03-2221-pr

To be Argued By:
KRISHNA R. PATEL

===

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-2221-pr

JEAN FILSAIME,

Petitioner-Appellant,

-vs-

JOHN ASHCROFT, U.S. ATTORNEY GENERAL,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

===

BRIEF FOR JOHN ASHCROFT
Attorney General of the United States

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TABLE OF CONTENTS

PAGE

Table of Authorities iii

Statement of Jurisdiction. ix

Statement of Issues Presented for Review x

Preliminary Statement 1

Statement of the Case 3

Statement of Facts 3

Summary of Argument 12

Argument 13

I. The Court Lacks Jurisdiction To Review the Connecticut District Court's April 3, 2003, Order Denying Filsaime's Habeas Petition Because There Is No Longer a Live Case or Controversy 13

A. Relevant Facts 13

B. Governing Law and Standard of Review . . 13

C. Discussion 14

II. The District Court Properly Dismissed the Habeas Petition for Lack of Personal Jurisdiction Because It Names the Wrong Respondent 20

A. Relevant Facts 20

B. Governing Law and Standard of Review . . 20

C. Discussion 21

III. Because Filsaime Did Not Raise His CAT Claim in His District Court Petition, It Has Been Forfeited 35

A. Relevant Facts 35

B. Governing Law and Standard of Review . . .35

C. Discussion 35

Conclusion 37

Certification per Fed. R. App. P. 32(a)(7)(C)

Addendum

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

Agosto v. INS, 436 U.S. 748 (1978) 20

Ahrens v. Clark, 335 U.S. 188 (1948) 22

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 37

Armentero v. INS, 340 F.3d 1058 (9th Cir. 2003) . . . 22

Billiteri v. U.S. Board of Parole, 541 F.2d 938 (2d Cir. 1976) 24, 25

Blango v. Thornburg, 942 F.2d 1487 (10th Cir. 1991) 24

Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973) . . . . *passim*

Carbo v. United States, 364 U.S. 611 (1961) 30

Castro-Carvache v. INS, 911 F. Supp. 843 (E.D. Pa. 1995) 25

Chase Manhattan v. American Nat'l Bank, 93 F.3d 1064 (2d Cir. 1996) 14

Chin v. United States, 622 F.2d 1090 (2d Cir. 1980) 17

Clark v. Stinson, 214 F.3d 315 (2d Cir. 2000) 14

Cleveland v. Higgins, 148 F.2d 722 (2d Cir. 1945) 18

Demjanjuk v. Meese, 784 F.2d 1114 (D.C. Cir. 1986) 33

Drozd v. INS, 155 F.3d 81 (2d Cir. 1998) 35-36

Ex parte Endo, 323 U.S. 283 (1944) 23

Filsaime v. Ashcroft, 01 CV 6592 (C.D. Cal. 2001). . . 6

Greene v. United States, 13 F.3d 577 (2d Cir. 1994) 35

Guerra v. Meese, 786 F.2d 414 (D.C. Cir. 1986) . . . 24

Henderson v. Reno, 157 F.3d 106 (2d Cir. 1998) . . . . *passim*

In re Kurtzman, 194 F.3d 54 (2d Cir. 1999) 14

INS v. St. Cyr, 533 US 289 (2001) 16, 17

Jones v. Biddle, 131 F.2d 853 (8th Cir. 1942) 24

Kuhali v. Reno, 266 F.3d 93 (2d Cir. 2001). 35

Liner v. Jafco, Inc., 375 U.S. 301 (1964) 14

Mai Kai Fong v. INS, 305 F.2d 239 (9th Cir. 1962) . 20

Mattel, Inc. v. Barbie-Club.com, 310 F.3d 293 (2d Cir. 2002) 35-36

Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003) . . . . *passim*

Patterson v. INS, No. Civ.A.3:03CV1363 (SRU), 2004 WL 1114575 (D. Conn. May 14, 2004) 22

Perez v. Ashcroft, No. 02 Civ. 10292 (NRB), 2003 WL 22004901 (S.D.N.Y. Aug. 25, 2003) 22

Pfotzer v. Amercoat Corp., 548 F.2d 51 (2d Cir. 1977) 18

Phillips v. Shannon, 445 F.2d 460 (7th Cir. 1971) . . 19

Roman v. Ahscroft, 340 F.3d 318 (6th Cir. 2003) . . . . *passim*

Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) . . . . *passim*

Sanders v. United States, 373 U.S. 1 (1963) 17, 24

Swaby v. Ashcroft, 357 F.3d 156 (2d Cir. 2004) 11

Theodoropoulos v. INS, 358 F.3d 162 (2d Cir. 2004) . . . . *passim*

United Food Local 919 v. Centermark Properties, 30 F.3d 298 (2d Cir. 1994) 14

United States ex rel. Schnitzler v. Follette, 406 F.2d 319 (2d Cir. 1969) 17

United States ex rel. Tanfara v. Esperdy, 347 F.2d 149 (2d Cir. 1965) 19

United States v. Michaud, 925 F.2d 37 (1st Cir. 1991) 17

United States v. Natelli, 553 F.2d 5 (2d Cir. 1977) (*per curiam*) 17

United States v. Perez, 129 F.3d 255 (2d Cir. 1997) 17

Vasquez v. Reno, 233 F.3d 688 (1st Cir. 2000) . . *passim*

Wang v. Ashcroft, 320 F.3d 130 (2d Cir. 2003) 35

Yesil v. Reno, 175 F.3d 287 (2d Cir. 1999). 28

Yesil v. Reno, 92 N.Y.2d 55 (1998). 28

Yi v. Maugans, 24 F.3d 500 (3d Cir. 1994) 21, 26

STATUTES

8 U.S.C. § 1105 . . . . 15, 20

8 U.S.C. § 1182 . . . . 5, 6

8 U.S.C. § 1226 8

8 U.S.C. § 1227 4

8 U.S.C. § 1229 . . . . 6, 13

8 U.S.C. § 1252 . . . . *passim*

18 U.S.C. § 1956 4

18 U.S.C. § 4001 25

28 U.S.C. § 1291 viii

28 U.S.C. § 2241 . . . . *passim*

28 U.S.C. § 2243 . . . . 21, 23

28 U.S.C. § 2253 viii

Antiterrorism and Effective Death Penalty Act of 1996,
Pub. L. No. 104-1323, 110 Stat. 1214 (“AEDPA”)
. . . . 8, 15

RULES

Fed. R. App. P. 4(a) . . . . viii, 18

Fed. R. Civ. P. 81 20

OTHER AUTHORITIES

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984 5

8 C.F.R. § 100.2 . . . . 25, 32

8 C.F.R. § 100.4 32

STATEMENT OF JURISDICTION

The district court (Alfred V. Covello, Senior U.S. District Judge) dismissed the petition for writ of habeas corpus for lack of jurisdiction. The petitioner filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a), and this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and § 2253(a).

