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

RESPONDENTS' REPLY MEMORANDUM OF POINTS AND AUTHORITES IN SUPPORT OF MOTION TO DISMISS OR TRANSFER

Respondents hereby submit their reply memorandum in support of their motion to dismiss or transfer the above-captioned petition for writ of mandamus or, in the alternative, writ of habeas corpus ("petition").[1]

INTRODUCTION

Gherebi II held that Guantanamo detainees challenging their status as enemy combatants must

[1] Respondents sincerely apologize for the length of this memorandum, which results from their effort to submit a combined response to the 29 page memorandum of law filed by the petitioner and the discrete arguments set forth in a separate memorandum filed by amicus.

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1 bring their challenges in the District of Columbia. In the face of that decision and Padilla, which made
2 clear that there is only one proper district court for habeas actions challenging present physical
3 confinement, petitioner spends twenty-eight pages attempting to justify maintaining this action in a
4 district within the Ninth Circuit whose only connection to the case is the voter registration of the
5 Guantanamo detainee's appointed counsel. His effort fails on multiple grounds.

6 First, Swift cannot rely on his voter registration because he has not established standing to bring
7 this action in his own name as a next friend or third party. Swift makes several contentions in this
8 regard, but none of them can deny the reality that, at the time he filed this action (the only relevant time
9 for standing purposes), his client had meaningful access to the courts and was not mentally incompetent.
10 Moreover, petitioner has no standing as a third party, because his abstract concern that he will have to
11 participate in legal proceedings that are unfair does not establish a distinct injury-in-fact.

12 Second, even accepting Swift's characterization of his action as one that is challenging
13 Hamdan's present pre-trial confinement in Camp Echo primarily, and his underlying confinement as an
14 enemy combatant only secondarily, that primary challenge is no more properly filed here than the
15 secondary one. In this regard, this Court should reject Swift's attempt to shoehorn this habeas action
16 into a mandamus mold by recasting his claims for relief – all going to the assertion of military authority
17 over Hamdan based on his status as a pretrial detainee – as a challenge to the conditions of his
18 confinement. Finally, even assuming Swift could bring a mandamus claim, he still has not established
19 that this action bears a close enough connection to this District to justify it going forward here.
20 Allowing this action to go forward here – based on Swift's voter registration – would not only contradict
21 Gherebi II and Padilla, but would constitute the elevation of form over substance in the extreme.

22 **ARGUMENT**

23 I. SWIFT LACKS STANDING AS A NEXT FRIEND OR THIRD PARTY

24 Swift asserts several bases for next-friend and third party standing, but none of them has any
25 merit. Because Hamdan had meaningful access to the courts via Swift at the time Swift filed this action
26 on his behalf, Swift cannot meet his burden of clearly establishing that Hamdan is "unable to litigate his
27 own cause." Whitmore v. Arkansas, 495 U.S. 149 (1990). And because Swift cannot identify any
28 concrete injury to himself, third-party standing is likewise unavailable to him. Id. at 155 ("To establish

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an Art. III case or controversy, a litigant first must clearly demonstrate that he has suffered an 'injury in fact.'"). This Court accordingly lacks jurisdiction and must dismiss the petition. Id. at 155-156.

a. Swift Cannot Serve As Hamdan's Next Friend

It is Swift's burden to establish standing, and he cannot identify a single case holding that a prisoner with access to a lawyer lacks "meaningful" access to the courts. That is because the law is clear that a detainee with access to counsel has access to the courts. Indeed, the very Supreme Court case on which he relies, Bounds v. Smith, 430 U.S. 817 (1977), defeats his position, as it holds that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful papers by providing prisoners with adequate law libraries, or adequate assistance from persons trained in the law." Id. at 828 (emphasis added); id. at 830-831 (listing numerous ways in which access to court may be ensured); Cornett v. Donovan, 51 F.3d 894, 898 (9th Cir. 1995); Lindquist v. Idaho State Bd. Of Corrections, 776 F.2d 851, 855 (9th Cir. 1985). Hamdan has undoubtedly received "adequate assistance from persons trained in the law," as Swift himself has documented by acknowledging the numerous and lengthy visits he has had with Hamdan from the time he was appointed until today. Hamdan not only has the assistance of Swift and personal contact with him whenever Swift visits him, but the assistance of a Georgetown law professor and a raft of attorneys at an international law firm. Hamdan's access to the courts is "meaningful" by any standard.[2]

Swift continues to rely on the claim that next-friend standing is proper because his access to Hamdan could be cut off at any time – the only basis he identified in his original memorandum for serving as a next friend. See Pet.'s Mem. 5. That speculative claim does not meet his burden, because to vest jurisdiction in this Court he had to establish an impediment to Hamdan's filing at the time Swift filed the petition. As the Supreme Court recently held, "It has long been the case that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. 1920, 1924 (2004); Smith v. Sperling, 354 U.S. 91, 93 n.1 (1957). Because there was no impediment to Hamdan signing and verifying the petition before it was filed (just

[2] The government's concession in the Coalition of Clergy case that the Guantanamo detainees lacked access to the courts has no bearing on this case, because the government has afforded Hamdan access to counsel. See Pet.'s Opp.3.

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as there was no impediment to him doing the same to the affidavit he filed in this action), Swift cannot establish next-friend standing under Whitmore.[3] See Warren v. Cardwell, 621 F.2d 319, 321 n.1 (9th Cir. 1980) (next friend "must show[] why the prisoner did not sign and verify the complaint").

