

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOSE PADILLA,	:	
DONNA R. NEWMAN,	:	
as Next Friend of Jose Padilla	:	
	:	
Petitioners,	:	
	:	
v.	:	Civil Action
	:	No. 4445
GEORGE W. BUSH,	:	
DONALD RUMSFELD,	:	
JOHN ASHCROFT,	:	
COMMANDER M.A. MARR	:	
	:	
Respondents.	:	

MOTION TO DISMISS  
AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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**MOTION TO DISMISS  
AMENDED PETITION FOR WRIT OF HABEAS CORPUS**

Respondents hereby move to dismiss the amended petition for a writ of habeas corpus for lack of jurisdiction. The petition in this case seeks to interject this Court into the President's conduct of ongoing hostilities. Specifically, the petition makes the extraordinary request that this Court order respondents to return Jose Padilla (a/k/a Abdullah Al Muhajir) from Charleston, South Carolina -- where he is being held by the United States military as an enemy combatant -- to New York to then be released into the public. The petition, however, contains two independent -- and equally fatal -- jurisdictional defects that require this Court to dismiss the petition, or at a minimum, transfer this habeas action to South Carolina.

First, the Court lacks jurisdiction because the petition has not been properly brought on Padilla's behalf. The habeas statute requires that a detainee himself sign the petition or, if he is unable to do so (as here), that someone with "next friend" standing bring it on his behalf. Attorney Donna R. Newman asserts "next friend" status to bring this habeas action on behalf of Padilla. She does not, however, satisfy the "significant relationship" requirement for next-friend standing set forth by the Supreme Court in Whitmore v. Arkansas, 495 U.S. 149 (1990).

Second, and in any event, the Court lacks habeas jurisdiction because no proper respondent with "custody" over Padilla is present within this Court's territorial jurisdiction. The amended habeas petition names President Bush, Secretary of Defense Rumsfeld, Attorney General Ashcroft and Commander M.A. Marr as respondents. Only one -- Commander Marr, the commanding officer of the Naval brig in South Carolina -- is a proper respondent. And none of the named respondents -- including Commander Marr -- is within this Court's territorial jurisdiction. This Court therefore lacks habeas jurisdiction over the petition.<sup>1</sup>

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<sup>1</sup> This motion to dismiss is addressed to the Court's lack of jurisdiction to entertain the petition and accompanying requests for relief. If the Court denies the motion to dismiss, it should transfer the action to South Carolina, where the Government would then address the merits of any of the claims

## BACKGROUND

On September 11, 2001, the al Qaida terrorist network launched a large-scale attack on the United States, killing approximately 3,000 persons, and specifically targeting the Nation's financial center and the headquarters of its Department of Defense. The September 11 attacks inflicted the loss of more American lives than the attack at Pearl Harbor, and were followed by a major military response. Shortly after the attacks, Congress authorized the President to use "force against the nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). In authorizing such force, Congress emphasized the "unusual and extraordinary threat to the national security and foreign policy of the United States" posed by the forces responsible for the September 11 attacks, and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Ibid.

The President, acting pursuant to his authority as Commander in Chief and with express congressional support, has dispatched

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raised in the petition. See 28 U.S.C. 1406(a), 1631.

the armed forces of the United States to Afghanistan to seek out and subdue the al Qaida terrorist network and the Taliban regime that had supported and protected that network. The ongoing military operations in Afghanistan and elsewhere -- which are being conducted not only by thousands of men and women of the United States armed forces but also by coalition forces sent by our international allies -- have, inter alia, resulted in the destruction of al Qaida training camps, removal of the Taliban regime that supported al Qaida, and gathering of vital intelligence concerning the plans, operations, and workings of al Qaida and its supporters. Numerous members of the military forces have lost their lives, and many others have suffered casualties as part of the campaign, which remains active and ongoing. See generally [www.army.mil/enduringfreedom](http://www.army.mil/enduringfreedom). While the military campaign is ongoing, the al Qaida network and those who support it remain a serious threat, as does the risk of future terrorist attacks on United States' citizens and interests carried out, as were the attacks of September 11, through covert infiltration of the United States by enemy belligerents. As explained below, Padilla is currently being held, consistent with the laws and customs of war, in the custody and control of the military as an enemy combatant in this ongoing armed conflict.

