2] The INS was abolished effective March 1, 2003, and its functions transferred to three bureaus within the Department of Homeland Security pursuant to the Homeland Security Act of 2002. *See* Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135, 2178 (codified as amended at 6 U.S.C. § 202 (2002)). The enforcement functions of the INS were transferred to the Bureau of Immigration and Customs Enforcement ("ICE"). *Id.* For convenience, defendant-appellee is referred to as the INS.

[3] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46 (annex, 39 U.N. GAOR Supp. No. 51 at 197), U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987; for United States Apr. 18, 1988).

B. Federal Court Proceedings

On December 24, 2003, despite the fact that his immigration proceedings occurred in Louisiana and that he has never been detained in Connecticut, Remy filed a petition for a writ of habeas corpus in the District of Connecticut challenging, among other things, his final order of removal. *See Remy v. Ashcroft*, Docket No. 3:03-CV-2245 (WWE). The district court (Hon. Warren W. Eginton, J.) originally concluded that it had jurisdiction over the petition, holding that the Attorney General was a proper respondent in an immigration habeas case. After the Government filed a motion for reconsideration, the Supreme Court issued its decision in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). On December 15, 2004, the district court granted reconsideration in light of *Padilla* and transferred Remy's habeas petition to the Western District of Louisiana based on venue considerations. GA 18-19. Remy never appealed the transfer order. He has since withdrawn that habeas petition in the Western District of Louisiana.

On December 30, 2003, while his first habeas petition was pending in the District of Connecticut, Remy filed a *pro se* petition for review before this Court, also challenging his final order of removal. *See Remy v. Ashcroft*, Docket No. 03-41210. On March 11, 2004, this Court transferred Remy's petition for review to the Court of Appeals for the Fifth Circuit based on venue considerations. The government then moved to dismiss Remy's petition for review in the Court of Appeals for the Fifth Circuit by arguing that, because his conviction qualified as an aggravated felony, the Court of Appeals for

the Fifth Circuit lacked jurisdiction. On June 24, 2004, the Court of Appeals for the Fifth Circuit granted the motion to dismiss without a written ruling. *See Remy v. Ashcroft*, Docket No. 04-60265. Thus, the legality of Remy's final order of removal has already been adjudicated by the Court of Appeals for the Fifth Circuit.

On December 21, 2004, only six days after the district court in Connecticut transferred Remy's first habeas petition, he filed a second habeas petition in the District of Connecticut primarily challenging his detention. *See Remy v. Chadbourne*, Docket No. 3:04-CV-2154 (WWE). GA 1-2 (docket entry). On December 29, 2004, the district court (Hon. Warren W. Eginton, J.) dismissed Remy's habeas petition for lack of jurisdiction pursuant to *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), on the grounds that Remy should have named his immediate custodian in Louisiana as respondent, rather than the Attorney General or some other remote supervisory official, and that the court in Connecticut lacked habeas jurisdiction over the case. GA 2 (docket entry); GA 20 (judgment). The above-captioned appeal seeks review of that order dismissing Remy's petition for a writ of habeas corpus.

Thereafter, Remy filed two new habeas petitions in the Middle District of Louisiana[4] – one challenging his final

[4] According to representations from the INS, Remy was briefly taken into custody in Massachusetts, and then detained in the Federal Detention Center, Oakdale, Louisiana (located in the Western District of Louisiana) from July 16, 2002, to January 12, 2004. Thereafter, he was transferred and detained at the Pointe Coupee Parish Jail, New Roads, Louisiana (continued...)

order of removal, *see Remy v. Ashcroft, et al*, Docket No. 3:04-CV-910, and one challenging his detention, *see Remy v. Chadbourne, et al.*, Docket No. 3:05-CV-32. Remy's habeas petition filed in the Middle District of Louisiana which challenged his final order of removal, *see Remy v. Ashcroft, et al,* Docket No. 3:04-CV-910, was transferred to the Court of Appeals for the Fifth Circuit pursuant to the Real ID Act, Pub. L. No. 109-13, 119 Stat. 231. *See Remy v. Gonzales*, Docket No. 05-60852. On December 13, 2005, the Court of Appeals dismissed that petition for review for lack of jurisdiction. Remy's petition filed in the Middle District of Louisiana challenging his continued detention, *see Remy v. Chadbourne, et al.*, 3:05-CV-32, is still pending.