Contrary to Swift's suggestion (Pet.'s Opp. 6-8), the government's position in this case is not inconsistent with its position in Padilla or Hamdi. There was no dispute in Padilla that Padilla could not sign and verify a habeas petition at the time it was filed, because at that time he was being held without access to counsel. Padilla v. Rumsfeld, 352 F.3d 695, 703 (2003), rev'd on other grounds, 124 S. Ct. 2711 (2004). The same was true in Hamdi. See, e.g., 294 F.3d 598 (4th Cir. 2002) (reversing district court order granting counsel access to Hamdi). Because Padilla and Hamdi, unlike Hamdan, clearly did not have access to the courts when their habeas challenges were filed, Hamdan's reliance on those cases to suggest an inconsistency is misplaced.

Swift and amicus now claim for the first time that next-friend standing is justified because there are questions about Hamdan's mental competence. Even if this Court were to consider this post-hoc claim for next-friend standing, it still fails. To establish mental incompetence, Swift must show that Hamdan, at the time the petition was filed, had "a mental disease, disorder, or defect that substantially affect[ed] his capacity to make an intelligent decision." Massie v. Woodford, 244 F.3d 1192, 1196 (9th Cir. 2001). Swift has presented no such evidence, and the filings in this very case refute any claim of mental incompetence. Swift cites to the declaration of Daryl Matthews, but, at the time the petition was filed, Dr. Matthews identified only a future risk of psychological deterioration. Matthews Decl. ¶14 ("Mr. Hamdan's current conditions of confinement place him at significant risk for future psychiatric deterioration[.]"); id. ¶ 15 ("The conditions of confinement described by Mr. Hamdan and his legal counsel may also cause deterioration to the point of significant impairment of his ability to assess his legal situation[.]"). Moreover, since the filing of the petition, Swift has submitted an affidavit signed by Hamdan. In asking the Court to rely on it in forming a view of this case, Swift has at the very least

[3] Swift contends (Pet.'s Opp. 4) that because this case may involve classified or protected information, Hamdan cannot bring it in his own name. The latter proposition does not follow from the former. Swift would have the same access to classified information whether he is a next friend or counsel for Hamdan.

impliedly represented to the Court that Hamdan is not incompetent.[4] In any event, the record shows that Hamdan is able to communicate with Swift, to cooperate with him, and to make intelligent decisions. See, e.g., Declaration of Charles Swift dated July 23, 2004 ¶¶ 4-7 (filed under seal). Compare Rohan v. Woodford, 334 F.3d 803, 805 (9th Cir. 2003) (prisoner "has been acting uncooperatively and irrationally").

Swift and amicus also allege for the first time that Hamdan's inability to understand English constitutes a basis for next-friend standing. This post-hoc claim is likewise unavailing. While Swift claims (Opp. 5) that "[t]his is not a situation where * * * a translator can be hired," the fact is that a translator is available to him for his meetings with Hamdan and for the translation of documents, as Hamdan's own affidavit attests. Indeed, Hamdan is no differently situated from countless individuals who participate in U.S. court proceedings everyday with a translator but without the assistance of a next-friend. Neither Swift nor amicus cites any case actually granting next-friend standing on the basis of a language barrier, let alone one where the barrier is cured by the presence of a translator.

In sum, because Hamdan is not incompetent and has meaningful access to the courts through Swift and a translator, Swift has failed to establish a "necessary condition for 'next friend' standing," Whitmore, 495 U.S. at 165 – namely, to "set forth * * * the necessity for resort to the next-friend device[.]" Weber v. Garza, 570 F.2d 511, 514 (5th Cir. 1978) (emphasis added); Wilson v. Lane, 870 F.2d 1250, 1253 (7th Cir. 1989) ("It is well-settled that a next-friend may not file a petition for a writ of habeas corpus on behalf of a detainee if the detainee himself could file the petition.").

Recognizing that Swift is unable to meet his burden, Swift (Pet.'s Opp. 6) and amicus (Mem.4) attempt to write out of existence Whitmore's "firmly rooted" requirement that Swift show Hamdan's inability to file on his own behalf, 495 U.S. at 163; id. at 165, on the ground that Hamdan authorized him to serve his interests. But Whitmore could not have been any clearer in holding that a next-friend's dedication to the best interests of the real party is only one of two prerequisites to next-friend standing. Indeed, neither Swift nor amicus cites a single case holding that next-friend standing is permissible when

[4] Putting aside questions regarding the veracity of the affidavit, its content does not suggest that Hamdan is irrational or unaware of his situation. See Massie, 244 F.3d at 1196.

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the real party in interest is able to litigate in his own name.[5] By inviting this Court to hold otherwise simply because Hamdan has authorized him to serve as a next friend would turn the doctrine of next-friend standing on its head. The petition must accordingly be dismissed. Whitmore, 495 U.S. at 166.

b. Swift Cannot Assert Third-Party Standing

Swift does not have third-party standing to represent Hamdan for the same reason he cannot serve as next friend: Hamdan is able to litigate his own cause. Powers v. Ohio, 499 U.S. 400, 410-411 (1991). Moreover, as we pointed out previously (Mem. In Support of Respondents' Mot. To Dismiss or Transfer, at 5), it would not be proper to recognize third-party standing when Congress has statutorily prescribed the circumstances under which a third party can file a habeas claim on a prisoner's behalf. Swift does not respond to this argument, and does not cite any case recognizing third-party standing in a habeas case. That is not surprising, given that the core of habeas corpus is a challenge to allegedly unlawful custody, and the injury stemming from such custody is the prisoner's only.

Indeed, Swift's inability to identify an injury in fact is yet another reason why third-party standing is not available. Contrary to Swift's suggestion (Pet.'s Opp. 8-9), the injury in fact requirement is not a prudential requirement, but a constitutional one. As the Supreme Court explained in Whitmore, Article III requires the complainant to "allege an injury to himself that is 'distinct and palpable,' * * * as opposed to merely '[a]bstract,'" and "actual or imminent, not 'conjectural' or 'hypothetical.'" 495 U.S. at 155 (citations omitted). Swift has not done so here, nor could he, where clearly it is only Hamdan, the detainee, who allegedly suffers injury from his confinement as an enemy combatant and pursuant to the military commission system. As Hamdan's appointed counsel, Swift may assist Hamdan in asserting whatever claims Hamdan may have, but it undoubtedly is Hamdan's alleged injury that creates a case or controversy here.