Padilla was arrested in Chicago on May 8, 2002, pursuant to a material witness warrant related to grand jury proceedings in

the Southern District of New York. Pursuant to an order of this Court, Padilla was detained at the Metropolitan Correctional Center in New York City. See Amend. Pet. ¶¶ 15, 19.

On June 9, 2002, the President determined that Padilla was an enemy combatant and should be transferred to the control of the United States military. Thereafter, the Department of Justice requested that this Court vacate the material witness warrant. This Court vacated the warrant on June 9, and Padilla was transferred to the exclusive control of the United States military and transported to the Consolidated Naval Brig in Charleston, South Carolina for detention as an enemy combatant. The initial petition for habeas relief was filed on June 11, after this Court had vacated the material witness warrant and after the military had transferred Padilla to South Carolina for detention and questioning as an enemy combatant.

The authority of the United States to seize and detain enemy combatants is well settled -- and vital to our core military objectives, including preventing enemies from rejoining the conflict and gathering intelligence to prevent attacks on Americans and U.S. interests. See Ex parte Quirin, 317 U.S. 1, 31, 35 (1942) ("[u]nlawful combatants" -- or "those who during time of war pass surreptitiously from enemy territory into our own \* \* \* for the commission of hostile acts involving

'destruction of life or property" -- are "subject to capture and detention"); see also In re Territo, 156 F.2d 142, 145 (9th Cir. 1946); Ex parte Toscano, 208 F. 938, 940 (S.D. Cal. 1913). The authority to capture and detain is not diminished by the fact that the enemy combatant is an American citizen. See Quirin, 317 U.S. at 37-38 ("[c]itizens who associate themselves with the \* \* \* enemy \* \* \* and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents"); accord Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956); In re Territo, 156 F.2d at 145.

#### ARGUMENT

#### I. ATTORNEY DONNA NEWMAN LACKS STANDING TO FILE THE PETITION AS PADILLA'S NEXT FRIEND.

This Court lacks jurisdiction over this petition because attorney Donna Newman lacks "next friend" standing to bring this habeas action on Padilla's behalf.<sup>2</sup>

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<sup>2</sup> Attorney Newman signed the first petition purportedly as Padilla's lawyer. In her amended petition, she appears to acknowledge that a "next friend," not counsel, must bring the case on Padilla's behalf. That is correct. The habeas statute requires that an application "shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf." 28 U.S.C. 2242 (emphasis added). As the Supreme Court has explained, the underscored words were intended to confer "next friend" standing on a third party where a detained prisoner is unable ("usually because of mental incompetence or inaccessibility") to seek relief himself. Whitmore v. Arkansas, 495 U.S. 149, 162-63 (1990). Thus, where a prisoner is inaccessible, only a proper "next friend" may file on his behalf. But for the reasons set forth herein, Newman cannot satisfy the vigorous restrictions on next-friend standing set forth by the Supreme Court in Whitmore.

It is well established that "before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue" under Article III of the Constitution. Whitmore v. Arkansas, 495 U.S. 149, 154 (1990). Generally, to establish standing, the "complainant must allege an injury to himself that is 'distinct and palpable.'" Id. at 155 (citations omitted). In Whitmore, the Supreme Court recognized that in very specific and limited circumstances, a non-injured person may bring an action as a detainee's "next friend." Id. at 162-63. And it cautioned that "'next friend' standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another." Id. at 163.

In order to assert next friend standing, a person must establish, not only that the detainee cannot himself sign the habeas petition, but also that the "next friend" has a "significant relationship" with the detainee, and is "truly dedicated" to his best interests. See Whitmore, 495 U.S. at 163-64; Massie ex rel. Kroll v. Woodford, 244 F.3d 1192, 1194 (9th Cir. 2001); Amerson v. Iowa, 59 F.3d 92, 93 n.3 (8th Cir. 1995); In re Zettlemyer, 53 F.3d 24, 27 n.4 (3d Cir. 1995). The "burden is on the 'next friend' clearly to establish the propriety of [her] status and thereby justify the jurisdiction of the court." Id. at 164; see Brewer v. Lewis, 989 F.2d 1021, 1026

(9th Cir. 1993) (petitioners claiming next-friend status must present "clear" and "meaningful evidence" satisfying Whitmore requirements).