SUMMARY OF ARGUMENT

The district court's dismissal should be affirmed because the district court lacked jurisdiction over the person who had immediate custody over Remy during the pendency of the habeas petition, and who was the only proper respondent – the warden of the facility in which he was detained.

In *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), the Supreme Court recently endorsed the majority view that "there is generally only one proper respondent to a given prisoner's habeas petition" involving a challenge to the

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[4] (...continued)
(located in the Middle District of Louisiana) from January 12, 2004, to May 5, 2005. He was subsequently transferred back to the Federal Detention Center on May 5, 2005, and remains detained there pending his removal to Haiti.

prisoner's present physical detention – namely, the petitioner's immediate custodian, and not the cabinet official who ultimately oversees that custodian. Although the Supreme Court in *Padilla* had no occasion to apply this rule in the immigration context, a majority of appellate courts to have considered the question had held that the Attorney General is not a proper habeas respondent in such circumstances. Moreover, since *Padilla*, every district court in this Circuit has concluded that "core" habeas petitions – that is, challenges only to an alien's detention, and not to his underlying removal order – are governed by *Padilla*'s immediate-custodian rule. Remy's habeas petition is precisely such a "core" habeas proceeding. While his habeas petition was pending in Connecticut, he was being detained in Louisiana, and his immediate custodian was the warden of the detention facility where he was then being held. Jurisdiction over Remy's habeas proceeding therefore lay with the federal courts in Louisiana, where a district court is in fact considering the merits of his detention claim.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE HABEAS PETITION FOR LACK OF PERSONAL JURISDICTION BECAUSE IT NAMES THE WRONG RESPONDENT AND WAS FILED OUTSIDE HIS DISTRICT OF CONFINEMENT

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

The text of the federal habeas corpus statute indicates that there is only one proper respondent to a habeas petition: "The writ . . . shall be directed to the person having custody of the person detained." 28 U.S.C. § 2243; *see also* Fed. R. Civ. P. 81(a)(2) (same). The federal habeas statute also provides that a court's habeas corpus jurisdiction is territorially limited: Habeas jurisdiction only extends to individuals and custodians within the boundaries of the court's district. 28 U.S.C. § 2241(a) ("Writs of habeas corpus may be granted by . . . the district courts . . . within their respective jurisdictions.").

In reviewing a district court's decision to exercise jurisdiction over a habeas petition, this Court "first determine[s] if [the named respondent] is a proper respondent." *Padilla v. Rumsfeld*, 352 F.3d 695, 707 n.16 (2d Cir. 2003), *rev'd, Rumsfeld v. Padilla*, 542 U.S. 426

(2004) (vacating judgment of the Court of Appeals and remanding the case for entry of order of dismissal without prejudice). A court of appeals exercises *de novo* review over the district court's determination as to the existence of personal jurisdiction over the respondent named in a habeas petition. *See Roman v. Ashcroft*, 340 F.3d 318, 314 (6th Cir. 2003).

C. Discussion

The district court properly dismissed the habeas petition. The majority of appellate courts that have considered the question have held that the Attorney General is not the proper respondent to a habeas petition filed by a detained alien who – like Remy – challenges his detention. *See Roman,* 340 F.3d at 323 ("A corollary of the immediate custodian rule is that generally the Attorney General is considered neither the custodian of a detained alien for purposes of § 2243 nor a proper respondent to an alien's habeas corpus petition."); *Vasquez v. Reno*, 233 F.3d 688, 696 (1st Cir. 2000) ("Having assayed the arguments advanced for the proposition that the Attorney General is the proper respondent in alien habeas cases, we find no compelling reason for supporting such a rule."); *see also Yi v. Maugans*, 24 F.3d 500, 507 (3d Cir. 1994) (rejecting proposition that "the Attorney General could be considered the custodian of every alien and prisoner" merely because "ultimately she controls the district directors and the prisons"). *But see Armentero v. INS*, 340 F.3d 1058, 1071 (9th Cir. 2003) (Meskill, J.) (concluding that Attorney General was proper respondent to petition filed by alien prior to dissolution of INS), *withdrawn*, 382 F.3d 1153 (9th Cir. 2004), *appeal dismissed*, 412 F.3d

1088 (9th Cir. 2005) (Berzon, J., dissenting) (arguing that Attorney General is proper respondent).