However, as explained in Point I *infra*, this Court lacks subject-matter jurisdiction to review the merits of Filsaime's habeas petition because a merits-based ruling has already been issued by the U.S. District Court for the Western District of Louisiana. That ruling moots Filsaime's claims, and accordingly there is no longer a live case or controversy.

Moreover, as explained in Point II *infra*, even were this Court to retain subject-matter jurisdiction, the district court's dismissal should be affirmed because the Attorney General is not the proper respondent to the petition, and the only proper respondent, the INS Field Director for the New Orleans District, is not subject to personal jurisdiction in the District of Connecticut.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Whether the April 2003 judgment of the U.S. District Court for the Western District of Louisiana, dismissing the merits-based challenges to Filsaime's final order of removal, precludes further review of Filsaime's final order of removal and thereby deprives this Court of subject-matter jurisdiction?

2. Whether the district court lacked habeas jurisdiction over Filsaime's petition in the District of Connecticut because the INS Field Director for the New Orleans District, and not the Attorney General, was the proper respondent?

3. Whether Filsaime forfeited his torture convention claim because he failed to properly present it in his habeas petition?

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 03-2221-pr

JEAN FILSAIME,

-vs- *Petitioner-Appellant,*

JOHN ASHCROFT, U.S. ATTORNEY GENERAL,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR JOHN ASHCROFT
Attorney General of the United States

Jean Filsaime ("Filsaime") is an alien who was deported to his native Haiti in 2003 in the wake of a federal money laundering conviction in 1997. After failing to obtain relief from an Immigration Judge ("IJ") and the Board of Immigration Appeals ("BIA"), Filsaime filed habeas petitions in various district courts around the country. The instant petition, filed in the District of Connecticut, was the last to be filed. In the span of two weeks in April 2003, district courts in the Western

District of Louisiana (where the petitioner was being detained) and District of Connecticut both denied his petitions.

The petitioner's appeal should be dismissed for lack of jurisdiction. First, the Western District of Louisiana has now ruled upon petitioner's habeas claims, and that decision became final upon expiry of the time for appeal. Accordingly, even if this court were to remand, the district court below would now be statutorily precluded from reviewing any challenge to Filsaime's final removal order. *See* 8 U.S.C. § 1252(d)(2). Second, the petitioner was detained in the Western District of Louisiana, which had jurisdiction over the proper respondent, the former Immigration and Naturalization Service's ("INS")[1] Field Director for the New Orleans Field Office, who had day-to-day custody of the petitioner. The district court below correctly concluded that it lacked jurisdiction because the instant petition had not been filed in the district of the petitioner's confinement and because the petition named an improper respondent, the Attorney General of the United States. Such a position has been adopted by a majority of appellate courts to consider the issue and is most consistent with the Supreme Court's recent decision in *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

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[1] On March 1, 2003, the INS was abolished and its functions were transferred to three separate bureaus within the Department of Homeland Security ("DHS"). For convenience, this brief shall refer to the "INS" throughout.

STATEMENT OF THE CASE

On February 19, 2003, Filsaime filed a motion to stay his deportation proceedings in the District of Connecticut. On March 4, 2003, the district court (Alfred V. Covello, Senior U.S. District Judge) issued a temporary stay until April 4, 2003. On March 24, 2003, Filsaime filed a petition for a writ of habeas corpus in the district court challenging his final order of removal.

On April 3, 2003, the district court dismissed the petition. On the same day, judgment entered. On April 14, 2003, Filsaime was deported to his native Haiti. On April 15, 2003, Filsaime filed a timely notice of appeal in this court.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. Filsaime's Immigration History and Removal Proceedings

Filsaime, a native and citizen of Haiti, entered the United States at New York, New York as a non-immigrant visitor for pleasure on or about August 2, 1967, with authorization to remain in the United States until February 1, 1968. (*See* Joint Appendix ("JA") 55). Filsaime did not leave the United States as required by the terms of his visa. Rather, he remained illegally in the United States. (*See id.*). On August 27, 1989, Filsaime was granted an indefinite period of voluntary departure. (*See* JA 56). On December 8, 1997, Filsaime was sentenced in the United States District Court for the Eastern District of Virginia

after having pled guilty to conspiracy to launder drug proceeds in violation of 18 U.S.C. § 1956(h), for which he was sentenced to fifty-seven months of incarceration. (*See* JA 69-74 (judgment and conviction); *see also* JA 70 (incarceration for 57 months); JA 58 (Notice to Appear)). He laundered approximately $503,075. (JA 58, 77).

On November 3, 1997, the former INS revoked Filsaime's period of voluntary departure because of his plea of guilty to money laundering. (*See* JA 56). The INS placed Filsaime in removal proceedings, charging that he was deportable from the United States as an alien who has remained in the United States longer than permitted pursuant to section 237(a)(1)(B) of the Immigration and Nationality Act of 1952, as amended ("INA" or "Act"), 8 U.S.C. § 1227(a)(1)(B). (*See* JA 56). The INS subsequently filed Additional Charges of Deportability (Form I-261) charging that Filsaime was also deportable (1) as an alien who had been convicted of an aggravated felony as that term is defined in INA § 237(a)(2)(A)(iii) (D) & (U), 8 U.S.C. § 1227(a)(2)(A)(iii)(D) & (U), namely conspiracy to commit an offense as described in 18 U.S.C. § 1956; and (2) as an alien who had been convicted of a controlled substance violation under section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i). (*See* JA 58).

Filsaime's removal proceeding was conducted in Oakdale, Louisiana, where he was detained in INS custody. Filsaime, through his attorney, Ismael Gonzalez, Esq., made applications for asylum, withholding of

removal, CAT[2] relief, cancellation of removal, and a waiver under former section 212(c) of the Act, 8 U.S.C. § 1182(c) (1994). (JA 75). On March 21, 2001, after a removal hearing, the IJ determined that Filsaime was deportable as charged, denied his applications for relief, and ordered him deported to his native Haiti. (*See* JA 76-87 (IJ's decision)).

Filsaime appealed the IJ's decision to the BIA. He challenged only his deportability and the denial of withholding and CAT relief. (JA 61; *see* 63-65 ("The respondent appeals the denial of specific forms of relief.")). By decision dated August 10, 2001, the BIA affirmed the IJ's denial of relief and sustained two of the three charges of deportability. (*See* JA 61-65). The BIA did not sustain the charge of deportability pursuant to INA § 237(a)(2)(B)(i), finding that his money laundering conviction was not sufficiently related to the controlled substances offenses. (JA 62).