As the Fourth Circuit just reaffirmed in Hamdi v. Rumsfeld, No. 02-6827, slip op. (4th Cir. June 26, 2002) (copy attached)-- which held, inter alia, that a federal public defender lacked next-friend standing to bring a habeas petition on behalf of an enemy combatant in the absence of a significant pre-existing relationship -- such "[j]urisdictional limitations have their roots in the respect courts owe the other branches of our government," id. at 19, and are important "limits [on the extent to which] the conduct of war may be reduced to the medium of litigation," id. at 17.

Attorney Newman has not met her burden of establishing next-friend standing. Although she alleges that while briefly serving as his attorney for the material witness proceedings she met regularly with Padilla in New York, filed and argued motions on his behalf, and consulted with his family and the government, see Amend. Pet. ¶¶ 7, 19, 20, that is not sufficient to establish next-friend standing. Newman's entire prior relationship with Padilla lasted from May 15 to June 9, see 5/16/2002 Order (appointing Newman under Criminal Justice Act), Amend. Pet. ¶ 22 -- or about three weeks. The fact that Newman has done her job as appointed counsel on a now dismissed material-witness matter

for three weeks does not, without more, mean that she has established a "significant relationship" with the detainee.

"Next friend" standing is typically reserved for those who have a close, personal relationship with a detainee -- like a parent, spouse, or sibling. See, e.g., Vargas v. Lambert, 159 F.3d 1161, 1168 (9th Cir. 1998) (parent); In re Heidnik, 112 F.3d 105, 106 n.1 (3d Cir. 1997) (daughter); Smith ex rel. Missouri Publ. Defender Comm'n v. Armontrout, 812 F.2d 1050, 1052 (8th Cir. 1987) (brother); In re Ferrens, 8 F. Cas. 1158, 1159 (S.D.N.Y. 1869) (wife); see also T.W. v. Brophy, 124 F.3d 893, 897 (7th Cir. 1997) ("next friend must be an appropriate alter ego for a plaintiff \* \* \* ordinarily the eligibles will be confined to the plaintiff's parents, older siblings \* \* \* or a conservator or other guardian, akin to a trustee"). More distant relatives and acquaintances generally do not have a sufficient relationship. See, e.g., Davis v. Austin, 492 F. Supp. 273 (N.D. Ga. 1980) (neither detainee's first cousin nor a minister who had counseled detainee could sue as next friend) (cited with approval in Whitmore, 495 U.S. at 164).

Although attorneys have occasionally been accorded "next friend" status, it is only where the attorney has had a longstanding relationship with the prisoner. See, e.g., Miller ex rel. Jones v. Stewart, 231 F.3d 1248, 1251 (9th Cir. 2000), stay vacated by 531 U.S. 986 (2000); Ford v. Haley, 195 F.3d 603,

624 (11th Cir. 1999) ("in certain circumstances, attorneys \* \* \* who have a long history of representing a client with mental disorders may appear as 'next friend'"); Schornhorst v. Anderson, 77 F. Supp. 2d 944, 951 (S.D. Ind. 1999) (attorneys had represented prisoner for between five and ten years); In re Cockrum, 867 F. Supp. 494, 495 (E.D. Texas 1994) (attorney represented prisoner for a year).

Attorney Newman, thus, does not qualify as Padilla's "next friend." Her three-week representation of Padilla is not akin to the relationship between a prisoner and his parent, spouse, or sibling -- or even like that between a long-standing lawyer and client. Moreover, the petition indicates that Attorney Newman has consulted with members of Padilla's family. Amend. Pet. ¶ 20. That there may be some genuine "next friends" available underscores the inappropriateness of conferring such status on Attorney Newman. See Hamdi, No. 02-6827, slip op. at 17 (lawyer's absence of significant relationship stood "in stark contrast to the close familial connection [of detainee's father] that was right around the corner").