Swift nevertheless appears to make two assertions of injury, neither of which is sufficient. One claim is that, as appointed counsel, he must operate pursuant to a set of "illegal and unjust set of rules." Pet.'s Opp. 9. But Swift does not articulate what right, constitutional or otherwise, that he has to operate

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[5] Their reliance on Toth v. Quarles, 350 U.S. 11 (1955), is unavailing, because next-friend standing was not challenged there. See Lewis v. Casey, 518 U.S. 343, 352 n.2 (1996) ("[T]he existence of unaddressed jurisdictional defects has no precedential effect.").

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pursuant to a particular set of procedures before the military commission. If what he is complaining about is that the rules prevent Hamdan from getting a fair trial, that is an injury to Hamdan, not to himself. Swift relies on a single, thirty-year old Eighth Circuit case, Wounded Knee Legal Defense/Offense Committee v. FBI, 507 F.2d 1281 (8th Cir. 1974), for the proposition that "a lawyer has standing to challenge any act which interferes with his professional obligation to his client and thereby, through the lawyer, invades the client's constitutional right to counsel, " id. at 1284, but that case is readily distinguishable and the proposition for which Swift cites it has never been applied to recognize third-party standing in an action seeking release from confinement. In Wounded Knee, the court held that a committee had standing to seek monetary and injunctive relief for the alleged violation of the constitutional rights of their members and clients. The court issued that holding against a backdrop of substantial allegations of harassment, arrest, and assault of the committee's members, see id. at 1282-1283 & n.3, observing that the right of the commission to provide effective assistance of counsel "may not be fettered by harassment of government officials," id. at 1284.

Applying the Wounded Knee proposition as broadly as Swift would do here would eviscerate the injury-in-fact requirement. For example, on Swift's rationale, a lawyer could claim third-party standing anytime a trial ruling (limiting cross-examination, precluding testimony of a witness, etc.) prevented him from representing his client as zealously as he would have liked. This case does not involve an alleged infringement on the right to practice law, because Swift as appointed counsel has no right to represent Hamdan. Indeed, Swift's claim is indistinguishable from one the Supreme Court found lacking in Conn v. Gabbert, 526 U.S. 286 (1999). There, a lawyer challenged the search of his person while his client was testifying before the grand jury. The Court held that the lawyer had standing to challenge the search insofar as it allegedly infringed his constitutional right to practice law. At the same time, the Court held that the lawyer did not have standing to challenge the search on the ground that it interfered with his client's ability to obtain effective assistance of counsel before the grand jury. Conn, 526 U.S. at 292-293. Swift's asserted injury here is not meaningfully different than the injury the Supreme Court found lacking in Conn, because Swift is attempting to derive standing solely from his client's alleged rights (e.g., not to be confined pursuant to an allegedly unlawful process).

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Swift's second attempt (Pet.'s Opp. 9) to identify a concrete injury distinct from that allegedly accruing to Hamdan – namely, that by filing this petition, he has exposed himself to penal and ethical sanctions and thereby has standing – is also unavailing. Swift cannot bootstrap third-party standing by filing a lawsuit on another's behalf and then claim that by virtue of filing that lawsuit, he has suffered an injury. The question in third-party standing is whether the plaintiff suffered an injury sufficient to bring the action, not whether the plaintiff has suffered an injury by virtue of having brought the action.[6]

In sum, an appointed lawyer seeking to challenge the lawfulness of his client's detention lacks third-party standing, because the alleged injury clearly belongs to the detainee, not the lawyer. See, e.g., Coalition of Clergy, 310 F.3d at 1163 (coalition of lawyers, law professors, and clergy lack third-party standing because they cannot demonstrate injury in fact). Swift's failure to identify a distinct, concrete injury to himself leaves this Court without jurisdiction over the petition.

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

Alternatively, this Court must transfer the action to Washington, D.C., in accordance with Gherebi II. Despite the fact that Swift, like Gherebi, seeks release from confinement at Guantanamo Bay, and despite the fact that he, like Gherebi, has challenged the actions of individuals who reside in Washington, D.C. and Virginia, Swift nevertheless contends that because he has styled this action as one for mandamus or habeas corpus, rather than habeas corpus only, he can take advantage of his voter registration in Washington State to create jurisdiction and venue in this District. This Court should reject this attempt to justify forum shopping, not only because the Padilla and Gherebi II Courts have delivered a clear message, see Respondents' Mem. at 8-9, but also because mandamus is not available for someone seeking release from pre-trial custody[7]; even if it is, Hamdan, the real party in interest, does not reside in this district; and, even if Swift has standing and his contacts matter, this Court remains the wrong forum.

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[6] The provision that he contends he may have violated, Section 7(b)(2) of the President's military order, restricts a detainee's access to the courts. Whatever might be said about its effect on the detainee, Section 7(b)(2) clearly does not injure Swift.

[7] The government has addressed mandamus at the threshold stage only to the extent necessary to illustrate that this Court is not the proper forum for this action. There is no need to go into the merits of the mandamus claims (i.e., whether there is a clear, non-discretionary duty in connection with the eight different counts Swift has asserted), because mandamus jurisdiction does not lie when an alternative remedy is available.