Filsaime filed a motion to reopen that was denied by the BIA on November 6, 2001. (*See* JA 67-68)). In denying the motion, the BIA held that Filsaime had not submitted any facts that were not previously available. *See id.*

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

B. Filsaime's Federal Court Proceedings

Filsaime filed a petition for a writ of habeas corpus in the Central District of California on August 1, 2001. *Filsaime v. Ashcroft*, 01 CV 6592 (C.D. Cal. 2001). (*See* JA 91 n.1). On September 21, 2001, the district court dismissed the petition for lack of personal jurisdiction over the New Orleans District Director of the INS, who the court determined was the only proper respondent to the action. (*See id.*). On or about January 28, 2002, Filsaime filed a Petition for Emergency Stay of Deportation with the Court of Appeals for the Ninth Circuit seeking a stay of removal. The stay was denied on April 19, 2002. (*See* JA 88-89).

Subsequently, on October 30, 2004, Filsaime filed a petition for a writ of habeas corpus in the Eastern District of New York. (*See* JA 91-92 (order of Judge Gershon, transferring petition)). In that petition, Filsaime argued (1) that his continued detention without bail violated the Constitution, and (2) that his ineligibility for relief under INA § 212(h), 8 U.S.C. § 1182(h), and INA § 240A, 8 U.S.C. § 1229b, violated the Equal Protection Clause. (*See id.*). By Order dated October 15, 2002, the court transferred the habeas petition to the United States District Court for the Western District of Louisiana. (*See id.*). The court also entered a temporary stay.

On February 4, 2003, the district court in the Western District of Louisiana vacated the stay.[3] On February 24, 2003, a magistrate judge in that district issued a Report that recommended denying and dismissing the habeas petition.[4] The magistrate judge's decision set forth findings of fact and conclusions of law that formed the basis for its decision. The magistrate judge considered Filsaime's claims relating to his detention, as well as his ineligibility for relief under INA §§ 212(h) and 240A. (*See id.*). Filsaime filed objections to the Report and Recommendation on March 24, 2003.[5]

While his habeas petition was pending in the Western District of Louisiana, on or about February 19, 2003 -- after his stay had been vacated by the Western District of Louisiana -- Filsaime filed an Emergency Petition for Stay of Removal in the District of Connecticut. In his stay petition, Filsaime stated that his "forthcoming habeas petition shall be based on 212(h) waiver in conjunction with Adjustment of status under section 245(A)." (JA 5). Filsaime did not inform the Connecticut District Court that he had filed a notice of appeal in the Court of Appeals for the Fifth Circuit from the Louisiana court's lifting of the stay. The Connecticut court issued an Order directing the

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[3] *See* Declaration of Krishna R. Patel dated May 4, 2004 "Patel Decl.", Ex. A at 3, Addendum at 3 which was attached to the Government's motion to dismiss. A copy of several of the exhibits attached to the Patel Decl. are included in the Addendum for ease of reference.

[4] *See* Addendum at 5-9.

[5] *See* Addendum at 4 (docket sheet).

Government to respond on or before March 21, 2003. (JA 19). The United States informed the Connecticut court that the INS had scheduled Filsaime's removal before that response date. Accordingly, on March 4, 2003, the Connecticut court issued a temporary stay of removal until April 4, 2003.

The Government responded to the Order to Show Cause in Connecticut on or about March 20, 2003, without having been served with a copy of any habeas petition.[6] (JA 34 n.2).

Only on March 24, 2003 -- one month after the magistrate judge in the Western District of Louisiana had issued his Report and Recommendation -- did Filsaime file his habeas petition in the District of Connecticut. This petition was not served on the Government. Applying a very liberal reading of the Connecticut habeas petition, Filsaime raised challenges to the retroactive effect of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-1323, 110 Stat. 1214 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRIRA"), §§ 212(h) and 245(A) of the Act (JA 27-28), and his continued detention which he alleged was pursuant to § 236(c) of the INA, 8 U.S.C. § 1226(c). (JA 22). Filsaime's habeas petition does not mention his CAT

[6] At the time of the Government's response, this Office had become aware of an appeal pending in the Fifth Circuit but was under the mistaken impression that it was from the dismissal of a habeas petition on the merits, rather than simply the lifting of the temporary stay.

claim, much less the BIA's denial of it. Again, Filsaime never informed the Connecticut court that a habeas petition raising a challenge to his final order of removal, which asserted essentially the same claims as contained in his Connecticut habeas petition, was under consideration in the Western District of Louisiana. Nor did he inform the Connecticut district court that a Report and Recommendation had already been issued in the Western District of Louisiana recommending that his claims be denied and dismissed.

On April 3, 2003, Filsaime served the Government with his reply brief and attached a copy of a habeas petition that is not identical to the one that was filed with the district court.[7] The district court docket sheet does not show a docket entry for Filsaime's reply brief. (JA 1). It therefore appears that he did not file it with the court.

In the meantime, on March 21, 2003, the Court of Appeals for the Fifth Circuit denied Filsaime's motion for a stay pending appeal.[8] A copy of that order was forwarded to the Connecticut district court.

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[7] At the time the Government did not realize that the habeas petition attached to the reply brief was not identical to the one filed with the court on March 24, 2003. The habeas petition filed with the court has a March 24, 2003 file-stamp. (*See* JA 16-31). The habeas petition sent to the Government has a file-stamp that appears to be crossed out, dated March 10, 2003. A copy of the entire reply brief is attached as Ex. E to the Government's motion to dismiss in this Court.

[8] *See* Addendum at 11.

On April 3, 2003, the District of Connecticut denied Filsaime's habeas petition for "substantially the same reasons set forth in the government's brief."[9] (JA 93 (endorsement order on emergency petition for stay of removal); JA 94 (judgment denying habeas petition)). The Connecticut court further noted that the Court of Appeals for the Fifth Circuit had "denied the identical relief requested on March 21, 2003." (JA 93).

On April 14, 2003, the Western District of Louisiana issued a judgment adopting the magistrate judge's Report and Recommendation and denying Filsaime's habeas petition. On the same day, Filsaime was deported to his native Haiti.

On April 15, 2003, Filsaime filed a notice of appeal from the April 3, 2003, Order of the Connecticut District Court and motion for a stay with this Court.

The Government was contacted by this Court on April 15, 2003, about Filsaime's motion for a stay. This Office orally informed the Court that petitioner had already been deported. Subsequently, by letter dated October 20, 2003, the Government submitted a copy of the warrant of removal and requested that the case be denied as moot. By order filed December 3, 2003, this Court directed that

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[9] The Government's brief, which was filed before Filsaime filed his Connecticut habeas petition and which opposed his stay petition, nevertheless asserted various jurisdictional obstacles which justified denial and dismissal of whatever petition would later be filed.

counsel be appointed and that the Clerk's Office issue a briefing schedule pertaining to the issue of whether the appeal is moot in light of Filsaime's deportation.[10]

On or about January 22, 2004, counsel for petitioner filed a motion for "Judicial notice of proceedings in W.D.L.A." On February 11, 2004, this Court referred the motion to the panel hearing the appeal. On May 11, 2004, the Government filed a motion to dismiss for lack for subject-matter jurisdiction and a motion to supplement the appellate record. By Order filed June 6, 2004, the Court granted the Government's motion to supplement the record but denied the motion to dismiss and permitted the Government to "argue the same issues in its brief as in the motion to dismiss filed."