This Court on one occasion discussed the issue but declined to resolve it. *Henderson v. Reno*, 157 F.3d 106, 124-28 (2d Cir. 1998). The Supreme Court has likewise had no occasion to address this precise issue. *Padilla*, 542 U.S. at 445 n.8 (noting circuit split, and declining to reach issue); *see Ahrens v. Clark,* 335 U.S. 188, 193 (1948) (declining to reach question of whether Attorney General was "the proper respondent" to petition filed by aliens held at Ellis Island for deportation to Germany), *overruled on other grounds by Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973).

Prior to the issuance of *Padilla*, judges in this Circuit had disagreed over whether the Attorney General is a properly named respondent in an immigration petition. *See Patterson v. INS,* No. Civ.A.3:03CV1363 (SRU), 2004 WL 1114575, at *2 (D. Conn. May 14, 2004) (noting that result "in different courts in this district" is "mixed," and citing cases); *see Perez v. Ashcroft*, No. 02 Civ. 10292 (NRB), 2003 WL 22004901, at *2 & n.5 (S.D.N.Y. Aug. 25, 2003) (citing cases from the Southern and Eastern Districts of New York). In the wake of *Padilla*, however, every district court in this Circuit to consider the issue has concluded that where an alien files a "core" habeas petition – like Remy's – that challenges only his detention, the proper respondent is the alien's immediate custodian, and jurisdiction lies only in the district of the alien's confinement.

As explained below, and consistent with the reasoning of *Padilla*, this Court should adopt the reasoning of the First and Sixth Circuits, as well as that of all the district courts in this Circuit, that 28 U.S.C. § 2241 and § 2243 require aliens who challenge their detention pending removal to name their immediate custodian rather than the Attorney General or some other remote supervisory official as respondent, and to file their habeas petition in their district of confinement.

1. The General Rule That the Proper Respondent Is the Petitioner's "Immediate Custodian" Dictates That the Attorney General Is Not the Proper Respondent Here

It is well established as a general rule that a petitioner seeking a writ of habeas corpus must name as the respondent his "custodian": the official who holds the petitioner in what is alleged to be unlawful custody and has the ability, if need be, to produce the petitioner before the district court. *See Padilla*, 542 U.S. at 434-35. As the Supreme Court very recently stated in *Padilla*, 28 U.S.C. § 2242 "straightforwardly provides that the proper respondent to a habeas petition is 'the person who has custody over [the petitioner].'" *Id.* (holding that Secretary of Defense was not proper respondent in habeas petition filed by prisoner detained by military authorities; confirming longstanding general rule that Attorney General is not the proper respondent to a habeas petition); *but see id.* n.8 (recognizing that the issue of whether the Attorney General is a proper respondent in an immigration habeas petition was not before the Court and "declin[ing]

to resolve it."); *see also Billiteri v. U.S. Board of Parole*, 541 F.2d 938, 948 (2d Cir. 1976); *Ex parte Endo*, 323 U.S. 283, 306 (1944) (writ is "'directed to, and served upon, not the person confined, but his jailer'" (citation omitted)); 8 U.S.C. § 2241(c)(1)-(3) (requiring that petitioner be "in custody" for writ to extend to him).

In *Padilla*, the Court reaffirmed a principle that has existed for over "100 years," that the habeas "provisions contemplate a proceeding against some person who has the *immediate custody* of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary." *Padilla*, 542 U.S. at 434-35 (internal quotation marks and citation omitted). The Supreme Court went on to state that in prisoner cases "the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." *Id.* ("there is generally only one proper respondent to a given prisoner's habeas petition"); *see also Blango v. Thornburg*, 942 F.2d 1487, 1491-92 (10th Cir. 1991); *Guerra v. Meese*, 786 F.2d 414, 416 (D.C. Cir. 1986); *Sanders v. Bennett*, 148 F.2d 19, 20 (D.C. Cir. 1945); *Jones v. Biddle*, 131 F.2d 853, 854 (8th Cir. 1942); *Roman*, 340 F.3d at 330 (Gibbons, C.J., concurring) (collecting cases).