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a. Mandamus Jurisdiction Does Not Lie To Challenge The Legality Of Hamdan's Custody As A Pretrial Detainee

In his previously filed petition and supporting memorandum, Swift challenged the government's authority to hold Hamdan in pre-commission custody and to hold him at all as an enemy combatant. He claimed that the government cannot hold Hamdan in pretrial custody, not because the conditions of that custody are unduly harsh, but because his continuing custody as a pretrial detainee under the President's military order is per se unlawful under the Uniform Code of Military Justice, the Geneva Conventions, the Constitution, and other federal statutes. See 4/6/04 Pet. 15-23. He clearly challenged the fact of that pretrial custody and sought Hamdan's complete release from it. See id. at 24. He sought release for Hamdan not only from his status as a pretrial detainee, but also from his status as an enemy combatant. Id. at 25. Given that Swift's petition cannot be read as anything other than a request for relief from present physical confinement in all of its permutations, it clearly falls within the exclusive province of habeas corpus. See Preiser v. Rodriguez, 411 U.S. 475, 486 (1973) (where petitioner contends that "he is being unlawfully detained by the Executive or the military," "habeas corpus has been accepted as the specific instrument to obtain release from such confinement"). Today Swift thus sings a different tune, contending that he is not challenging the "fact or duration" of his imprisonment, but rather, merely "the legality of the military commission process and the debilitating conditions of Hamdan's confinement." Pet.'s Opp. 13; Amicus Br. 5. Unless Swift is prepared to walk away from the relief he requested in the petition and to file a new challenge based on the conditions of his confinement, however, this action must proceed as a habeas petition.

Swift's argument that mandamus is proper with respect to what he characterizes as his primary claim for release from military commission confinement boils down to the notion that because Hamdan could remain confined as an enemy combatant even if his challenge to his pretrial custody succeeded, his challenge to the government's very authority to hold him as a pretrial detainee effectively becomes a challenge to the conditions of his confinement. See Pet.'s Opp. 13-14. The case law does not support

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this train of logic.[8] In fact, both the Supreme Court and the Ninth Circuit have made clear that mandamus does not become an appropriate remedy where it otherwise would not be (e.g., a challenge to the fact of a conviction or, as here, a challenge to the fact of pretrial custody) solely because the prisoner would remain in confinement on alternate grounds even if a habeas action succeeded.

In Peyton v. Rowe, 391 U.S. 54 (1968), for example, the Supreme Court held that habeas rather than mandamus was the proper vehicle for a prisoner's challenge to the second of two consecutive sentences. Even though the petitioner would not be released if his habeas claim succeeded, the Court ruled that "the notion that immediate physical release [is] the only remedy under the federal writ of habeas corpus * * * finds no support in the statute and has been rejected by this Court." Id. at 67. In Walker v. Wainwright, 390 U.S. 335 (1968), the Court similarly held that the habeas writ was available to challenge the first of two consecutive sentences, and that "it is immaterial that another prison term might still await him even if he should successfully establish the unconstitutionality of his present imprisonment." Id. at 337. See also Imbler v. Oliver, 397 F.2d 277 (9th Cir. 1968) (habeas corpus available to challenge conviction for which prisoner is serving concurrent sentence).

These cases illustrate that Swift's challenge to the authority of the government to hold Hamdan in pretrial custody, a classic habeas action, does not transmute into a challenge to the particular conditions of that custody cognizable under mandamus by virtue of his continuing confinement on independent grounds. None of the cases Swift cites holds otherwise. In Benny v. United States Parole Comm'n, 295 F.3d 977 (9th Cir. 2002), the Ninth Circuit permitted the petitioner to use mandamus to request an early parole termination hearing, because that request, even if granted would not require the government to release Benny from the type of confinement he was under. Similarly, in Ramirez v. Galaza, 334 F.3d 850 (9th Cir. 2003), and Neal v. Shimoda, 131 F.3d 818 (9th Cir. 1997), the Ninth

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[8] Even assuming that the military's authority to continue detaining Hamdan on an alternate ground were relevant to assessing whether Hamdan's challenge to the validity of his pretrial custody sounds in habeas or mandamus, that fact, contrary to Swift's contention, would not support a finding that mandamus is appropriate here. That is because a successful challenge to the authority of the government to subject him to the military tribunal would prevent the government from detaining him past the cessation of hostilities, thereby in all likelihood shortening the duration of Hamdan's confinement. See, e.g., Bostic v. Carlson, 884 F.2d 1267, 1269 (9th Cir. 1989) ("Habeas corpus jurisdiction also exists when a petitioner seeks expungement of a disciplinary finding from his record if expungement is likely to accelerate the prisoner's eligibility for parole."); Ramirez v. Galaza, 334 F.3d 850, 858 (9th Cir. 2003).

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Circuit permitted non-habeas actions to proceed where the petitioners sought, respectively, to expunge prison disciplinary records and to have their sex offender designations removed, because neither request challenged the validity of the underlying judgments or their continuing confinement pursuant to them. Here, by contrast, Swift's challenges enumerated in his petition are entirely to the validity of any military tribunal judgment that would be rendered against Hamdan and, if successful, would result in the immediate termination of his confinement pursuant to the military justice system.[9]

In sum, because Swift has challenged the validity of his pretrial custody and not its particular conditions, see Muhammad v. Close, 124 S. Ct. 1303, 1304 (2004), his action is "the province of habeas corpus." For that reason, mandamus is not available to him, see Preiser v. Rodriguez, 411 U.S. 475 (1973) (habeas corpus is the exclusive remedy for challenge to custody); Nova Stylings, Inc. v. Ladd, 695 F.2d 1179, 1180-1181 (9th Cir. 1983) (mandamus unavailable when other statutory remedy prescribed), and the jurisdiction and venue rules of habeas corpus dictate the transfer of this case to the District of Columbia. See Padilla, 124 S. Ct. at 2725 n.16; Gherebi II, 2004 WL 1534166, at *2, *9.[10]