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[10] In light of a recent decision of this Court on the issue of mootness in immigration cases, the Government withdraws this argument. *See Swaby v. Ashcroft*, 357 F.3d 156, 160-61 (2d Cir. 2004). Under *Swaby*, a justiciable "case or controversy" exists because (i) Filsaime was in custody at the time his habeas petition was filed, and (ii) his permanent bar from re-entering the United States constitutes a "collateral consequence" of his conviction. *See id.* (holding that habeas petition seeking § 212(c) relief was not moot, notwithstanding that petitioner was no longer in custody after being removed from the United States).

SUMMARY OF ARGUMENT

Because the Western District of Louisiana has issued a decision denying Filsaime's habeas petition on the merits, any challenge to the Connecticut district court's April 3, 2003, order is now moot. Even if this Court were to remand, the district court would be statutorily precluded under 8 U.S.C. § 1252(d)(2) from reviewing any challenge to Filsaime's final removal order. There is no longer a live controversy with respect to the propriety of the April 3, 2003, decision denying Filsaime's habeas petition. Accordingly, the appeal should be dismissed for lack of subject-matter jurisdiction. *See infra* Point I.

Even were this Court to retain subject-matter jurisdiction, the district court's dismissal should be affirmed because the district court lacked jurisdiction over the person who had immediate custody over Filsaime during the pendency of the habeas petition, and who was the only proper respondent to this habeas petition -- the INS Field Director of the New Orleans Field Office. *See infra* Point II.

The Supreme Court has recently endorsed the majority view that "there is generally only one proper respondent to a given prisoner's habeas petition" -- namely, the prisoner's immediate custodian, and not the cabinet official who ultimately oversees that custodian. *Padilla*, 124 S. Ct. 2711 (2004). Although the Supreme Court in *Padilla* had no occasion to apply this rule in the immigration context, a majority of appellate courts to have considered the question have held that the Attorney General is not a proper respondent. While Filsaime's habeas peititon was

pending in Connecticut, he was being detained in Oakdale, Lousiana, and his immediate custodian was the INS New Orleans Field Director, who exercised authority over Filsaime's confinement. Jurisdiction over Filsaime's habeas proceeding therefore lay in the Western District of Louisiana, where a district court considered and rejected the merits of a habeas petition filed by Filsaime.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO REVIEW THE CONNECTICUT DISTRICT COURT'S APRIL 3, 2003, ORDER DENYING FILSAIME'S HABEAS PETITION BECAUSE THERE IS NO LONGER A LIVE CASE OR CONTROVERSY

A. Relevant Facts

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

B. Governing Law and Standard of Review

When an alien commits certain crimes, the Government can initiate proceedings to remove that alien from the United States. *See* INA § 239(a)(1), 8 U.S.C. § 1229(a)(1) (removal proceedings are initiated by serving a notice to appear); *see also* INA § 240a (a)(2), 8 U.S.C. § 1229a (a)(2) (setting forth the charges that can be brought against an alien in removal proceedings). The framework of the INA also includes a claim-preclusion provision.

Specifically, the INA provides that an alien may not attack the validity of the underlying removal order if "another court has [] decided the validity of the [final removal] order." 8 U.S.C. § 1252(d)(2).

This Court reviews *de novo* the denial of a petition for a writ of habeas corpus, *Clark v. Stinson*, 214 F.3d 315, 319 (2d Cir. 2000), as well as questions of subject-matter jurisdiction, *Chase Manhattan v. American Nat'l Bank*, 93 F.3d 1064, 1070 (2d Cir. 1996). Moreover, the issue of subject-matter jurisdiction may be raised "at any stage of the proceedings," and "the party asserting jurisdiction bears the burden of proving that the case is properly in federal court." *United Food Local 919 v. Centermark Properties*, 30 F.3d 298, 301 (2d Cir. 1994).

C. Discussion

Petitioner's challenge to the Connecticut district court's April 3, 2003, order has become moot. The Western District of Louisiana has issued a decision denying Filsaime's habeas petition on the merits. As discussed below, even if this court were to remand, statutory claim preclusion would prevent the district court from reviewing the BIA's final order of removal. Because this Court cannot afford the petitioner the remedy he seeks, there is no longer a live controversy with respect to the propriety of the April 3, 2003, decision denying Filsaime's habeas petition. *See* U.S. Const., art. III; *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964) ("the exercise of judicial power depends upon the existence of a case or controversy"); *In re Kurtzman*, 194 F.3d 54, 58 (2d Cir. 1999) ("a case becomes moot . . . when it is impossible for

the court to grant any effectual relief whatever to a prevailing party" (internal quotation marks omitted)). Consequently, this Court should dismiss the appeal for lack of jurisdiction.

The INA provides that:

> *A court may review a final order of removal only if* -
>
> . . . .
>
> *(2) another court has not decided the validity of the order*, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

8 U.S.C. § 1252(d) (emphasis added); *see also* 8 U.S.C. §1105(a)(c) (1994) (similar provision, applicable to judicial review of final orders of deportation issued against aliens placed in proceedings prior to April 1, 1997). This section is clearly a limitation on the courts' jurisdiction to review final orders of removal.

The scope of § 1252(d) was recently made clear in this Court's superseding opinion in *Theodoropoulos v. INS*, 358 F.3d 162 (2d Cir. 2004). In that case, the Court considered whether the preclusion-of-review provisions of § 1252(d) applied to habeas cases in light of the Supreme Court's holding that limitations in AEDPA and IIRIRA on

judicial review did not apply to habeas review. *See INS v. St. Cyr*, 533 US 289, 311 (2001). The issue in *Theodoropoulos* was whether the statutorily imposed administrative exhaustion requirement in subsection (1) of § 1252(d) applied in habeas cases.

The Court observed that unlike the subsections of § 1252 at issue in *St. Cyr*, which would have completely stripped the courts of all jurisdiction to review certain claims, the preclusion provisions of § 1252(d)(1) merely added an exhaustion hurdle to otherwise undisturbed avenues of judicial review. 358 F.3d at 170. Consequently, the court held that the preclusion-of-review provisions of § 1252(d) applied to "all forms of review including habeas corpus." *Id.* at 171.

