Judge Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Lieutenant Commander CHARLES SWIFT, as next friend for SALIM AHMED HAMDAN, Military Commission Detainee, Camp Echo, Guantanamo Bay Naval Base, Guantanamo, Cuba, Petitioner, v. DONALD H. RUMSFELD, United States Secretary of Defense; JOHN D. ALTENBURG, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General THOMAS L. HEMINGWAY, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General JAY HOOD, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; GEORGE W. BUSH, President of the United States, Respondents.	NO. C04-0777RSL **NOTICE OF MOTION AND MOTION TO DISMISS OR TRANSFER; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** (Note on Motion Calendar for: July 27, 2004)

Respondents respectfully request, pursuant to Rule 12(b)(1), Rule 12(b)(3), and Rule 17(a) of the Federal Rules of Civil Procedure, that this Court dismiss or transfer the above-captioned petition for writ of mandamus or, in the alternative, writ of habeas corpus

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("petition").[1] This motion is made and based on the accompanying memorandum, the pleadings and papers filed herein, and such oral argument as the Court may entertain.

DATED this 16 day of July, 2004.

Respectfully submitted,

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[1] By filing this motion for threshold relief based on lack of jurisdiction and improper venue, respondents do not thereby waive any other grounds for dismissal of the petition, including but not limited to failure to exhaust remedies/abstention and failure to state a claim on which relief could be granted.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The Court of Appeals' recent decision in Gherebi v. Bush, No. 03-55785, 2004 WL 1534166 (9th Cir. Jul. 8, 2004) (Gherebi II), makes clear that this action should proceed, if at all, in the District of Columbia. Gherebi II held that the proper venue for habeas petitions filed on behalf of Guantanamo detainees is the District of Columbia. 2004 WL 1534166, at *9. This petition is not subject to different treatment than the habeas petition transferred to the District of Columbia in Gherebi II by virtue of it being styled in the alternative as a request for mandamus. The law is clear that a challenge to the lawfulness of physical confinement is the exclusive province of habeas corpus. And even assuming the mandamus writ were generally available in these circumstances, this Court remains a patently inappropriate forum, given that none of the parties nor Hamdan resides anywhere near the Western District of Washington. Indeed, this action should be dismissed for lack of subject-matter jurisdiction over the petition, because petitioner Charles Swift does not have standing to sue on behalf of Salim Hamdan, the real party in interest.

ARGUMENT

I. THIS COURT SHOULD DISMISS THE PETITION FOR LACK OF SUBJECT-MATTER JURISDICTION, BECAUSE PETITIONER SWIFT LACKS STANDING

Petitioner Swift has filed this petition as an alleged next-friend to Hamdan, the real party in interest. (Pet.'s Mem. In Support (Pet.'s Mem.) 2). Swift, however, has no standing to serve as Hamdan's next friend, because he has not met his burden "clearly to establish" that Hamdan "is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability." Whitmore v. Arkansas, 495 U.S. 149, 164, 165 (1990). Swift also has failed to establish third-party, or jus tertii standing, to litigate on Hamdan's behalf. This Court accordingly lacks jurisdiction and should dismiss the petition. See Whitmore, 495 U.S. at 155-156 ("A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing.').

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a. Swift Lacks Standing To Serve As Hamdan's Next Friend.

"Under Article III, a federal court cannot consider the merits of a legal claim unless the person seeking to invoke the jurisdiction of the court establishes the requisite standing to sue." Vargas v. Lambert, 159 F.3d 1161, 1166 (9th Cir. 1998). Petitioner Swift has failed to do so here. He claims the mantle of "next friend" (Pet.'s Mem. 3-4), but, as the Supreme Court made clear in Whitmore, a bare claim to next-friend status is insufficient. That is because "'next friend' standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another." Id. at 163. Rather,

> [d]ecisions applying the habeas corpus statute have adhered to at least two firmly rooted prerequisites for "next friend" standing. First, a "next friend" must provide an adequate explanation – such as inaccessibility, mental incompetence, or other disability – why the real party in interest cannot appear on his own behalf to prosecute the action. * * * Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate[.]