Swift contends that Padilla did not hold that habeas petitioners detained outside the United States must file in the district where the respondent resides. But the language in Padilla that Swift downplays – "we have allowed the petitioner [detained outside the United States] to name as respondent a supervisory official and file the petition in the district where the respondent resides," 124 S. Ct. at 2725 n.16 – makes clear that, to the extent a detainee confined outside the United States can file a habeas petition, he

[9] Swift and amicus also cite Workman v. Mitchell, 502 F.2d 1201 (9th Cir. 1974), and Mead v. Parker, 464 F.2d 1108 (9th Cir. 1972). But these cases both involved challenges by inmates to the conditions of their detention – in particular, the prison's disciplinary system in Workman and the prison's law library in Mead. In neither case would the petitioners have been released from a particular form or confinement, or had their detention shortened, if their challenges succeeded. That petitions for mandamus were available to them thus establishes nothing with regard to Hamdan, who challenges not the conditions of his pre-commission detention, but rather the government's very authority to place him in pre-commission detention in the first place.

[10] For the same reasons that Swift's attempt to recast his challenges to validity of Hamdan's present physical confinement as a challenge to the conditions of his confinement fails, so does his attempt to distinguish Padilla. Because Hamdan is indeed challenging the "fact or duration" of his present physical confinement, his case is much more analogous to Padilla's than it is to the petitioner in Braden v. 30th Judicial Circuit Ct. Of Kentucky, 410 U.S. 484 (1973), who was challenging the assertion of future custody over him, or to the petitioners in Strait v. Laird, 406 U.S. 341 (1972), and Eisel v. Secretary of the Army, 477 F.2d 1251 (D.C. Cir. 1973), whose custody was only nominal. In any event, none of those cases stands for the proposition that when the challenge is not to present physical confinement, there are no limits as to the proper forum. See Padilla, 124 S. Ct. at 2723-2724 (pointing out that in Braden, "we concluded that the Western District of Kentucky had jurisdiction over the petition 'since the respondent was properly served in that district'") (emphasis in Padilla).

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must do so in the district where the proper respondent resides. See Hirota v. MacArthur, 338 U.S. 197, 202 (Douglas, J., concurring) (the place to hear challenge brought by petitioners confined pursuant to judgment of international military tribunal "is in the district where there is a respondent who is responsible for the custody of petitioners"; that district "is obviously the District of Columbia"). Given that the Padilla Court's decision was animated by concerns about "rampant forum shopping" by habeas petitioners, id. at 2725, reading the exception as the government does is far more plausible.[11] Moreover, the Gherebi II Court concluded upon reviewing Padilla, in particular footnote 16, that the proper forum for the Guantanamo detainee's habeas action was the District of Columbia. 2004 WL 1534166, at *2. Because the fact that Swift challenges two forms of custody rather than one does not meaningfully distinguish this case from Gherebi's, this case cannot remain in this district under Padilla or Gherebi II.[12]

b. This District Is Not The Proper Forum For This Action Even Assuming Mandamus Is Appropriate

Swift relies on 28 U.S.C. 1391(e)(3) to establish venue in this district, but this district is not the proper forum under that provision. First, Salim Hamdan, the real party in interest, does not reside in this district, and Section 1391(e) thus dictates that venue lies where a defendant resides. Second, even if Swift had standing and even if his contacts to Washington State mattered, he has not established that he "resides" in this district, given the overarching interest in convenience that term of Section 1391(e) was designed to serve.

i. As The Nominal Party, Swift's Contacts Are Irrelevant

Swift mistakenly contends (Pet.'s Opp. 19) that respondents' assertion that he is only a nominal

[11] Swift's reliance on Justice Scalia's dissent in Rasul for the proposition that Guantanamo detainees can petition anywhere in the country is misplaced not only because a dissent is not a reliable guide to the holding of the majority, see, e.g., Chandler v. United States, 218 F.3d 1305, 1327 n.44 (11th Cir. 2000), but also because the Court vacated Gherebi I for further consideration in light of Padilla, 2004 WL 1432135 (U.S. June 28, 2004), and because two members who voted to recognize jurisdiction over habeas claims in Rasul, Justices Kennedy and O'Connor, wrote separately in Padilla to make clear that Justice Scalia's interpretation of Rasul was incorrect. 124 S. Ct. at 2728 ("When an exception applies, see, e.g, Rasul v. Bush, 124 S. Ct. 2686 (2004), courts must still * * * limit the available forum to the one with the most immediate connection to the named custodian.").

[12] It bears noting, moreover, that at least two of the detainees involved in habeas and other proceedings before the U.S. District Court for the District of Columbia are in the same or similar position as Hamdan with regard to their status before military commissions. See Rasul v. Bush, No. 02-CV-0299 (habeas petition on behalf of, inter alia, David Hicks); Habib v. Bush, No. 02-CV-1130.

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plaintiff whose residence is not determinative of venue is based only on "a treatise, but no cases." First, Swift cannot dispute that, even if he has standing to bring this action on Hamdan's behalf, Hamdan, not himself, is the real party in interest. As the Supreme Court explained in Whitmore, 495 U.S. at 163, "[a] 'next friend' does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest."

Second, by bringing this action in his own name as "next friend" of Hamdan, Swift violated Rule 17(a) of the Federal Rules of Civil Procedure, which provides that "[e]very action shall be prosecuted in the name of the real party in interest." As the Court explained more than a century ago, "The next friend, by whom the suit is brought on behalf of the infant, is neither technically or substantially the party, but resembles an attorney, or guardian ad litem, by whom a suit is brought or defended in behalf of another. The suit must be brought in the name of the infant, and not in that of the next friend." Morgan v. Potter, 157 U.S. 195, 198 (1895); see also Nash on behalf of Takeshi Hashimoto v. MacArthur, 184 F.2d 606, 607-608 (D.C. Cir. 1950).