**II. THIS COURT LACKS HABEAS JURISDICTION BECAUSE IT LACKS TERRITORIAL JURISDICTION OVER PADILLA'S PROPER CUSTODIAN.**

**A. President Bush, Secretary Rumsfeld And Attorney General Ashcroft Are Not Proper Respondents.**

In any event, even if Newman could satisfy the requirements of next-friend standing, this Court would still lack habeas

jurisdiction over the petition. There is only one proper respondent for a habeas petition filed to challenge the detention of Padilla, and that is the commanding officer of the Naval Brig in South Carolina, Commander Melanie A. Marr, United States Navy. As discussed below, the proper habeas respondent is a prisoner's immediate, not ultimate, custodian. President Bush, Secretary of Defense Rumsfeld and Attorney General Ashcroft are therefore not proper respondents in this case.

By its terms, the federal habeas corpus statute provides that the writ "shall be directed to the person having custody of the person detained." 28 U.S.C. 2243. Thus, the proper respondent in a habeas case is the person who holds the petitioner in custody. Braden v. 30<sup>th</sup> Judicial Circuit Court, 410 U.S. 484, 494-95 (1973) ("[t]he writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody."); see also 28 U.S.C. 2242 (habeas petitioner must "allege \* \* \* the name of the person who has custody over him").

In this case, Commander Marr is the immediate custodian and therefore the only proper respondent. See, e.g., Vasquez v. Reno, 233 F.3d 688, 693 (1st Cir. 2000) ("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"), cert. denied, 122 S. Ct. 43 (2001); In re Hasred, 123 F.3d 922,

925 n.2 (6th Cir. 1997) (prison warden, not executive with ultimate authority over prisoner, is proper habeas respondent); Yi v. Maugans, 24 F.3d 500, 507 (3d Cir. 1994) (same; dismissing notion that Attorney General could be proper habeas custodian); Guerra v. Meese, 786 F.2d 414, 416 (D.C. Cir. 1986) (wardens at individual detention facilities, not Parole Commission, were proper custodians even though Commission had power to grant releases; otherwise, custodian could be "any person or entity possessing some sort of power to release" prisoner); Sanders v. Bennett, 148 F.2d 19, 20 (D.C. Cir. 1945) ("proper person to be served [in habeas action] is the warden of the penitentiary \* \* \* rather than an official in Washington, D.C. who supervises the warden").

As the Second Circuit has explained in an analogous context:

[I]t would stretch the meaning of the term ["custodian"] beyond the limits \* \* \* to characterize the Parole Board as the 'custodian' of a prisoner who is under the control of a warden and confined in a prison \* \* \* At that point the prisoner's relationship with the Parole Board is based solely on the fact that it is the decision-making body which may, in its discretion, authorize a prisoner's release on parole.

Billiteri v. U.S. Board of Parole, 541 F.2d 938, 948 (2d Cir. 1976); see Henderson v. INS, 157 F.3d 106, 126 (2d Cir. 1998) ("Billiteri appears to bar the designation of a higher authority \* \* \* as a custodian when a habeas petitioner is under the day-to-day control of another custodian"). Indeed, the Second Circuit has pointedly noted that, although the Attorney General

ultimately has control over all prisoners in the federal prison system, "no one seriously suggests that [he] is a proper respondent in prisoner habeas cases." Id. at 126.

Monk v. Secretary of the Navy, 793 F.2d 364 (D.C. Cir. 1986), is also instructive. There, a corporal in the Marine Corps brought a habeas action challenging his court-martial conviction, and named the Secretary of the Navy as the respondent. Id. at 368. He argued that because the Secretary was his "ultimate custodian," he was a proper habeas respondent. Id. at 369. The court of appeals flatly rejected the claim, and held that the "immediate" custodian (the local commandant of the facility in which Monk was incarcerated) was the proper respondent, not the Secretary. Ibid.