Thus, "for a court to entertain a habeas corpus action, it must have jurisdiction over the petitioner's custodian." *Billiteri*, 541 F.2d at 948; *see also Roman*, 340 F.3d at 319 ("[A] court has jurisdiction over a habeas corpus petition only if it has personal jurisdiction over the petitioner's

custodian."). This Court recognized in *Billiteri* that "it would stretch the meaning of the term custodian beyond the limits established by the Supreme Court" to characterize as the custodian – and thus the proper respondent – an official or entity other than the prison warden who, in that capacity, exercises control and confines the prisoner in the manner that is challenged. *Id.* "The individual best able to produce the body of the person detained is that person's immediate custodian, his 'jailor' in the parlance of an earlier time." *Vasquez,* 233 F.3d at 693 (citations omitted). Thus, the rule "gives a natural, commonsense construction to the statute." *Id.*; *accord Roman*, 340 F.3d at 321-22.

Given that the same statutes govern all prisoner habeas petitions, there is no reason to apply a different rule in the immigration context. As this Court observed in *Henderson v. Reno*, 157 F.3d 106, 124-28 (2d Cir. 1998), "the Attorney General is designated, pursuant to statute, as the custodian of *all* federal prisoners, *see* 18 U.S.C. § 4001 (1994), yet no one seriously suggests that she is a proper respondent in prisoner habeas cases." 157 F.3d at 126. For purposes of identifying the proper habeas respondent, the Attorney General's role with respect to detained aliens does not differ materially from his role with respect to federal prisoners. *See Vasquez*, 233 F.3d at 693. "While the Attorney General is the ultimate overseer of all federal prisoners, []he is not responsible for day-to-day prison operations and does not hold prisoners in actual custody." *Vasquez*, 233 F.3d at 691. Similarly, while the Attorney General has ultimate authority over certain immigration matters, the warden of a given detention facility retains day-to-day control over an alien's confinement.

As the First Circuit observed in holding that as a general rule the Attorney General is not a proper respondent to an immigration habeas petition:

> [C]onsistency almost always is a virtue in the law and consistency strongly suggests this result. In terms of identifying a proper custodian, there is no principled distinction between an alien held in a detention facility awaiting possible deportation and a prisoner held in a correctional facility awaiting trial or serving a sentence. Since the case law establishes that the warden of the penitentiary, not the Attorney General, is the person who holds a prisoner in custody for habeas purposes, it would not only be illogical but also quixotic to hold that the appropriate respondent in an alien habeas case is someone other than the official having day-to-day control over the facility where the alien is detained.

Vasquez, 233 F.3d at 693; *accord Roman*, 340 F.3d at 321 ("We see no reason to apply a different rule for identifying a petitioner's custodian depending on whether the petitioner is an alien or a prisoner."); *cf. Yi*, 24 F.3d at 507 (if immediate custodian rule were not applied, Attorney General "could be considered the custodian of every alien and prisoner in custody because ultimately she controls the district directors and the prisons").

Practical considerations also counsel in favor of holding that neither the Attorney General nor any other high-level official is the proper respondent in a case like this. "The immediate custodian rule is clear and easily administered,"

Vasquez, 233 F.3d at 693, and the adjudication of immigration habeas petitions "would become considerably more difficult to administer if [courts] were to adopt a broader definition of 'custodian' in this context," *Roman*, 340 F.3d at 322. Indeed, the latter interpretation "would establish a regime in which several courts would have personal jurisdiction over an alien's 'custodians'" and would thus permit aliens to "engage in forum shopping, choosing among several different districts as long as personal jurisdiction existed over at least one of the various custodians and venue considerations were satisfied." *Id.* Venue limitations might reduce the problem to some extent, but would not do so completely, and, in any event, permitting aliens to file in multiple jurisdictions would force courts "in many cases to undertake fact-intensive analyses of venue and forum non conveniens issues" that would not otherwise be required. *See id.*

In *Henderson,* this Court, in *dicta*, engaged in a lengthy discussion recognizing arguments on both sides of the issue of whether the Attorney General is the appropriate respondent in an immigration petition. *See Henderson,* 157 F.3d at 121-28. The Court's analysis began from the premise that if New York's long-arm statute would permit service of process to be effected on the alien's custodian, the question of whether the Attorney General can be a named respondent in an immigration habeas would be mooted. *See id.* at 122-123. Accordingly, this Court certified to the New York Court of Appeals the question of whether New York's long-arm statute would permit service of process on the INS New Orleans District Director. *Id.* at 124. The New York Court of Appeals denied the request for certification. *See Yesil v. Reno*, 92

N.Y.2d 55 (1998). The case was ultimately settled and therefore the propriety of the Attorney General being named as a respondent in an alien's habeas petition was never decided. *See Yesil v. Reno*, 175 F.3d 287, 288-89 (2d Cir. 1999) (per curiam).