Despite the fact that he is "neither technically or substantially the party," Swift contends without any legal support that his residence is determinative of venue. In fact, professors Wright, Miller, and Kane collect more than ten cases that undermine his contention, including Blackwell v. Vance Trucking Co., 139 F. Supp. 103 (E.D.S.C. 1956), which is precisely on point. Swift dismisses Blackwell as premised not upon the real party in interest rule, but on the prevention of forum shopping. While it is clear that there (as here) the nominal plaintiff was attempting to establish what it perceived to be a favorable venue, the rationale of the decision rests squarely on the real party in interest rule:

> It is plain, and I presume would be conceded, that it was an attempt to establish venue in South Carolina. However it is clear from the authorities that this cannot be done. The proper nature of this action and its proper style is "Stuart Nerzig, an infant, by William H. Blackwell, his guardian ad litem v. Vance Trucking Co." When stated in this form * * * the title itself discloses what is the fact, namely, that the actual controversy is between a citizen of New York and a citizen of North Carolina. The statute confines the venue of the action to either the district where the plaintiff resides or where the defendant resides. Objection to the venue has been timely raised. It must be sustained and the action dismissed.

Id. at 109. The same is true of the other cases cited by the treatise. See, e.g., Horzepa v. Dauski, 40 F. Supp. 476, 477 (E.D.N.Y. 1940) (and cases cited) (citizenship of real party in interest determines

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question of diversity, not that of guardian ad litem).[13]

Professor Miller, in his amicus brief, notwithstanding the cases in his treatise, supports Swift's claim that venue should be determined not by the residency of the real party in interest, Salim Ahmed Hamdan, but by the residency of his alleged next friend. Professor Miller invites this Court to ignore the real party in interest requirement of Rule 17(a), Fed.R.Civ.P, embracing the unprecedented notion that venue should be determined by the residence of someone who is neither technically nor substantially a party to the case. With all due respect to Professor Miller, his treatise correctly states the law – his amicus memorandum does not.

Respondents do not disagree that 28 U.S.C. § 1391(e)(3) permits a plaintiff to bring an action in any judicial district in which he or she resides. On the other hand, 28 U.S.C. § 1391(e) does not create nationwide venue in all cases brought against the Government regardless of the residence of the plaintiff. To the contrary, as Professor Miller's treatise confirms, absent other grounds, if a plaintiff in an action against the Government does not reside in a given district, 28 U.S.C. § 1391(e) mandates that it go elsewhere. See 15 Wright, Miller & Kane, Federal Practice And Procedure: Civil 2d § 3815, at 159 (1986) (noting that at least one plaintiff must reside in the district to satisfy the residency requirement and that venue may not be based on the joinder of a plaintiff who has been improperly or collusively joined for the purpose of creating venue); Hartke v. Federal Aviation Administration, 369 F. Supp. 741, 746 (E.D.N.Y. 1973) (venue improper in case against government because the plaintiff did not reside in the district).

Because Hamdan, the real party in interest, does not reside in the Western District of Washington, Professor Miller's argument that venue lies here depends on two premises: (1) that the real party in interest requirement does not apply; and (2) that Swift truly resides in this District.[14] With respect to the first premise, Professor Miller argues that in mandamus cases brought to vindicate the

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[13] Swift attempts to draw a distinction between diversity and venue, implying that it is somehow more acceptable to manufacture venue than it is to manufacture diversity. Pet.'s Opp. 19 n.23. Courts no doubt frown on both, and the common thread of the cases is that determinations going to the proper forum must be based on the location of the real party in interest, not that of someone who is "neither technically or substantially the party."

[14] Professor Miller accepts without any analysis the second premise notwithstanding case law cited in his own treatise indicating that the premise is faulty, which we will address below.

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rights of aliens, the real party in interest requirement of Rule 17(a), F.R.Civ.P., is inoperative. Professor Miller cites no authority supporting that proposition. That is not surprising, because Rule 17(a), F.R.Civ.P., itself could not be any more plain in providing that "[e]very action shall be prosecuted in the name of the real party in interest." (Emphasis added.) According to Professor Miller's treatise, "[t]he effect of this passage is that the action must be brought by the person who, according to the governing substantive law, is entitled to enforce the right." 6A Wright, Miller & Kane, Federal Practice And Procedure: Civil 2d § 1543, at 334 (1990) (emphasis added).

Furthermore, there is no reason for an exception to the real party in interest rule. The interests served by the rule are no less applicable here than in any other case. Professor Miller in his treatise tells us that "[a]rguably * * * Rule 17(a) performs the useful function of protecting individuals from harassment and multiple suits by persons who would not be bound by the principles of claim preclusion if they were not prevented from bringing subsequent actions by a real party in interest rule." 6A Wright, Miller & Kane, Federal Practice And Procedure: Civil 2d § 1541, at 322 (1990). The Ninth Circuit agrees. U-Haul International, Inc. v. Jartran, Inc., 793 F.2d 1034, 1039 (9th Cir. 1986). There is no reason that Hamdan, the real party in interest here, should not be bound by the outcome of this litigation simply because he is an alien. Further, with special resonance here, the rule acts to prevent forum shopping. See Martineau v. City of St. Paul, 172 F.2d 777, 779 (8th Cir. 1949) ('The proper title of this action is, 'Daniel Joseph Murphy, a minor, by Robert J. Martineau, his general guardian, Plaintiff, versus' the defendants. As so amended the title discloses what is the fact, namely, that the actual controversy is between citizens of Minnesota, and that the diversity of citizenship requisite for federal jurisdiction is lacking."); Blackwell v. Vance Trucking Company, 139 F.Supp. 103, 109 (E.D.S.C. 1956) (venue).