Further, as the First Circuit has explained, the very text of Section 2243, which provides that "[t]he writ \* \* \* shall be directed to the person having custody of the person detained" (emphasis added), indicates that there is only one proper respondent to a habeas petition -- i.e., the immediate custodian:

Section 2243 does not indicate that a petitioner may choose from among an array of colorable custodians, and there is nothing about the nature of habeas practice that would justify a court in stretching the statute's singular language to encompass so mischievous an interpretation.

Vasquez, 233 F.3d at 693.<sup>3</sup>

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<sup>3</sup> Strait v. Laird, 406 U.S. 341 (1972), in no way alters this analysis. Strait addressed the factually unique context of an unattached, inactive Army reservist who lived in California, whose "only meaningful contact" with the Army had been in

Accordingly, President Bush is not Padilla's custodian for habeas purposes. In any event, it is well settled that a court of the United States "has no jurisdiction \* \* \* to enjoin the President in the performance of his official duties" or otherwise to compel the President to perform any official act. Franklin v. Massachusetts, 505 U.S. 788, 802-03 (1992) (plurality opinion) (citations omitted); id. at 825 (Scalia, concurring in part and concurring in the judgment).<sup>4</sup>

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California, but whose "nominal commander" was the commander of the Army's recordkeeping center, located in Indiana, who had always "enlisted the aid and directed the activities of armed forces personnel in California in his dealings" with the petitioner. Id. at 343-44. The Court concluded that the commander of records was "present" in California for habeas purposes based on his reliance on the California officers in virtually all of his dealings with the petitioner. Id. at 345. Strait has no application here because neither Padilla nor those responsible for his detention are present in this district. Moreover, the Court in Strait recognized the unique facts before it and explicitly rejected any suggestion that it was abandoning Schlanger v. Seamans, 401 U.S. 487 (1971), or the rule that "presence of the 'custodian' within the territorial jurisdiction of the District Court was a sine qua non." Id. at 343; see also Vasquez, 233 F.3d at 695-96 (Strait "cannot plausibly be read \* \* \* to consign to the scrap heap the substantial body of well-reasoned authority holding that a detainee must name his immediate custodian as the respondent to a habeas petition").

<sup>4</sup> Although the Supreme Court has left open the question whether the President may be ordered to perform a purely "ministerial" duty, 505 U.S. at 802, the relief petitioner seeks -- primarily, his release from custody -- is far from "ministerial." See Mississippi v. Johnson, 71 U.S. 465, 499 (1866) ("duties [that] must necessarily be performed under the supervision of the President as commander-in-chief" are "in no just sense ministerial" but are "purely executive and political.").

Nor is the Attorney General Padilla's habeas custodian. Indeed, the Attorney General is in no sense Padilla's custodian at all: as noted, when the President designated Padilla as an enemy combatant, he was transferred out of the control of the Justice Department and into the control of the military.<sup>5</sup>

Secretary Rumsfeld also does not qualify as Padilla's habeas custodian. Again, as the courts (including the Second Circuit and this Court) have repeatedly held, the proper custodian for habeas purposes is the "immediate custodian" -- generally the local warden or superintendent -- of the facility where a petitioner is detained.<sup>6</sup> That is because the warden has day-to-

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<sup>5</sup> In Henderson, the Second Circuit reserved judgment about whether the Attorney General might be the proper respondent in a habeas action filed by an alien challenging his deportation. See 157 F.3d at 125-27 (discussing unique circumstances involved in immigration matters). The particular concerns implicated in alien habeas cases, however, do not apply here. In any event, this Court has since found that the Attorney General is not the proper respondent in such cases. See Belvett v. Ashcroft, No. 00 Civ. 2463, 2002 WL 287839, at \* 1 (S.D.N.Y. Feb. 27, 2002); Martinez-Rymer v. Ashcroft, No. 98 Civ. 5375, 2002 WL 372876, at \* 2 (S.D.N.Y. Feb. 14, 2002); Tejeda v. Reno, No. 00-Civ-6338, 2000 WL 1280969, at \* 2 (S.D.N.Y. Sept. 11, 2000). But see Alcaiede-Zelaya v. McElroy, No. 99 Civ. 5102, 2000 WL 1616981, at \*4 (S.D.N.Y. Oct. 27, 2000); Arias-Agramonte v. INS, No. 00 Civ. 2412, 2000 WL 1617999, at \* 8 (S.D.N.Y. Oct. 30, 2000).