Although *Henderson* did not ultimately decide the question, it nevertheless framed many of the relevant arguments regarding who the proper respondent is in an immigration habeas case. On one side, this Court noted that as a general rule the proper custodian is the individual with "day-to-day control over the petitioner" and stated that "for the great majority of habeas cases . . . the rule made sense, and still does." *Henderson*, 157 F.3d at 122. This Court also recognized that in the same way that the Attorney General is the ultimate custodian of all immigration petitioners, the Attorney General is also the ultimate custodian of all federal prisoners and "yet no one seriously suggests that []he is a proper respondent in the prisoner habeas cases." *Id.* at 126.

In discussing the countervailing arguments, the Court observed that the immediate custodian rule is not absolute. Specifically, § 2255 carves out a statutory exception, requiring a federal prisoner to file his habeas in the district where he was originally sentenced and must name the United States as a respondent. *Id.* at 125. In addition, § 2254 requires that a petitioner who is not in custody must name his immediate custodian as well as the state attorney general. Finally, the case law also recognizes certain exceptions to the immediate custodian rule. *Id.* at 125. This Court also suggested that the Attorney General's role in immigration matters is "extraordinary and

pervasive," making it "unique" enough that this factor may militate in favor of allowing the Attorney General to be named as the proper respondent to an immigration habeas petition. *Id.* at 126.

The Court further considered how practical considerations might weigh for or against naming the Attorney General as a proper respondent. For example, certain districts containing immigration detention facilities, with over-crowded dockets, might find some relief if the Attorney General could be named as the respondent and habeas petitioners were therefore able to bring petitions outside their district of confinement. *Id.* at 128. On the other hand, the Court recognized that traditional venue considerations could lead to similar overcrowding in districts containing large immigrant populations – "districts that in many cases are already among the busiest in the nation." *Id.* Given the "powerful arguments on each side" the Court refrained from deciding the issue unnecessarily. *Id.*

In *Padilla*, the Supreme Court recently had occasion to speak to the role that many of these considerations should play in a court's analysis of who is the proper respondent in a habeas petition. Although it specifically reserved decision on who the proper respondent in an immigration habeas should be, 542 U.S. at 445 n.8, the Court's analysis nevertheless provides significant guidance.

First, the Supreme Court observed, as did this Court in *Henderson*, that certain statutes carved out exceptions to the immediate-custodian rule. As the Supreme Court explained, however, the fact that Congress had felt

compelled to enact these exceptions reinforced the "commonsense reading of § 2241(a)" that habeas petitions aimed at relieving an individual from confinement are "'issuable only in the district of confinement.'" *Padilla*, 542 U.S. at 442-43 (quoting *Carbo v. United States*, 364 U.S. 611, 618 (1961)). Accordingly, *Padilla* teaches that the existence of statutory exceptions to the default immediate-custodian rule cannot be said to support an interpretation of § 2241(a) that permits filing of habeas petitions outside the district of confinement.

Second, the Supreme Court rejected the notion that long-arm jurisdictional statutes (which vary from state to state) should impact the question of who is the proper respondent in a habeas case. *Padilla*, 542 U.S. at 445 ("*Braden* in no way authorizes district courts to employ long-arm statutes to gain jurisdiction over custodians who are outside of their territorial jurisdictions."). Instead, the Court re-affirmed a formal and literal application of the habeas statute, finding that there is generally only one proper respondent (the petitioner's immediate custodian) and one district in which a habeas petition should be filed (the district in which the prisoner is detained). *See Padilla*, 542 U.S. at 442-448; *see also id.* at 7 n.9.[5]

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[5] Even under the analysis of the panel in *Padilla*, found too expansive by the Supreme Court, the Attorney General would still be an improper respondent. In *Padilla*, this Court focused on the unique "degree of Cabinet-level involvement," whereby the President himself designated the Secretary of Defense to detain Padilla. 352 F.3d at 707-08. The panel acknowledged the circuit split regarding whether the Attorney General is an appropriate respondent in immigration habeas (continued...)