Professor Miller makes the argument that the real party in interest requirement should be ignored in order to avoid rendering Section 1391(e)(3) mere surplusage "in any next-friend action brought on behalf of an alien." Amicus Mem. 7. However, as Professor Miller observes elsewhere in his treatise in respect to claims brought by alien plaintiffs, venue is simply determined by the alternative grounds in the applicable venue-determining statute, e.g., where the defendants reside or where the claim arose, rather than by the residence of the plaintiff. 15 Wright, Miller & Kane, Federal Practice And Procedure: Civil 2d § 3810, at 96-97 (1986); Hartke, supra.

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Professor Miller also argues that to apply the real party in interest requirement to an alien suing the Government in mandamus would be "inconsistent with the policy of the Mandamus and Venue Statute to make it easier for parties to bring mandamus actions outside the District of Columbia[.]" Amicus Mem. 7. Respondents disagree. The purpose of the Act was to make it easier for plaintiffs to sue the federal government in the District where they reside. It was not the purpose of the Act to allow the federal government to be sued everywhere regardless of the parties' residence. Consequently, the Act was not written to provide for "ubiquitous venue" in actions brought against the Government. This has been recognized in a number of cases cited by Professor Miller in his treatise. See, e.g., Reuben H. Donnelly Corp. v. FTC, 580 F.2d at 266 (that the FTC has an office in Chicago does not make it a resident of the Northern District of Illinois); Kings County Economic Community Development Association v. Hardin, 333 F.Supp. 1302, 1303-1304 (N.D. Calif. 1971) (both cited at 15 Wright, Miller & Kane, Federal Practice And Procedure: Civil 2d § 3815, at 156 n. 11 (1986)). There is no support for Professor Miller's argument in his treatise or in the caselaw.[15]

Lastly, Professor Miller argues that if the real party in interest requirement is not ignored by the Court, then the United States will have an incentive to move prisoners to locations where there are no federal courts in order to force all mandamus actions into the District of Columbia. It is difficult to respond to such unadorned speculation, except to say that it provides no basis for reading the real party in interest requirement out of the federal rules.

ii. Swift Does Not Reside In This District

Even if Swift's connections to the district matter, this Court still is not the proper forum for the action. Swift cannot possibly "reside" in this district, 28 U.S.C. 1391(e)(3), for the self-evident reason that he maintains no residence here. It is apparent from Swift's own declaration that he presently resides in the Eastern District of Virginia. Swift nevertheless contends that he resides in this district based on the "general rule," that "'[f]or purposes of the venue statutes, residence of an individual is equivalent to permanent residence of legal domicile.'" Pet.'s Opp. 20-21 (quoting Moore's Federal Practice). The Ninth Circuit, however, does not follow the "general rule." While other courts might equate the terms

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[15] Moreover, given that Hamdan does not reside in the Western District of Washington, it is difficult to understand how it can be said that he is being inconvenienced in a manner inconsistent with the Act.

1 “citizenship,” “domicile,” and “residence,” for venue purposes, the Ninth Circuit does not:

2 Granting that defendants’ supporting affidavits showed them to be citizens of Nevada, that fact was immaterial for the venue statute appropriate to this case. [28 U.S.C. 1391(a)] provides that
3 where jurisdiction is founded only on diversity of citizenship – as this one was – venue shall be laid only in the district where all defendants reside. The statutory criterion is residence, not
4 citizenship. The terms are not synonymous.

5 Arley v. United Pacific Ins. Co., 379 F.2d 183, 185 n.1 (9th Cir. 1967) (cited in 15 Wright, Miller &
6 Kane, Federal Practice And Procedure: Civil 2d § 3805, at 33-34 (1986)). See also Kanter v. Warner-
7 Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001); United States v. Otherson, 637 F.2d 1276, 1280 n.4 (9th
8 Cir. 1980); Stacher v. United States, 258 F.2d 112, 116 (9th Cir. 1958) (“domicile * * * involves intent”;
9 “residence * * * generally involves an actual place of abode”). The meaning of the term “resides” in
10 subsection (e) of 28 U.S.C. 1391 should have no different meaning than the Ninth Circuit has given to
11 the very same term in subsection (a). See, e.g., Bramwell v. U.S. Bureau of Prisons, 348 F.3d 804, 807
12 (9th Cir. 2003). Because Swift does not maintain a physical residence in the Western District of
13 Washington, he does not reside there within the meaning of Section 1391(e)(3).

14 The fact that Swift is a military member does not change the analysis. Swift relies on an
15 American Law Reports annotation for the proposition that his residence and domicile are determined by
16 reference to their location before enlistment, but his partial quotation of the annotation gives the reader
17 the misimpression that a special black and white rule applies to military members and that, regardless of
18 circumstances, the domicile and residence of military personnel are frozen at the place where they
19 entered the service. That is not the case, however. Quoted fully, the sentence reads: “Practically all of
20 the authorities are in agreement that a person inducted into military service retains his domicile or
21 residence in the state from which he entered military service and may institute an action for divorce there
22 until such time as he effectively abandons it and establishes a new one elsewhere.” 21 A.L.R.2d 1163 at
23 § 13 (emphasis added). Case law illustrates this point. See, e.g., Deese v. Hundley, 232 F. Supp. 848,
24 850 (W.D.S.C. 1964); Thomas v. Thomas, 58 Wn.2d 377, 380, 363 P.2d 107, 109 (Wash. 1961) (a
25 servicemen’s domicile is not frozen for the duration of his tour of duty).