<sup>6</sup> See, e.g., Henderson, 157 F.3d at 122; Billiteri, 541 F.2d at 948; Anthony v. United States, No. 92 Civ. 6652, 1993 WL 485755, at \* 1 (S.D.N.Y. Nov. 23, 1993); Horodner v. Scott, No. 92 Civ. 3481, 1992 WL 233879, at \* 2 (S.D.N.Y. Sept. 10, 1992); see also Vasquez, 233 F.3d at 691; Hogan v. Hanks, 97 F.3d 189, 190 (7th Cir. 1996); Yi, 24 F.3d at 507; Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992); Blango v. Thornburgh, 942 F.2d 1487, 1491-92 & n.10 (10th Cir. 1991); Guerra, 786 F.2d at 416; Mounce v. Knighten, 503 F.2d 967, 969 (5th Cir. 1974); Jones v. Biddle, 131 F.2d 853, 854 (8th Cir. 1942).

day control over the petitioner and is the one who can free the prisoner should the writ be granted. See Wang v. Reno, 862 F. Supp. 801, 811-12 (E.D.N.Y. 1994) (“[s]ince the result of an issuance of the writ is a direction to the respondent to “free the body” of the petitioner \* \* \* the court issuing the writ must have jurisdiction over the person holding the petitioner”); accord Henderson, 157 F.3d at 122. Although Secretary Rumsfeld may be among those who exercise some degree of control over Padilla, he is not Padilla’s immediate custodian, and, hence, is not a proper respondent here.

In sum, the President, Attorney General Ashcroft, and Secretary Rumsfeld are not proper respondents in this habeas petition, and at the very least, these respondents should be dismissed from this action. Only Commander Marr could properly be named as a respondent in a habeas action, such as this one, brought while Padilla is held in the Consolidated Naval Brig in Charleston, South Carolina. But for the reasons set forth below, this Court lacks territorial jurisdiction over any habeas petition brought against Commander Marr.

**B. The Only Proper Respondent Is Outside This Court’s Territorial Jurisdiction.**

The Court lacks habeas jurisdiction because Commander Marr, the only proper respondent in this case, is not within this Court’s territorial jurisdiction. And as the Supreme Court has made clear, “the absence of [the] custodian is fatal to \* \* \*

jurisdiction." Schlanger v. Seamans, 401 U.S. 487, 489 (1971).<sup>7</sup>

The federal habeas corpus statute contains an express territorial limitation that restricts the jurisdiction of district courts to granting the writ only "within their respective jurisdictions." 28 U.S.C. 2241(a) (emphasis added). Congress wrote the limitation into the habeas statute for several reasons:

it was thought inconvenient, potentially embarrassing, certainly expensive and on the whole quite unnecessary to provide every judge anywhere with authority to issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat.

Carbo v. United States, 364 U.S. 611, 617 (1961). Thus, when the Supreme Court considered whether a custodian "must be in the territorial jurisdiction of the District Court," Schlanger, 401 U.S. at 489, it unequivocally answered, "yes." Id. at 491; see also Malone v. Calderon, 165 F.3d 1234, 1237 (9th Cir. 1999) (dismissing petition against out-of-state custodian because

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<sup>7</sup> Nor are Secretary Rumsfeld and Attorney General Ashcroft within this Court's territorial jurisdiction, either. For purposes of habeas jurisdiction, those officials are "present" only at their official posts in Virginia (at the Pentagon) and Washington, D.C., respectively. See Monk, 793 F.2d at 369 & n.1 (rejecting claim that Secretary of Navy is proper habeas respondent but noting that Pentagon officials, in any event, are located in the Eastern District of Virginia); Demjaniuk v. Meese, 784 F.2d 1114, 1116 (D.C. Cir. 1986) (Bork, J., in chambers) (jurisdiction over Attorney General lies in D.C. Circuit in the "very limited and special circumstances" where location of prisoner was kept confidential). Thus, even if the Court were to find, contrary to settled precedent, that the Attorney General and Secretary are Padilla's habeas custodians, the Court would still lack jurisdiction over them and the petition.