Third, the Supreme Court recognized that the dangers of forum shopping (described in *Henderson*) weighed in favor of maintaining a strict immediate-custodian rule. Without that rule,

> a prisoner could name a high-level supervisory official as respondent and then sue that person wherever he is amenable to long-arm jurisdiction. The result would be rampant forum shopping, district courts with overlapping jurisdiction, and the very inconvenience, expense, and embarrassment Congress sought to avoid when it added the jurisdictional limitation [to § 2241] 137 years ago.

Padilla, 542 U.S. at 447. The instant action is a prime example of this danger. Here, all matters concerning Remy's prospective removal and his detention by the INS were exclusively handled by the INS in Oakdale, Louisiana. Remy filed multiple simultaneous habeas petitions in the District of Connecticut and with this Court – some challenging his removal order, and some challenging his detention – apparently because he perceived the law here as being more favorable to him than in the Middle or Western Districts of Louisiana and the Fifth Circuit Court of Appeals. *See* Remy Br. at 18 (characterizing the Western District of Louisiana as a "District where he will likely be removed prior to the

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[5] (...continued)
cases, but was "satisfied that the unique involvement of Secretary Rumsfeld distinguishes this case from the typical immigrant petition." *Id.* at 706. The petitioner in the present case, of course, alleges no such personal involvement by the Attorney General.

adjudication of his claims"). Yet, the official who has physical custody of Remy and who can produce him is the warden of his detention facility. As the Supreme Court recognized in *Padilla*, this is exactly the type of mischief that Congress sought to avoid by imposing jurisdictional provisions in habeas cases.

As such, the proper respondent to this habeas petition challenging Remy's continued detention pending removal was the warden of the facility where he was then confined. *See Padilla*, 542 U.S. at 435-38 (explaining that in habeas challenges to "present confinement[,]" the proper respondent is the warden of the facility where a prisoner is being held); *accord Billiteri*, 541 F.2d at 948 (warden of correctional facility where petitioner is incarcerated, not parole board, is "custodian" of detainee "who is under the control of [the] warden and confined in a prison, and who is seeking, in a habeas corpus action, to be released from precisely that form of confinement").[6]

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[6] In an effort to recharacterize his petition as something other than a core habeas challenge to his physical detention, Remy repeatedly makes the conclusory claim that the legality of his detention is "part-and-parcel of his final order of removal." *See, e.g.,* Remy Br. at16. His removal order is not, however, at issue in this case. The Fifth Circuit has conclusively adjudicated the merits of his challenge to the removal order, and so that challenge cannot be renewed here or in any other court. *See* 8 U.S.C. § 1252(d)(2) (holding that an alien may not attack the validity of the underlying removal order if "another court has [] decided the validity of the [final removal] order"); *Filsaime v. Ashcroft*, 393 F.3d 315 (2d Cir. 2004) (holding that 1252(d)(2) deprived court of jurisdiction to review already-adjudicated challenge to removal order, absent

(continued...)

Indeed, since *Padilla* was decided, every district court in this Circuit to consider the issue has held that pure custody challenges – what *Padilla* described as "core" habeas actions – may be brought only in the district of the alien's confinement, naming the alien's immediate custodian. *See*, *e.g.*, *Walters v. Chertoff*, No. 3:05-CV-1672 (RNC), 2005 WL 3416124, at *2 (D. Conn. Dec. 12, 2005) (holding that court lacks habeas jurisdiction under *Padilla* over alien's request for release, where detained in Massachusetts); *Washington v. District Director, INS*, No. 04 Civ. 3492 (RMB) (MHD), 2005 WL 2778747, at *2 (S.D.N.Y. Oct. 19, 2005) (in accordance with *Padilla*, transferring habeas petition to federal district court in New Jersey); *Drakoulis v. Ashcroft*, 356 F. Supp. 2d 367, 370-71 (S.D.N.Y. 2005) (holding that Attorney General is not proper respondent in habeas challenging only immigration detention; holding that only warden of detention facility was proper respondent and transferring case to D.N.J.);

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[6] (...continued)
showing that prior review was inadequate or ineffective). Moreover, even if Remy still had a remaining claim to advance against his removal order, the REAL ID Act dictates that it be brought pursuant to a petition for review filed in the Circuit where his removal proceedings were completed – here, the Fifth Circuit. *See* 8 U.S.C. § 1252(a)(5) (2006). Accordingly, any pending challenge to his removal would have had to be transferred to the Fifth Circuit pursuant to the REAL ID Act, leaving only his detention claim before the district court.