Ibid.

With respect to the first requirement, Swift has provided no explanation why Hamdan did not file this petition in his own name. All Swift asserts on this score is that "[b]ecause the Department of Defense stated that it may preclude [me] from meeting with Mr. Hamdan again," Hamdan authorized him to proceed as next friend. Pet.'s Mem. 5. That speculative assertion is plainly insufficient to establish Hamdan's "inaccessibility, mental incompetence, or other disability." Whitmore, 495 U.S. at 163. Indeed, Swift acknowledges that he met with Hamdan "on multiple occasions from January 2004 to March 2004 concerning his wishes in this matter." Pet.'s Mem. 5. Swift translated those wishes into this petition, which he filed on April 5, 2004, but has not provided any reason to believe Hamdan could not have signed the papers in his own name. In fact, Swift has submitted in this very proceeding an affidavit signed by Hamdan (and an English translation). By his own admissions and submissions in this case, Swift has conclusively established that Hamdan is not inaccessible.

Swift's reliance on the Gherebi and Padilla cases (Pet.'s Mem.4-5) is for that reason misplaced. The key predicate for next-friend standing in those cases – the detainees' inability

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to access counsel, see Coalition of Clergy v. Bush, 310 F.3d 1153, 1161 (9th Cir. 2002) (Guantanamo detainees such as Gherebi, "are not able to meet with lawyers"); Padilla v. Rumsfeld, 352 F.3d 695, 703 (2d Cir. 2003) ("There is no dispute that Padilla is unable to file a petition on his own behalf–he is being held incommunicado."), rev'd on other grounds, 124 S. Ct. 2711 (2004) – is absent in this case. See also Warren v. Cardwell, 621 F.2d 319, 321 n.1 (9th Cir. 1980) (permitting lawyer to file petition on behalf of prisoner as next friend because, though such filing was "irregular," the prisoner "could not sign and verify the petition because the prison was 'locked down'"). Because Swift has not clearly established that Hamdan lacks access to the courts or suffers from a "similar disability," Swift lacks standing as a next friend. Whitmore, 495 U.S. at 165, 166.

b. Swift Lacks Third-Party Standing.

Swift argues in the alternative that he has standing as a third party. Pet.'s Mem. 6. That contention is equally meritless. Swift's attempt to rely on *jus tertii* standing here cannot be sustained. Next friend standing has a textual basis in the habeas statute[2] and, as set forth above, both the Supreme Court and the Ninth Circuit have provided clear guidance for the application of next-friend standing principles in habeas proceedings. The effort by Swift as Hamdan's attorney to rely on non-statutorily based third-party standing in the context of a habeas corpus petition brought on behalf of a prisoner constitutes an effort to circumvent these carefully crafted standing rules which were derived by the courts from this statutory authority and are specifically applicable in habeas proceedings.

In any event, *jus tertii* standing is not available to Swift here. The Supreme Court has

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[2] Congress has codified the doctrine of next-friend standing only for habeas corpus proceedings. See 28 U.S.C. 2242 ("Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf."). While Swift relies on next-friend standing for his mandamus request as well, Congress has not authorized it. Whether Swift could assert that status in the absence of statutory authorization need not be resolved here, however, given that his failure to establish standing as a next friend for the habeas action dooms his assertion of that status for mandamus relief. See Whitmore, 495 U.S. at 164-165 ("Without deciding whether a 'next friend' may ever invoke the jurisdiction of a federal court absent congressional authorization, we think the scope of any federal doctrine of 'next friend' standing is no broader than what is permitted by the habeas corpus statute[.]").