"habeas corpus jurisdiction does not extend to officials outside the court's territorial limits"); Guerra, 786 F.2d at 417 (same); Wright v. U.S. Brd. of Parole, 557 F.2d 74, 77 (6th Cir. 1977) (same); Sholars v. Matter, 491 F. 279, 281 (9th Cir. 1974) (district court's power to issue writ is "legislatively limited to its territorial jurisdiction"); Winck v. Danzig, 147 F. Supp. 2d 1278, 1283 (M.D. Ala. 2001) (dismissing serviceman's habeas petition because custodian was not within court's territorial jurisdiction).

The Second Circuit's decision in Henderson does not counsel against this understanding of a district court's habeas jurisdiction. There, the Court assumed, without deciding, that a district court would have jurisdiction over a habeas respondent if the state long-arm statute could reach him. See Henderson, 157 F.3d at 123. This assumption was based on a statement in Braden, 410 U.S. at 495, that a custodian could "be reached by service of process." See Henderson, 157 F.3d at 122 (quoting Braden). Braden's reference to service, however, cannot be read to have altered the rule of Schlanger (requiring territorial jurisdiction over the custodian) -- and to tacitly allow state long-arm statutes to trump the territorial limitations in the federal habeas statute. To the contrary, Braden overruled a portion of Ahrens v. Clark, 325 U.S. 188 (1948), which had held that both the detainee and his custodian had to be within the

district court's territorial jurisdiction. Id. at 189-93. While the Court in Braden held that a detainee need not be present in a court's territorial jurisdiction, it did not alter the settled requirement that the custodian be physically present in the district. Indeed, citing Schlanger, it found that the lower court had jurisdiction because the respondent was "properly served in that district." Braden, 410 U.S. at 500 (emphasis added).<sup>8</sup> Thus, Braden did not question, much less eliminate, the well-established principle (reaffirmed only two years earlier in Schlanger) that a habeas court must have territorial jurisdiction over a petitioner's custodian.

Furthermore, the Supreme Court has also explicitly rejected the suggestion that 28 U.S.C. 1391(e) -- which permits nationwide service of process on government officers in civil cases -- applies in habeas cases. See Schlanger, 401 U.S. at 490 n.4 (Section 1391(e) cannot serve to "exten[d] habeas corpus jurisdiction"); see also Dunne v. Henman, 875 F.2d 244, 248 (9th Cir. 1989) (section 1391(e) "does not extend habeas corpus

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<sup>8</sup> The Court in Braden also embraced the dissenting opinion of Justice Rutledge in Ahrens. See 410 U.S. at 495. There, Justice Rutledge reviewed the history of the habeas statute, and, particularly, the words "within their respective jurisdictions." He concluded that, with this limitation, Congress meant to foreclose district judges from "issu[ing] process against jailers in remote districts" and also to ensure that "process does not run beyond the territorial jurisdiction of the issuing court." 335 U.S. at 204-05; see also id. at 205 (limitation intended to prevent district courts from "issu[ing] process to run through the country \* \* \* and thus to bring before them jailers without regard to distance.")

jurisdiction to persons outside the territorial limits of the district court"). If a federal statute permitting nationwide service on federal officers does not trump the territorial limit on habeas jurisdiction, then a state long-arm statute cannot either.<sup>9</sup>

The proper custodian in this case, Commander Marr, is located at her duty station in Charleston, South Carolina. Thus, the only place where a habeas petition could be filed on Padilla's behalf is South Carolina, not New York.<sup>10</sup>

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<sup>9</sup> Indeed, a state long-arm statute is invoked by a federal court via Fed. R. Civ. P. 4(e). And the federal rules make clear that they "shall not be construed to extend or limit the jurisdiction of the United States district courts." Fed. R. Civ. P. 82; see also Fed. R. Civ. P. 81(a)(2) (rules of civil procedure inapplicable in habeas cases to extent they would conflict with habeas statute).