Accordingly, the only remaining question which is pending in the Middle District of Louisiana, and potentially raised here, is whether his detention has been unduly protracted. That is a core habeas claim, since it goes only to Remy's present physical confinement.

Shehnaz v. Ashcroft, No. 04 Civ. 2578 (DLC), 2004 WL 2378371, at *4 (S.D.N.Y. Oct. 25, 2004) (same); *Azize v. Bureau of Citizenship and Immigration Service*, No. 04 Civ. 9684 (SHS) (JCF), 2005 WL 3488333 (S.D.N.Y. Oct. 7, 2005) (after noting that "*Padilla* controls" where habeas action is challenge to present physical custody, transferring case to the Western District of Louisiana, where petitioner was detained); *Barnes v. USICE*, No. 05 Civ. 370 (NGG), 2005 WL 1661652, at *2 (E.D.N.Y. July 14, 2005) (holding that jurisdiction lies only in district of present physical confinement, and transferring habeas petition to federal court in Pennsylvania); *Ortega v. Gonzalez*, No. 05 Civ. 2365 (NGG), 2005 WL 1523783, at *4 (E.D.N.Y. June 28, 2005) (habeas jurisdiction lies only in district of confinement; transferring petition to Western District of Louisiana); *Deng v. Garcia*, 352 F. Supp.2d 373, 375-76 (E.D.N.Y. 2005) (holding that post-*Padilla* challenges to immediate physical detention must be addressed to immediate custodian).[7]

The facts of this case do not present any extraordinary reason to deviate from the immediate-custodian rule. *See Padilla*, 542 U.S. at 436 n.9. There is no evidence that

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[7] Some courts have held post-*Padilla* that the Attorney General is a proper respondent in habeas cases challenging immigration detention, but only where the petitioner was also challenging his underlying removal order. *See, e.g., Somir v. United States*, 354 F.Supp.2d 215, 217 (E.D.N.Y. 2005); *Shehnaz v. Ashcroft,* No. 04CV2578(DLC), 2004 WL 2378371, at *4 (S.D.N.Y. Oct. 25, 2004); *Batista-Taveras v. Ashcroft*, No. 03 Civ.1968, 2004 WL 2149095, at *6 (S.D.N.Y. Sept. 23, 2004); *Garcia-Rivas v. Ashcroft*, No. 04 Civ. 292, 2004 WL 1534156, at *2 (S.D.N.Y. July 7, 2004).

requiring Remy to seek relief in Louisiana will interfere with his "access to habeas corpus relief," *Roman*, 340 F.3d at 325. Nor is this a case in which the petitioner is being held in "an undisclosed location," *id.* (citing *Demjanjuk v. Meese*, 784 F.2d 1114, 1116 (D.C. Cir. 1986) (Bork, C.J., in chambers)), or where "the government manipulated its authority in an attempt to deny [petitioner] a meaningful opportunity for relief," *Roman*, 340 F.3d at 326; *see also Vasquez*, 233 F.3d at 696 (an "extraordinary circumstance" warranting naming of Attorney General might arise in case where "INS spirited an alien from one site to another in an attempt to manipulate jurisdiction," but petitioner "neither marshaled facts suggesting furtiveness nor made a showing of the elements necessary to demonstrate bad faith"). Remy is presently housed in Louisiana, where he litigated both his administrative immigration cases as well as various petitions and appeals, pending his lawful removal to Haiti.