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permitted a "limited exception[]" to the general rule that "a litigant must assert his or her own legal rights," provided that "three important criteria are satisfied: The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests." Powers v. Ohio, 499 U.S. 400, 410-411 (1991) (citations omitted) (quoting Singleton v. Wulff, 428 U.S. 106 (1976)). Swift's conclusory statement (Pet.'s Mem. 6) that the military order and the accompanying regulations that he is challenging "make it impossible for Mr. Hamdan to assert his own rights and also interfere with his ability to enter into a full and unfettered professional attorney/client relationship" does not satisfy these requirements. While Swift contends that Hamdan's confinement is unlawful under the Constitution, various treaty provisions, and federal statutes, Swift cannot "rest his claim to relief on the legal rights or interests of third parties," but rather, "must show [that] he has suffered a direct and palpable injury and [that] there is a substantial likelihood that the relief requested of the court will redress that injury." United States v. Van Cauwenberghe, 934 F.2d 1048, 1056 (9th Cir. 1991) (emphasis added); Barrows v. Jackson, 346 U.S. 249, 255 (1953) ("a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation").

Swift, however, has not identified any injury to himself, rendering his assertion of third-party standing constitutionally deficient. See Singleton v. Wulff, 428 U.S. 106, 112 (1976) ("injury in fact" is constitutional requirement). Indeed, the Supreme Court has never granted third-party standing to a lawyer to litigate a matter on behalf of his client where the lawyer's stake in the matter amounts to nothing more than his obligation to represent his client's interests zealously.

The examples of third-party standing that Swift cites are readily distinguishable. In United States Dep't Of Labor v. Triplett, 494 U.S. 715, 720-721 (1990), the Supreme Court held that a lawyer had third-party standing to assert on behalf of his (current and prospective) clients a constitutional challenge to a statutory scheme that prohibited the lawyer from

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receiving certain fees and that triggered a disciplinary proceeding against him. The lawyer there established that he suffered an injury in fact, because the allegedly unconstitutional statute prevented him from recovering fees and subjected him to disciplinary proceedings. See also Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 623 n.3 (1989) (holding that lawyer has third-party standing to challenge constitutionality of criminal forfeiture statute where lawyer has $170,000 stake in assets that the statute subjects to forfeiture). In NAACP v. Alabama, 357 U.S. 449 (1958), the Supreme Court permitted the NAACP to challenge on behalf of its members the constitutionality of a state order compelling production of its membership lists, because an adverse ruling threatened the NAACP with the loss of money and members. Id. at 459-460. See also Griswold v. Connecticut, 381 U.S. 479 (1965) (permitting medical professionals convicted of aiding and abetting violation of statute prohibiting use of contraceptives to challenge constitutionality of law on behalf of married people with whom they had professional relationship); Barrows, 346 U.S. at 255-256 (permitting party to a racially restrictive covenant to challenge its constitutionality on behalf of groups excluded by covenant, because that party "has been sued for damages totaling $11,600"). The common thread tying these cases together, and setting them apart from this one, is that in each the third party asserted a concrete, direct injury to itself, whether financial or reputational. Swift's claim, by contrast, cannot be differentiated from that of any appointed lawyer who contends that his client is being subjected to unconstitutional or otherwise unlawful procedures. See Coalition of Clergy, 310 F.3d at 1163 (coalition of clergy, lawyers, and law professors lack third-party standing to assert rights of Guantanamo detainees because, among other reasons, neither the coalition nor its members can demonstrate injury-in-fact). Indeed, Swift's argument that third-party standing should be recognized here is tantamount to arguing that all appointed attorneys should be afforded third-party standing, because Swift has no personal injury distinct from the bare fact of his representation of Hamdan. And even if Swift could somehow surmount the injury-in-fact hurdle, he has not shown that Hamdan is unable to protect his own interests by bringing the habeas action in his own name. See Argument I(a), supra. Swift

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therefore cannot rely on third-party standing.

In sum, because Swift cannot establish standing as a next friend or as a third party, this petition must be dismissed for lack of jurisdiction. Whitmore, 495 U.S. at 155-166.