In reaching this conclusion, the Court did not limit its analysis to § 1252(d)(1). The operative language construed in *Theodoropolous* appears in the main body of § 1252, and prefaces both subsections (1) and (2). See § 1252(d) ("A court may review a final order of removal only if . . ."). The holding in *Theodoropolous* that § 1252's reference to judicial "review" encompasses habeas proceedings is therefore applicable with equal force to subsections (1) and (2). Indeed, this Court recognized that the two subsections were to be read in harmony regarding the scope of available review, basing its interpretation of subsection (1) in part upon the recognition that "subsection (2)'s reference to other courts and prior judicial proceedings plainly contemplates habeas or collateral review." 358 F.3d at 169; *id.* at 172 ("its recitation in subsection (2) of the effect that prior judicial proceedings have on the scope of a subsequent court's review seems

plainly to contemplate habeas review."). As a result, it is clear from *Theodoropoulos* that § 1252(d)(2) precludes judicial review of already adjudicated claims.

Moreover, the constitutional avoidance doctrine that underpinned the Supreme Court's decision in *St. Cyr* is not implicated here. In *St. Cyr*, the concern was to ensure that a petitioner had *some* access to habeas relief. Under § 1252(d)(2), the petitioner retains access to one court; what he is barred from doing is seeking such access twice. Petitioner can cite no case permitting him to re-litigate claims that he had a full and fair opportunity to litigate in another forum. *See Sanders v. United States*, 373 U.S. 1, 15 (1963) (setting the standard for determining the propriety of successive habeas corpus petitions); *United States ex rel. Schnitzler v. Follette*, 406 F.2d 319, 322 (2d Cir. 1969) (reversing a district court's decision to entertain a habeas corpus application when the application was factually and legally identical to one previously rejected on the merits by the Second Circuit); *cf. United States v. Perez*, 129 F.3d 255, 260 (2d Cir. 1997) ("A §2255 motion may not relitigate issues that were raised and considered on direct appeal."); *United States v. Natelli*, 553 F.2d 5, 6 (2d Cir. 1977) (*per curiam*) (same). Courts likewise preclude re-litigation of issues in the context of other collateral review proceedings. *See Chin v. United States*, 622 F.2d 1090, 1092 (2d Cir. 1980) (barring relitigation of issues in *coram nobis* proceedings); *United States v. Michaud*, 925 F.2d 37, 41 (1st Cir. 1991) .

Section 1252(d)(2) clearly places a claim preclusion requirement on a court's jurisdiction to review a challenge arising from a final order of removal. Here, Filsaime

previously filed two petitions for a writ of habeas corpus raising challenges to his final order of removal. As discussed above, the petition filed in the Eastern District of New York -- and later transferred to the Western District of Louisiana -- raised similar claims to those raised in Filsaime's Connecticut habeas petition. At the time that the Connecticut district court issued its order on April 3, 2003, unbeknownst to it, a magistrate judge in the Western District of Louisiana had already issued a Report and Recommendation dated February 24, 2003, recommending dismissal of the petition. Shortly thereafter, a district judge in the Western District of Louisiana issued a judgment adopting the Report and Recommendation. Filsaime therefore had his day in court (indeed, he had two). Moreover, the judgment issued by the Western District of Louisiana was in no way impacted by Judge Covello's April 3, 2003, order denying Filsaime's habeas petition. The Western District of Louisiana independently considered the merits claims raised by Filsaime and issued a valid decision denying them. Any appeal from the decision of that court would lie to the Court of Appeals for the Fifth Circuit, and not to this Court.

The Government has checked all publicly available docket sheets and has found no appeal of the Louisiana court's April 14, 2003, order denying and dismissing Filsaime's habeas petition. *See* Fed. R. App. P. 4(a)(1)(B) (notice of appeal to be filed within 60 days of entry of judgment). Accordingly, the April 14, 2003, decision is now final. *Cleveland v. Higgins*, 148 F.2d 722, 724 (2d Cir. 1945) ("A dismissal with prejudice is a 'final judgment' on the merits which will bar a second suit between same parties for same cause of action."); *Pfotzer*

v. Amercoat Corp., 548 F.2d 51, 52 (2d Cir. 1977); *Phillips v. Shannon*, 445 F.2d 460 (7th Cir. 1971) (recognizing that the overwhelming weight of authority holds that a dismissal with prejudice constitutes a disposition on the merits).

Filsaime has made no showing that any challenges to his final order of removal, including his CAT claim, could not have been presented to the Western District of Louisiana. Nor has he claimed that the Western District of Louisiana was in any way impaired from providing him the remedy that he sought. Filsaime's Louisiana habeas petition provided him an adequate remedy to address any challenge that he wished to raise to his final order of removal. Indeed, it appears that he raised many of the same arguments that were raised in his Connecticut habeas petition.

In sum, because the Western District of Louisiana has issued a decision on the validity of Filsaime's removal order, the Connecticut district court would now be precluded by § 1252(d)(2) from hearing Filsaime's challenges to his final removal order. Because the district court's hands would be tied on remand, this Court cannot afford the petitioner the relief that he seeks. Moreover, because Filsaime does not raise any challenge that could not have been brought in the habeas petition decided by the Western District of Louisiana, this Court is barred from reviewing Filsaime's challenge to the denial of CAT relief. *See United States ex rel. Tanfara v. Esperdy*, 347 F.2d 149, 151 (2d Cir. 1965) (applying § 1252(d)(2)'s predecessor statute -- 8 U.S.C. § 1105a (repealed 1996) -- and finding that Third Circuit's prior adjudication of defendant's

immigration claims barred subsequent habeas petition filed in Southern District of New York); *Mai Kai Fong v. INS*, 305 F.2d 239, 241 (9th Cir. 1962) (pursuant to § 1105a, finding no jurisdiction over appeal from order of deportation because, *inter alia*, petitioner had already lost in civil action challenging deportation filed in another district court); *see also Agosto v. INS*, 436 U.S. 748, 756 n.7 (1978) (noting that § 1105a(c)'s preclusion-of-review provisions based upon res judicata principles were "designed to minimize dilatory and repetitious litigation of deportation orders").

II. THE DISTRICT COURT PROPERLY DISMISSED THE HABEAS PETITION FOR LACK OF PERSONAL JURISDICTION BECAUSE IT NAMES THE WRONG RESPONDENT

A. Relevant Facts

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

B. Governing Law and Standard of Review

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

boundaries of the court's district. 28 U.S.C. § 2241(a) ("Writs of habeas corpus may be granted by . . . the district courts . . . within their respective jurisdictions.").

In reviewing a district court's decision to exercise jurisdiction over a habeas petition, this Court "first determine[s] if [the named respondent] is a proper respondent." *Padilla v. Rumsfeld*, 352 F.3d 695, 707 n.16 (2d Cir. 2003), *rev'd, Rumsfeld v. Padilla*, 124 S. Ct. 2711 (vacating judgment of the Court of Appeals and remanding the case for entry of order of dismissal without prejudice). A court of appeals exercises *de novo* review over the district court's determination as to the existence of personal jurisdiction over the respondent named in a habeas petition. *See Roman v. Ahscroft*, 340 F.3d 318, 314 (6th Cir. 2003).