26 It may well be that Swift’s domicile is the State of Washington, though it is not possible on the
27 selective presentation contained in his April 5, 2004 declaration to reach any firm conclusion in that
28 regard. But domicile is not the issue under Section 1391(e)(3). Rather, the question is where Swift

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"resides," and it is undisputed that Swift maintains no dwelling in Washington State. Nothing in the annotation Swift relies on suggests that a military member who no longer lives in the place where he joined the service, but maintains a private residence with his spouse elsewhere, can nevertheless claim to reside in the place where he joined, for purposes of Section 1391 or otherwise. See 21 A.L.R. 1163 § 7 ("A distinction is clearly made * * * between situations where the person in the armed forces is allowed to live off post at a place of his own choosing and where he is required to take up his quarters on the military reservation. In the former situation the courts are in general agreement that a soldier or sailor should be deemed capable of acquiring a domicile or residence at the place where he is living.").[16]

Moreover, as we explained in our initial memorandum, construing "resides" to require a substantial present connection to the district is also consistent with Congress' intent. Congress sought to make it more convenient for plaintiffs to file a mandamus action by allowing them to bring it "locally." Stafford v. Briggs, 444 U.S. 527, 542 (1980). The number of miles Swift must travel from his residence in Virginia to litigate this action in this District sufficiently illustrates that the forum is neither convenient nor local as to him. The fact that he has retained local counsel who have logged many hours on the case is the ultimate bootstrap in a series of bootstraps in service of Swift's effort to vest this Court with jurisdiction and venue. This Court should not take the case up on its bootstraps, however, because Swift's effort falls well short of the mark.

c. The Doctrine Of Pendent Venue Cannot Be Used To Circumvent The Statutory Limits On Habeas Corpus Jurisdiction

Even assuming a mandamus claim could be properly lodged in this District, it should not remain here, because his habeas claim for release from confinement (which, in our view, encompasses his petition as a whole) must be transferred to the District of Columbia. Swift's contrary contention that the habeas claim can remain in this district by virtue of "pendent venue" lacks merit for several reasons.

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[16] Although employing the language of "residence," it is apparent that the Court in Dennett v. Dennett, 71 F.3d 975 (D.C. Cir. 1934), was attempting to determine the domicile of the petitioner. Id. at 976 (focusing on "intention and conduct"). In any event, the case does not assist Swift. The court's decision was based not on an automatic rule, but rather an examination of the totality of the circumstances that led it to conclude that the petitioner "intend[ed] to make the District of Columbia his permanent place of legal residence." Id. at 977. In Manley v. Engram, 755 F.2d 1463 (11th Cir. 1985), the only issue decided was whether the plaintiff could move for a change of venue from her originally chosen forum. Holmes v. United States Board of Parole, 541 F.2d 1243 (7th Cir. 1976), is plainly inapposite, as Swift is not in any sense incarcerated or held against his will in Virginia.

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First, the general rule is that venue must be established for each separate claim in a complaint. See Lamont v. Haig, 590 F.2d 1124, 1135 (D.C. Cir. 1978). The pendent venue doctrine is a judicially created exception to this rule. The Ninth Circuit has never endorsed the use of this doctrine, which essentially permits a court to serve as a forum for a claim which the venue rules would not allow to be brought before it.[17]

Second, the pendent venue rule cannot overcome jurisdictional rules governing habeas corpus petitions. None of the cases on which Swift relies suggests, much less holds, otherwise. Because "[t]he plain language of the habeas statute * * * confirms the general rule that for core habeas petitions challenging present physical confinement, jurisdiction lies in only one district," Padilla, 124 S. Ct. at 2722, this Court cannot obtain jurisdiction over the habeas claim via the pendent venue doctrine. A judge made rule, even if cognizable in this Circuit, cannot trump the terms of the habeas statute.

Third, even if the habeas district of confinement rule is construed as a special venue provision rather than a jurisdictional constraint, but see Padilla, 124 S. Ct. at 2717 n.7, the pendent venue doctrine would still call for the entire action being transferred to the District of Columbia, because "where one claim is subject to a specific venue provision, and the other is not, the more specific venue provision controls." Lengacher v. Reno, 75 F. Supp. 2d 515 (E.D. Va. 1999); see Norkol/FiberCore, Inc. v. Gubb, 279 F. Supp. 2d 993, 999 (E.D. Wis. 2003) (28 U.S.C. § 1391 is general venue statute). Another district court explained the rationale for this rule:

> [I]f any of the claims making up the cause of action are governed by a special venue provision of the type that limits venue to specified districts, the cause of action may be brought only in a district specified by such provision. This is so because congressional intent to limit the available districts is clear and cannot be circumvented by claims of pendent venue.

Pacer Global Logistics, Inc. v. Nat'l Passenger Railroad Corp., 272 F. Supp. 2d 784 (E.D. Wis. 2003). Because Swift's habeas claim is at a minimum subject to the special venue rules governing habeas petitions, see Gherebi II (transferring case for venue defect), the pendent venue doctrine too calls for

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[17] The only mention of the doctrine in the Ninth Circuit is a case that simply recognizes its use in a case decided in another Circuit. See Smith v. United States, 953 F.2d 1116, 1119 n.5 (9th Cir. 1991).

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transferring the case to the District of Columbia.[18]

CONCLUSION

For the foregoing reasons and the reasons stated in our memorandum, respondents respectfully request that this Court dismiss this action or transfer it to the District of Columbia in accordance with Gherebi II.

DATED this 27th day of July, 2004.

Respectfully submitted,

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[18] Some courts apply an alternate test and apply the venue statute applicable to the "primary" claim. Solow Building Co. LLC v. ATC Associates, Inc., 175 F. Supp.2d 465, 469 (E.D.N.Y. 2001). Even under this test, Swift's bid to obtain venue in this District should fail. Even if this Court were to agree that Swift's "primary" challenge is to the validity of his custody pursuant to the military justice system and that his challenge to his detention as an enemy combatant is "secondary," that primary challenge equally sounds in habeas and thus belongs in the District of Columbia. See supra Part II(A).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 27, 2004, I electronically filed the foregoing Respondents' Reply Memorandum of Points and Authorities in Support of Motion to Dismiss or Transfer with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

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