II. THIS CASE MUST BE TRANSFERRED IN ACCORDANCE WITH GHEREBI II

Alternatively, the Court of Appeals' Gherebi II decision dictates its transfer to the federal district court for the District of Columbia. Following remand from the Supreme Court, which vacated the original Gherebi decision asserting jurisdiction over Guantanamo detainees, 352 F.3d 1278 (9th Cir. 2003), for reconsideration in light of Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004), the Gherebi II Court held that the proper venue for a next-friend petition for a writ of habeas corpus filed on behalf of Faren Gherebi, a Guantanamo detainee, and naming Secretary Rumsfeld, President Bush and various other officials as respondents lies in the District of Columbia. 2004 WL 1534166, at *9. The Court of Appeals accordingly transferred the case there pursuant to 28 U.S.C. 1406(a) (venue defect) and 1404(a) (transfer for convenience of parties and witnesses and in the interest of justice). Ibid.

The impetus for the Gherebi II transfer decision was the Supreme Court's decision in Padilla, which held that, as a general rule, habeas petitioners challenging their present physical confinement must name their immediate custodian as a respondent and file the petition in the district of confinement (where the immediate custodian resides). 124 S. Ct. at 2724-2725. The Court explained that

> [t]his rule, derived from the terms of the habeas statute, serves the important purpose of preventing forum shopping by habeas petitioners. Without it, 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 137 years ago.

Id. at 2725. While noting that it had "relaxed the district of confinement rule when American citizens confined overseas * * * have sought relief in habeas corpus," the Court indicated the relaxation carried limits such that an overseas petitioner, while permitted "to name as

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respondent a supervisory official," can only bring the petition "in the district where the respondent resides." Id. at 2725 n.16 (citing favorably cases in which the overseas petitioner filed in the District of Columbia). Justice Kennedy, in a concurring opinion joined by Justice O'Connor, emphasized this limitation, writing that "[w]hen an exception [to the district of confinement rule] applies, see, e.g., Rasul v. Bush, 124 S. Ct. 2686, courts must still take into account the considerations that in the ordinary case are served by the immediate custodian rule, and, in a similar fashion, limit the available forum to the one with the most immediate connection to the named custodian." Id. at 2728 (Kennedy, J., concurring) (emphasis added).

The Gherebi II decision, issued in the wake of Padilla, binds this Court. The petition in this case, just like the petition in Gherebi, names as respondents U.S.-based supervisory officials who reside in the District of Columbia or the Eastern District of Virginia. Because none of the respondents resides in the Western District of Washington, this Court lacks territorial jurisdiction under Padilla and is an improper venue under Gherebi II. The fact that this petition not only challenges the lawfulness of Hamdan's confinement generally, but also specifically challenges the lawfulness of his designation and confinement pursuant to the President's November 13, 2001 military order, does not distinguish this petition in any material respect from the Gherebi petition for purposes of determining the proper forum. Indeed, petitioner could not have selected a jurisdiction with a more attenuated connection to the respondents named and the claims raised. This petition must therefore be transferred to the District of Columbia under controlling Ninth Circuit precedent. Gherebi II, 2004 WL 1534166, at *9; see also Dunne v. Henman, 875 F.2d 244, 248 (9th Cir. 1989) (holding that district court for Western District of Washington lacked jurisdiction over habeas petition naming Illinois-based respondent).

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III. PETITIONER CANNOT CIRCUMVENT THE JURISDICTION AND VENUE RULES APPLICABLE TO HABEAS CORPUS PROCEEDINGS BY STYLING THIS CORE HABEAS ACTION AS A REQUEST FOR MANDAMUS

a. Petitioner's Challenge To The Legality Of Hamdan's Confinement Is The Exclusive Province Of Habeas Corpus.

This petition is not distinguishable from Gherebi II on the basis of the presence of a mandamus request, because it is well-settled that when a prisoner seeks release from allegedly unlawful confinement, the writ of habeas corpus is the exclusive means for doing so. The Supreme Court so held thirty-one years ago in Preiser v. Rodriguez, 411 U.S. 475, 500 (1973). There, state prisoners who had been deprived of good-conduct-time credits filed actions in federal district court seeking release from confinement pursuant to 42 U.S.C. 1983 together with petitions for writs of habeas corpus. The case came to the Supreme Court after the lower courts had directed release of the prisoners pursuant to Section 1983, presenting the question whether a prisoner seeking release from allegedly unlawful confinement "may bring an action for equitable relief pursuant to § 1983, or whether he is limited to the specific remedy of habeas corpus." Id. at 482.