Indeed, Remy's claim that the Government has attempted to improperly limit his habeas corpus remedy by continually transferring him from jurisdiction to jurisdiction is without merit. Although the record was not developed in this regard, the Government can represent that INS records reflect the following events: Just after coming into federal custody in Massachusetts, Remy was detained in the Federal Detention Center, Oakdale, Louisiana (located in the Western District of Louisiana) from July 16, 2002, to January 12, 2004. He was then transferred and detained at the Pointe Coupee Parish Jail, New Roads, Louisiana (located in the Middle District of Louisiana) from January 12, 2004, to May 5, 2005. Remy was subsequently transferred back to the Federal

Detention Center on May 5, 2005, and remains detained there pending his removal. In short, there is no evidence that Remy has been perpetually transferred in an effort to prejudice him or that it was done for any other unlawful purpose.

Moreover, Remy's transfers between two facilities in the Middle and Western Districts of Louisiana has not frustrated his ability to seek habeas relief in a given forum. Remy has a detention claim pending in the Middle District of Louisiana – which was filed while he was detained in that district – and that court is still considering the merits of his detention claim. The District Court for the Middle District of Louisiana has recently denied the Government's motion to transfer his pending habeas challenge to his detention back to the Western District of Louisiana pursuant to traditional venue principles, and the Government has accordingly filed a merits brief in that forum. *See* Civil Action No. 05-0032-C-M3, Motion dated May 12, 2005, GA26; Order dated Mar. 3, 2006, GA 29; Memorandum filed Mar. 22, 2006, GA 32. The Government's transfer argument in the Middle District (limited to venue considerations) as well as the district court's decision (again, premised on a weighing of venue factors) were both consistent with the position the Government is here advancing regarding the identity of the proper respondent in an habeas action challenging immigration detention. It is also consistent with the Supreme Court's holding in *Ex parte Endo*, 323 U.S. 283, 306 (1944), that where a district court properly acquired jurisdiction in a habeas case (that is, where the petitioner was detained in the district at the time the petition was filed, and where the court had jurisdiction over a properly

named respondent), the removal of the petitioner to another district did not cause the court to lose jurisdiction. As the Supreme Court recently observed in *Padilla*, *Endo* "stands for the important but limited proposition that when the Government moves a habeas petitioner after she properly files a petition naming her immediate custodian, the District Court retains jurisdiction and may direct the writ to any respondent within its jurisdiction who has legal authority to effectuate the prisoner's release." 542 U.S. at 441. Consequently, even if one could hypothesize a situation in which the Government constantly transfers a detainee in an effort to derail his efforts at judicial review, such is clearly not the case here.

Finally, if this Court were to disagree with the Government and find the immediate-custodian rule to be inapplicable in the present case, traditional venue considerations would still weigh in favor of transferring the instant habeas petition out of the District of Connecticut and to the Middle or Western Districts of Louisiana. *See Braden*, 410 U.S. at 493; *Henderson*, 157 F.3d at 127. Both his removal proceedings and detention have taken place in Louisiana. He filed several habeas petitions in Louisiana while being detained by the INS in Louisiana. He has also litigated the legality of his removal order at least two times before the Fifth Circuit Court of Appeals. Indeed, Remy has no personal connection with Connecticut, other than his simple claim to have family presently living there. Such an attenuated connection cannot serve as a basis for venue of his detention challenge. To hold otherwise would strongly undermine the reasoning of *Padilla*, and enable habeas petitioners

like Remy to freely forum-shop for the jurisdiction which they believe has the most favorable law for their case.

In sum, the decisions of the Supreme Court, this Court, other Circuits, and the district courts of this Circuit all support the conclusion that the immediate-custodian rule applies here, and that the district court properly dismissed the habeas petition that Remy filed in the District of Connecticut.

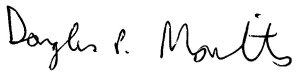
CONCLUSION

This Court should affirm the district court's dismissal of the habeas petition because the district court lacked jurisdiction over Remy's immediate custodian, who was the only proper respondent to this "core" habeas petition challenging only his present physical confinement.

Dated: April 4, 2006

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY



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Addendum

28 U.S.C. § 2241

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless–

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority,

privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in
the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C.A. § 2243

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be

amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

Fed. R. Civ. P. 81(a)(2)

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.

ANTI-VIRUS CERTIFICATION

Case Name: Remy v. Chadbourne

Docket Number: 05-0602-pr

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 4/4/2006) and found to be VIRUS FREE.

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Record Press, Inc.

Dated: April 4, 2006