<sup>10</sup> Jurisdiction, of course, is not to be confused with venue. And although, as the petition notes (Amend. Pet. ¶ 14), venue considerations also apply in habeas cases, such considerations do not point to this Court as the proper forum here. In the first place, and contrary to the petition's claim, this Court does not have "unique familiarity with the facts and circumstances of this case." Amend. Pet. ¶ 14. The matter that brought Padilla initially into this Court's jurisdiction was his arrest on a material witness warrant. That matter -- and all the facts and issues that it raised -- is now over. Padilla is no longer being detained as a material witness, pursuant to 18 U.S.C. 3144, but as an enemy combatant, pursuant to the laws of war. The petition for habeas corpus, filed after Padilla's transfer from this jurisdiction, challenges Padilla's detention in South Carolina as an enemy combatant. This is an entirely different case -- involving different legal issues and implicating very different policy concerns. And although we agree that the resolution of the case does not require Padilla's presence (see Amend. Pet. ¶ 14), we also note that the petition elsewhere requests an evidentiary hearing. See *id.* at 9. However this case may play out in the future with regard to such a hearing, neither the issues implicated by the merits of the petition nor concerns about judicial economy make this district a

## CONCLUSION

This Court lacks jurisdiction over this habeas petition because attorney Newman does not have "next friend" standing to bring the case on Padilla's behalf. Moreover, the Court lacks habeas jurisdiction over this petition because the only proper respondent, Commander Marr, is outside this Court's territorial jurisdiction. President Bush, Attorney General Ashcroft, and Secretary Rumsfeld are not proper respondents and, in any event, they, too, are not within the Court's jurisdiction. Accordingly, the Court should dismiss the petition, or at a minimum, transfer this habeas action to South Carolina.

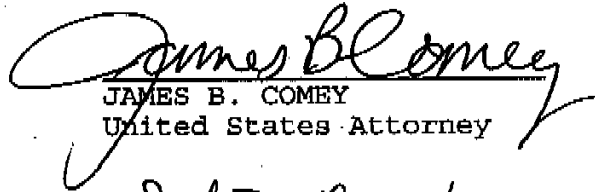
Attorney Newman's lack of standing would, of course, deprive any court of jurisdiction over the petition. Accordingly, if this Court agrees that Newman lacks standing, it should dismiss the petition. If, however, the Court believes that Newman may maintain the action as Padilla's next friend (or that the next-friend issue may be resolved after transfer by a court with habeas jurisdiction), it should transfer the case to the district court in South Carolina, the only district court with jurisdiction over the proper respondent. See 28 U.S.C. 1406(a), 1631.<sup>11</sup>

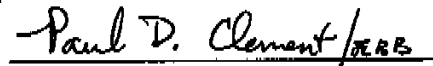
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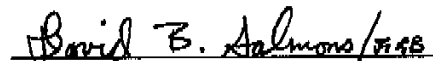
better forum than the district of South Carolina.

<sup>11</sup> Some courts have ordered transfer while leaving for the transferee court's resolution other threshold grounds for dismissal, at least where the ground for transfer was clear. See Bolar v. Frank, 938 F.2d 377, 379-380 (2d Cir. 1991) (transferring employment discrimination case from New York to

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Ohio on venue grounds, and leaving to Ohio court to decide government's challenge based on failure to exhaust administrative remedies "in the first instance"); Tejeda v. Reno, No. 00-Civ-6338, 2000 WL 1280969, at \* 2 & n.7 (S.D.N.Y. Sept. 11, 2000) (transferring habeas claim because New York court lacked jurisdiction over proper custodian without deciding government's argument that petition should be dismissed for failure to exhaust administrative remedies, noting that "[t]he Government is free, of course, to renew" its claims for dismissal in the transferee court).

(Opinion attached to Respondent's Motion to dismiss)

**YASER ESAM HAMDY v. DONALD RUMSFELD, *et al.***  
(4th Cir. June 26, 2002)

<http://laws.findlaw.com/4th/026827p.html>