C. Discussion

The district court properly dismissed the habeas petition. The majority of appellate courts that have considered the question have held that the Attorney General is not the proper respondent to a habeas petition filed by a detained alien who -- like Filsaime -- challenges a final order of removal. *See Roman,* 340 F.3d at 323 ("A corollary of the immediate custodian rule is that generally the Attorney General is considered neither the custodian of a detained alien for purposes of §2243 nor a proper respondent to an alien's habeas corpus petition."); *Vasquez v. Reno*, 233 F.3d 688, 696 (1st Cir. 2000) ("Having assayed the arguments advanced for the proposition that the Attorney General is the proper respondent in alien habeas cases, we find no compelling reason for supporting such a rule."), *see also Yi v. Maugans*, 24 F.3d 500, 507

(3d Cir. 1994) (rejecting proposition that "the Attorney General could be considered the custodian of every alien and prisoner" merely because "ultimately she controls the district directors and the prisons"); *but see Armentero v. INS*, 340 F.3d 1058, 1071 (9th Cir. 2003) (Meskill, J.) (concluding that Attorney General was proper respondent to petition filed by alien prior to dissolution of INS), *petition for rehearing en banc pending*.

This Court on one occasion discussed the issue but declined to resolve it. *Henderson v. Reno*, 157 F.3d 106, 124-28 (2d Cir. 1998). The Supreme Court has likewise had no occasion to address this precise issue. *Padilla*, slip op. at 7 n.8 (noting circit split); *see Ahrens v. Clark*, 335 U.S. 188, 193 (1948) (declining to reach question of whether Attorney General was "the proper respondent" to petition filed by aliens held at Ellis Island for deportation to Germany), *overruled on other grounds by Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973).

Prior to the issuance of *Padilla*, judges in this Circuit have disagreed over whether the Attorney General is a properly named respondent in an immigration petition. *See Patterson v. INS*, No. Civ.A.3:03CV1363 (SRU), 2004 WL 1114575, at *2 (D. Conn. May 14, 2004) (noting that result "in different courts in this district" is "mixed," and citing cases); *see Perez v. Ashcroft*, No. 02 Civ. 10292 (NRB), 2003 WL 22004901, at *2 & n.5 (S.D.N.Y. Aug. 25, 2003) (citing cases from the Southern and Eastern Districts of New York).

As explained below, this Court should adopt the reasoning of the First and Sixth Circuits that 28 U.S.C. § 2241 and § 2243 require aliens who are detained pending deportation to name their immediate custodian rather than the Attorney General as respondent, and to file their habeas petition in their district of confinement.

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

It is well established as a general rule that a petitioner seeking a writ of habeas corpus must name as the respondent his "custodian": the official who holds the petitioner in what is alleged to be unlawful custody and has the ability, if need be, to produce the petitioner before the district court. *See Padilla*, slip. op. at 5-6. As the Supreme Court very recently stated in *Padilla*, 28 U.S.C. § 2242 "straightforwardly provides that the proper respondent to a habeas petition is 'the person who has custody over [the petitioner].'" *Id.* (holding that Secretary of Defense was not proper respondent in habeas petition filed by prisoner detained by military authorities; confirming long-standing general rule that Attorney General is not the proper respondent to a habeas petition); *but see id.* n.8 (recognizing that the issue of whether the Attorney General is a proper respondent in an immigration habeas petition was not before the Court and "declin[ing] to resolve it."); *see also Billiteri v. U.S. Board of Parole*, 541 F.2d 938, 948 (2d Cir. 1976); *Ex parte Endo*, 323 U.S. 283, 306 (1944) (writ is "'directed to, and served upon, not

the person confined, but his jailer'" (citation omitted)); 8 U.S.C. § 2241(c)(1)-(3) (requiring that petitioner be "in custody" for writ to extend to him). In *Padilla*, the Court reaffirmed a principle that has existed for over "100 years," that the habeas "provisions contemplate a proceeding against some person who has the *immediate custody* of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary." *See Padilla*, slip op. at 6 (citation omitted). The Supreme Court went on to state that in prisoner cases "the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." *Id.* ("there is generally only one proper respondent to a given prisoner's habeas petition."); *see also Blango v. Thornburg*, 942 F.2d 1487, 1491-92 (10th Cir. 1991); *Guerra v. Meese*, 786 F.2d 414, 416 (D.C. Cir. 1986); *Sanders v. Bennett*, 148 F.2d 19, 20 (D.C. Cir. 1945); *Jones v. Biddle*, 131 F.2d 853, 854 (8th Cir. 1942); *Roman*, 340 F.3d at 330 (Gibbons, C.J., concurring) (collecting cases).

Thus, "for a court to entertain a habeas corpus action, it must have jurisdiction over the petitioner's custodian." *Billiteri*, 541 F.2d at 948; *see also Roman*, 340 F.3d at 319 ("[A] court has jurisdiction over a habeas corpus petition only if it has personal jurisdiction over the petitioner's custodian."). This Court recognized in *Billiteri* that "it would stretch the meaning of the term custodian beyond the limits established by the Supreme Court" to characterize as the custodian -- and thus the proper respondent -- an official or entity other than the prison

warden who, in that capacity, exercises control and confines the prisoner in the manner that is challenged. *Id.* "The individual best able to produce the body of the person detained is that person's immediate custodian, his 'jailor' in the parlance of an earlier time." *Vasquez*, 233 F.3d at 693 (citations omitted). Thus, the rule "gives a natural, commonsense construction to the statute." *Id.*; *accord Roman*, 340 F.3d at 321-22.

Given that the same statutes govern all prisoner habeas petitions, there is no reason to apply a different rule in the immigration context. As this Court observed in *Henderson*, "the Attorney General is designated, pursuant to statute, as the custodian of *all* federal prisoners, *see* 18 U.S.C. § 4001 (1994), yet no one seriously suggests that she is a proper respondent in prisoner habeas cases." 157 F.3d at 126. For purposes of identifying the proper habeas respondent, the Attorney General's role with respect to detained aliens does not differ materially from his role with respect to federal prisoners. *See Vasquez*, 233 F.3d at 693. The regulations promulgated by the Attorney General delegate most of his immigration-related functions to local INS District Directors, who are generally responsible for the administration and enforcement of the INA within the geographical confines of their INS districts. *See* 8 C.F.R. § 100.2(d)(2)(ii); *see generally Castro-Carvache v. INS*, 911 F. Supp. 843, 855 (E.D. Pa. 1995) (custody issues "must be addressed, at least in the first instance, by the District Director"). "While the Attorney General is the ultimate overseer of all federal prisoners, []he is not responsible for day-to-day prison operations and does not hold prisoners in actual custody." *Vasquez*, 233 F.3d at 691. Similarly, while the Attorney General has ultimate

authority over certain immigration matters, the INS District Directors (now DHS Field Office Directors) have primary responsibility for carrying out detention and removal functions.