The Court observed that it was clear from both the language of the habeas statutes and "the common-law history of the writ" that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from that unlawful custody." Id. at 484. Indeed, historically, habeas corpus was the proper means of securing release "[w]hether the petitioner had been placed in physical confinement by executive direction alone, or by order of a court, or even by private parties." Ibid. (footnotes omitted). The Court further explained that, when a prisoner has sought release from custody, habeas corpus "has been accepted as the specific instrument to obtain release" regardless of the precise nature of the legal challenge. Id. at 486 (writ of habeas corpus is the proper form of relief for prisoner claiming, inter alia, "that he is being unlawfully detained by the Executive or the military"). In light of that history and the statutory language, the Court concluded that the prisoners, regardless of whether their challenges effectively sought

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immediate release or merely a "shortening [in] the length of their actual confinement," had to seek relief exclusively through habeas corpus.

This exclusivity rule serves an important purpose, because federal habeas relief, unlike relief under other laws, is available only upon exhaustion of state remedies, and "[i]t would wholly frustrate explicit congressional intent to hold that the [prisoners] could evade this requirement by the simple expedient of putting a different label on their pleadings."[3] Id. at 489-490. Because petitioner "is challenging the very fact or duration of [Hamdan's] physical imprisonment, and the relief he seeks is a determination that [Hamdan] is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." Id. at 500. See also Muhammad v. Close, 124 S. Ct. 1303, 1304 (2004) ("Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus."); Benny v. United States Parole Comm'n, 295 F.3d 977, 988 (9th Cir. 2002) (concluding that mandamus request is appropriate "but only after determining that habeas corpus is not a proper method" to obtain relief for claimed violation that is not causally related to petitioner's custody); Nova Stylings, Inc. v. Ladd, 695 F.2d 1179, 1180-1181 (9th Cir. 1983) ("mandamus review may not generally be used when a statutory mode of review has been prescribed"). Petitioner thus cannot avail himself of the venue rules that attend mandamus actions as a means to circumvent the rules of jurisdiction and venue that govern habeas corpus proceedings and that call for the transfer of this petition pursuant to 28 U.S.C. 1406(a). Cf. United States v. McVeigh, 106 F.3d 325, 333 (10th Cir. 1997) ("[M]andamus may not be used to circumvent the policies effectuated by the restrictive provisions of § 3731[.]").

b. Even Assuming A Mandamus Action Could Proceed Alongside A Habeas Claim, The Western District Of Washington Remains An Inappropriate Venue For This Proceeding.

This District has no connection to the parties or claims in this proceeding and therefore is an inappropriate venue. The order in Gherebi II not only reflects a well-grounded

[3] The Supreme Court has held that the exhaustion requirement in habeas corpus applies to military proceedings as well. See, e.g., Gusik v. Schilder, 340 U.S. 128, 131-132 (1950).

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application of the principles of habeas corpus jurisdiction, but also a common sense recognition that cases challenging the detention of enemy combatants in Guantanamo Bay have no connection with the Ninth Circuit and can best be dealt with in a single forum with a more obvious connection to the controversy.[4] Nevertheless, by styling this habeas action as a request for mandamus in the alternative, and by bringing the action in his own name rather than in Hamdan's, the real party in interest, Swift attempts to make this remote forum a proper venue by taking advantage of the venue provision contained in Section 2 of the Mandamus and Venue Act of 1962, 28 U.S.C. 1391(e).[5] That provision provides in pertinent part that

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

28 U.S.C. 1391(e). Swift relies solely on subsection (e)(4), contending that he is a "resident" of Washington State because he was a resident of that State when he entered his current term of military service and intends ultimately to return there to live permanently, as evidenced by his maintenance there of his voter registration. Pet.'s Mem. 25-26. His reliance is misplaced.

To begin with, Swift's connection to Washington State is irrelevant. Not only is Swift not a proper next friend, see supra, Argument I.a., but it is also well established that a "next

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[4] This common sense proposition is evidenced by the order of the United States District Court for the Central District of California in Salim Gherebi v. George W. Bush, et al., Case No. CV04-210AHM(JTLx) (Exhibit A), transferring a separate case brought on behalf of Gherebi alleging a Bivens claim to the District of Columbia.