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

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

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

Practical considerations also counsel in favor of holding that neither the Attorney General nor any other high-level official is the proper respondent in a case like this. "The immediate custodian rule is clear and easily administered," *Vasquez*, 233 F.3d at 693, and the adjudication of immigration habeas petitions "would become considerably more difficult to administer if [courts] were to adopt a broader definition of 'custodian' in this context," *Roman*, 340 F.3d at 322. Indeed, the latter interpretation "would establish a regime in which several courts would have personal jurisdiction over an alien's 'custodians'" and would thus permit aliens to "engage in forum shopping, choosing among several different districts as long as personal jurisdiction existed over at least one of the various custodians and venue considerations were satisfied." *Id.* Venue limitations might reduce the problem to some extent, but would not do so completely, and, in any event, permitting aliens to file in multiple jurisdictions would force courts "in many cases to undertake fact-intensive analyses of venue and forum non conveniens issues" that would not otherwise be required. *See id.*

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

New York Court of Appeals the question of whether New York's long-arm statute would permit service of process on the INS New Orleans District Director. *Id.* at 124. The New York Court of Appeals denied the request for certification. *See Yesil v. Reno*, 92 N.Y.2d 55 (1998). The case was ultimately settled and therefore the propriety of the Attorney General being named as a respondent in an alien's habeas petition was never decided. *See Yesil v. Reno*, 175 F.3d 287, 288-89 (2d Cir. 1999).

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

In discussing the countervailing arguments, the Court observed that the immediate custodian rule is not absolute. Specifically, § 2255 carves out a statutory exception, requiring a federal prisoner to file his habeas in the district

where he was originally sentenced and must name the United States as a respondent. *Id.* at 125. In addition, § 2254 requires that a petitioner who is not in custody must name his immediate custodian as well as the state attorney general. Finally, the case law also recognizes certain exceptions to the immediate custodian rule. *Id.* at 125.

This Court also suggested that the Attorney General's role in immigration matters is "extraordinary and pervasive," making it "unique" enough that this factor may militate in favor of allowing the Attorney General to be named as the proper respondent to an immigration habeas petition. *Id.* at 126.

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

In *Padilla v. Rumsfeld*, 124 S. Ct. 2711 (2004), the Supreme Court recently had occasion to speak to the role that many of these considerations should play in a court's

analysis of who is the proper respondent in a habeas petition. Although it specifically reserved decision on who the proper respondent in an immigration habeas should be, slip op. at 7 n.8, the Court's analysis nevertheless provides significant guidance.

First, the Supreme Court observed, as did this Court in *Henderson*, that certain statutes carved out exceptions to the immediate-custodian rule. As the Supreme Court explained, however, the fact that Congress had felt compelled to enact these exceptions reinforced the "commonsense reading of § 2241(a)" that habeas petitions aimed at relieving an individual from confinement are "'issuable only in the district of confinement.'" *Padilla*, slip op. at 14-15 (quoting *Carbo v. United States*, 364 U.S. 611, 618 (1961)). Accordingly, *Padilla* teaches that the existence of statutory exceptions to the default immediate-custodian rule cannot be said to support an interpretation of § 2241(a) that permits filing of habeas petitions outside the district of confinement.

Second, the Supreme Court rejected the notion that long-arm jurisdictional statutes (which vary from state to state) should impact the question of who is the proper respondent in a habeas case. *Id.* at 16 ("*Braden* in no way authorizes district courts to employ long-arm statutes to gain jurisdiction over custodians who are outside of their territorial jurisdictions."). In so holding, the Court expressly rejected the contrary conclusion of the panel in *Padilla v. Rumsfeld*, 352 F.3d 695, 708-09 (2d Cir. 2003). Its holding necessarily implies that the *Henderson* panel's reliance on long-arm statutes, *see* 157 F.3d at 122-23, was flawed as well. Instead, the Court re-affirmed a formal and

literal application of the habeas statute, finding that there is generally only one proper respondent -- the petitioner's immediate custodian -- and one district in which a habeas petition should be filed -- the district in which the prisoner is detained. *See Padilla*, slip op. at 14-19; *see also id.* at 7 n.9.[11]

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

> a prisoner could name a high-level supervisory official as respondent and then sue that person wherever he is amenable to long-arm jurisdiction. The result would be rampant forum shopping, district courts with overlapping jurisdiction, and the very inconvenience, expense, and embarrassment

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[11] Even under the analysis of the panel in *Padilla*, found too expansive by the Supreme Court, the Attorney General would still be an improper respondent. In *Padilla*, this Court focused on the unique "degree of Cabinet-level involvement," whereby the President himself designated the Secretary of Defense to detain Padilla. 352 F.3d at 707-08. The panel acknowledged the circuit split regarding whether the Attorney General is an appropriate respondent in immigration habeas cases, but was "satisfied that the unique involvement of Secretary Rumsfeld distinguishes this case from the typical immigrant petition." *Id.* at 706. The petitioner in the present case, of course, alleges no such personal involvement by the Attorney General.

> Congress sought to avoid when it added the jurisdictional limitation [to § 2241] 137 years ago.

Padilla, slip op. at 19. The instant action is a prime example of this danger. Here, all matters concerning Filsaime's prospective removal and his detention by the INS were exclusively handled by the INS in Oakdale, Louisiana. Filsaime filed multiple simultaneous habeas petitions in districts that he may have perceived as more favorable to him than the Western District of Louisiana -- the Central District of California, the Eastern District of New York, and Connecticut. Yet, the official who had custody of Filsaime and who could have produced him was the New Orleans District Director of the INS. *See* 8 C.F.R. §§ 100.2(d)(2)(ii) (2004) (INS districts, "[h]eaded by district directors . . . are responsible for the administration and enforcement of the Act and all other laws relating to immigration and naturalization within their assigned geographic areas of activity") & 100.4(b)(28) (2004) (geographical jurisdiction of INS's New Orleans district). As the Supreme Court recognized in *Padilla*, this is exactly the type of mischief that Congress sought to avoid by imposing jurisdictional provisions in habeas cases.[12]

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[12] On appeal, the petitioner cites only the Attorney General as the proper respondent, and does not claim that the court below had jurisdiction over the New Orleans Field Director. Accordingly, any claim that the petition could be sustained as to any respondent other than the Attorney General must be deemed waived on appeal. *See, e.g., Qiu v. Ashcroft*, 329 F.3d 140, 156 (2d Cir. 2003) ("'Issues not sufficiently argued in the briefs are considered waived and normally will (continued...)

Nor does the petitioner claim that this case presents any extraordinary reason to deviate from the immediate-custodian rule. *See Padilla*, slip op. at 7 n. 9; *see also id.* at 4-5 (Kennedy, J. concurring). There is no evidence that requiring Filsaime to seek relief in Western District of Louisiana would have interfered with his "access to habeas corpus relief," *Roman*, 340 F.3d at 325. Indeed, Filsaime had the opportunity to present all of his arguments to the Western District of Louisiana. The fact of an unfavorable ruling is not a recognized or proposed exception permitting him to file petitions in other districts. Nor is this a case in which the petitioner is being held in "an undisclosed location," *id.* (citing *Demjanjuk v. Meese*, 784 F.2d 1114, 1116 (D.C. Cir. 1986) (Bork, C.J., in chambers)), or where "the government manipulated its authority in an attempt to deny [petitioner] a meaningful opportunity for relief," *Roman*, 340 F.3d at 326; *see also Vasquez*, 233 F.3d at 696 (an "extraordinary circumstance" warranting naming of Attorney General might arise in case where "INS spirited an alien from one site to another in an attempt to manipulate jurisdiction," but petitioner "neither marshaled facts suggesting furtiveness nor made a showing of the elements necessary to demonstrate bad faith"). Indeed, Filsaime was housed in Louisiana while he litigated both his administrative immigration cases as well as his various petitions and appeals. (*See* JA 54-87).

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[12] (...continued)
not be addressed on appeal.'") (quoting *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir.1998)).

Even if this Court were to find the immediate-custodian rule inapplicable in the present case, traditional venue considerations would still weigh in favor of transferring the instant habeas petition to the Western District of Louisiana. *See Braden*, 410 U.S. at 493; *Henderson*, 157 F.3d at 127. Filsaime's removal proceedings took place in Louisiana and the petitioner was detained there throughout those proceedings. Indeed, he filed his habeas petitions throughout the country while being detained in Louisiana. Moreover, Filsaime has alleged no connection to the State of Connecticut. The Eastern District of New York transferred the habeas petition to the Western District of Louisiana. As such, even if this court were to remand, the proper course would be for the district court to transfer the habeas petition to the Western District of Louisiana because any judicial review of a final administrative order resulting from immigration proceedings should logically take place in a court with jurisdiction in the district where those proceedings occurred. *Cf.* 8 U.S.C. § 1252(b)(2) ("petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings").

In sum, the decisions of the Supreme Court and this Court support the conclusion that the immediate custodian rule applies here.

III. BECAUSE FILSAIME DID NOT RAISE HIS CAT CLAIM IN HIS DISTRICT COURT PETITION, IT HAS BEEN FORFEITED

A. Relevant Facts

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

B. Governing Law and Standard of Review

Even were this Court to retain subject-matter and habeas jurisdiction, because Filsaime failed to properly raise his CAT claim in his habeas petition, his claim has been forfeited. *See Mattel, Inc. v. Barbie-Club.com*, 310 F.3d 293, 306 (2d Cir. 2002) (reiterating "well established general rule that an appellate court will not consider an issue raised for the first time on appeal" unless "necessary to remedy an obvious injustice") (quoting *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994)); *cf. Drozd v. INS*, 155 F.3d 81, 91 (2d Cir. 1998) (on direct petition for review finding argument "waived because it was not raised before the immigration judge or the BIA").

In the absence of factual findings, this Court applies *de novo* review to a district court's denial of a habeas petition. *See Wang v. Ashcroft*, 320 F.3d 130, 139-40 (2d Cir. 2003); *Kuhali v. Reno*, 266 F.3d 93, 99 (2d Cir. 2001).

C. Discussion

Even were this Court to remand this case to the district court, the only merits claim advanced by Filsaime in his

appeal is the denial of CAT relief. Filsaime, however, failed to make sufficient reference to CAT relief in his Connecticut habeas petition to raise a proper challenge under CAT. Filsaime's March 25, 2003, habeas petition does not even acknowledge that he sought CAT relief before the IJ. (*See* JA 22 (identifying forms of relief previously sought)). In addition, CAT relief is not referenced anywhere in his claims for relief. (*See* JA 26-28). The only possible reference to CAT relief is contained in Filsaime's "Prayer for Relief" in which he states that he "fears to be tortured in Haiti if removed," but he does not identify whether he is referring to his claim for withholding of removal or CAT. (JA 30). Even construed liberally, Filsaime's habeas petition fails to identify any theory as to why the BIA's denial of his CAT claim was in error. Because he failed to properly raise his CAT claim in his habeas petition, the claim has been forfeited. *See Mattel*, 310 F.3d at 306; *cf. Drozd* , 155 F.3d at 91.

Moreover, Filsaime's earlier habeas petition decided by the Western District of Louisiana also did not raise a CAT claim. Indeed, in both petitions Filsaime claimed in the "Prayer for Relief" section that he will be tortured if he is removed to Haiti. Even were this Court to deem that reference to torture as sufficient to make a claim for CAT relief, then by same token Filsaime had already raised that claim in his earlier filed (and now adjudicated) habeas petition in the Western District of Louisiana. To the extent that Filsaime would argue that the Western District of Louisiana never considered his CAT claim in their ruling, Filsaime's remedy would have been to move before that court for reconsideration or to file an appeal to the Court

of Appeals for the Fifth Circuit. Further review of this claim is inappropriate in the Connecticut District Court.

CONCLUSION

For the foregoing reasons, the Court should dismiss Filsaime's appeal for lack of jurisdiction. As the Supreme Court has admonished, "[w]hen a civil case becomes moot pending appellate adjudication, '[t]he established practice. . . in the federal system. . . is to reverse or vacate the judgment below and remand with a direction to dismiss.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (internal citation omitted). The Court went on to state that vacatur is appropriate when the mootness was caused by the unilateral action of the prevailing party or because of circumstances that are not attributable to either party. *Id.* Neither is the case here. The mootness, in this case, occurred because Filsaime filed habeas petitions in two separate districts, and the Louisiana court decided the validity of his claims on the merits. Accordingly, the Government respectfully requests that this Court dismiss the appeal and leave the Connecticut district court's dismissal intact.

Alternatively, the Court should affirm the district court's dismissal of the habeas petition because the district court lacked habeas jurisdiction over petitioner's immediate custodian, who was the only proper respondent to the habeas petition.

If this Court were to find both subject-matter and habeas jurisdiction to be proper, the appeal should be dismissed because Filsaime forfeited his challenge to the denial of CAT relief, which is the only relief he seeks here.

Dated: July 30, 2004

Respectfully submitted,

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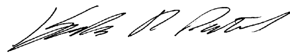

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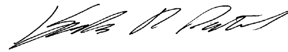
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,408 words, exclusive of the Table of Contents, Table of Authorities, and Addendum.



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ADDENDUM

Immigration and Nationality Act § 242(d)(2), 8 U.S.C. § 1252(d)(2)

(d) Review of final orders

A court may review a final order of removal only if--

. . . .

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

28 U.S.C. § 2241

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

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

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

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

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

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

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

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

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

transfer the application to the other district court for hearing and determination.

28 U.S.C.A. § 2243

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

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

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

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

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

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

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

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

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

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

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