[5] Even if a mandamus claim could be pursued despite the exclusive nature of the habeas remedy and even if Washington State were the proper forum for it, the habeas statute would still require the habeas claim to be litigated in the District of Columbia. There would be no point in keeping the mandamus claim here, while sending the habeas corpus claim to the District of Columbia. The result would be the creation of a multiplicity of suits based on the same set of facts for no obvious reason. Thus, even if appropriate in this venue, the mandamus claim should be transferred to the District of Columbia to be heard with the habeas corpus claim "in the interest of justice." 28 U.S.C. § 1404(a); and see Continental Grain Co. v. The Barge FBL-585, 364 U.S. 19, 25-26 (1960) ("To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent.")

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friend" is only a nominal party and not the real party in interest. See Whitmore, 495 U.S. at 163; Morgan v. Potter, 157 U.S. 195, 198 (1895). And for purposes of determining the appropriate venue, courts look to the connection the real party in interest has to the forum. See 6A Wright, Miller & Kane, Federal Practice And Procedure: Civil 2d § 1570, at 505 (1990) (citizenship of real party in interest rather than nominal party "generally is considered determinative for diversity and venue purposes"); cf. Fed. R. Civ. P. 17(a) ("every action shall be prosecuted in the name of the real party in interest").

Second, even assuming that the nominal party's connection to the forum were relevant, Swift's assertions regarding his connection to Washington go to his legal domicile rather than to where he "resides" for purposes of the venue provision. As the Sixth Circuit has explained,

> Generally, an individual's domicile is his true, fixed, and permanent home and principal establishment. It is the place to which he returns whenever he is absent. Residence, in contrast, requires both physical presence and an intention to remain some indefinite period of time, but not necessarily permanently. Thus, domicile is an individual's permanent place of abode where he need not be physically present, and residence is where the individual is physically present much of the time. An individual consequently may have several residences, but only one domicile.

United States v. Namey, 364 F.3d 843, 845 (6th Cir. 2004) (internal quotation marks and citation omitted). See also Kanter v. Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001) ("A person residing in a given state is not necessarily domiciled there, and thus is not necessarily a citizen of that state."); In re Pope, 580 F.2d 620, 622 (D.C. Cir. 1978) (per curiam) ("In keeping with its policy of convenience, we have held that for purposes of the general venue statute a prisoner has his residence at his place of confinement."). Given that Swift presently lives and works in Virginia, Swift Decl. ¶ 6, at 3 (Apr. 5, 2004), identifying Washington State as the place where he "resides" for purposes of the venue statute stretches the meaning of that word to the point that it no longer serves its intended purpose.

Indeed, by enacting Section 1391(e), Congress "intended nothing more than to provide nationwide venue for the convenience of individual plaintiffs in actions which are nominally against an individual officer but are in reality against the Government." Stafford v. Briggs, 444 U.S. 527, 542 (1980) (emphasis added); Gilbert v. DaGrossa, 756 F.2d 1455, 1460 (9th Cir.

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1985) (Section 1391(e) "is designed to permit an action which is essentially against the United States to be brought locally rather than in the District of Columbia as would normally be required if Washington, D.C., is the official residence of the agency sued.") (emphasis added). Swift cannot plausibly claim it is convenient for him to litigate this petition in Washington State or that he is proceeding "locally," on the ground that someday he intends to return here, when the reality is that he and his attorney must fly 3000 miles to litigate the matter in this District on behalf of someone held in Cuba. Thus, venue would not lie here even if Swift were the relevant party for venue purposes and could overcome the statutory barrier to styling this action as a mandamus petition and the constitutional barrier to bringing this action in lieu of the real party in interest.

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CONCLUSION

For the foregoing reasons, respondents respectfully urge this Court to dismiss this action or transfer it to the District of Columbia in accordance with Gherebi II.

DATED this 16 day of July, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 16, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participant(s):

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