No. 03-1436

In the Supreme Court of the United States

NANCY ALCANTER, FIELD OFFICE DIRECTOR, SAN FRANCISCO, CALIFORNIA, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

RIGOBERTO C. PEDROSO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THEODORE B. OLSON
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor General

DONALD E. KEENER
MICHELE Y. F. SARKO
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the continued detention of a Mariel Cuban, who was apprehended at the border of the United States, was denied admission, and was subsequently ordered removed from the United States as a criminal alien, is lawful.

PARTIES TO THE PROCEEDINGS

Petitioner Nancy Alcanter, the Field Office Director in San Francisco, California, for United States Immigration and Customs Enforcement, and United States Immigration and Customs Enforcement are the successors to the relevant responsibilities of the Immigration and Naturalization Service, which was a respondent below.* John Ashcroft, Attorney General of the United States, is also a petitioner and was a respondent below.

The respondent is Rigoberto C. Pedroso.

---

* On March 1, 2003, the functions of several border and security agencies, including those of the former Immigration and Naturalization Service, were transferred to the Department of Homeland Security and assigned within that Department to Immigration and Customs Enforcement. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, treaty, statutes and regulation:

In the Supreme Court of the United States

No. 03-1436

NANCY ALCANTER, FIELD OFFICE DIRECTOR, SAN FRANCISCO, CALIFORNIA, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

RIGOBERTO C. PEDROSO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Nancy Alcanter, the Field Office Director, San Francisco, California, of the United States Immigration and Customs Enforcement, Department of Homeland Security, and on behalf of Attorney General John Ashcroft, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

[1] Although the Attorney General and the Immigration and Naturalization Service (as succeeded by United States Immigration and Customs Enforcement) were named as habeas corpus respondents below, they are not the proper respondents in a habeas corpus action challenging an alien's detention. The relevant

OPINIONS BELOW

The per curiam opinion of the court of appeals (App., *infra*, 1a-2a) is unreported. The order of the district court (App., *infra*, 3a-4a), adopting the findings and recommendations of a magistrate judge (App., *infra*, 6a-8a), is also unreported.

JURISDICTION

The court of appeals entered its judgment on January 16, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "No person shall * * * be deprived of life, liberty, or property, without due process of law."

2. The Immigration and Nationality Act, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 305(a)(3), 110 Stat. 3009-598, provides:

---

field director of the United States Immigration and Customs Enforcement is the proper respondent. See *Roman* v. *Ashcroft*, 340 F.3d 314, 318-327 (6th Cir. 2003); *Vasquez* v. *Reno*, 233 F.3d 688 (1st Cir. 2000), cert. denied, 534 U.S. 816 (2001); *Yi* v. *Maugans*, 24 F.3d 500, 507 (3d Cir. 1994); but see *Armentero* v. *INS*, 340 F.3d 1058, 1061 (9th Cir. 2003) (concluding that the Attorney General is the proper respondent in an immigration detention case), petition for reh'g en banc pending, No. 02-55368. Because the habeas corpus petition was filed in the appropriate district, where the respondent was held in immigration custody and where the appropriate Immigration and Naturalization Service District Director (now the Immigration and Customs Enforcement field director) is located, the issue is without jurisdictional or procedural consequence in this case.

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. 1231(a)(6).

STATEMENT

1. The Immigration and Nationality Act has long authorized the Attorney General or, since March 1, 2003, the Secretary of Homeland Security, to parole aliens seeking admission into the United States "temporarily under such conditions as he may prescribe" and only for "urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A); 8 U.S.C. 1182(d)(5) (1976 & Supp. IV 1980). The Act makes clear, however, that the discretionary "parole of such alien shall not be regarded as an admission of the alien." *Ibid.*; see generally *Fernandez-Roque* v. *Smith*, 734 F.2d 576, 578-579 (11th Cir. 1984); *Palma* v. *Verdeyen*, 676 F.2d 100, 101-102 (4th Cir. 1982). Section 1182(d)(5)(A) also provides that when, in the opinion of the Attorney General (or, now, the Secretary of Homeland Security), the purposes of the alien's parole have been served, the alien shall be returned to custody, "and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." 8 U.S.C. 1182(d)(5)(A).

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 305(a)(3), 110 Stat. 3009-598, Congress mandated the detention, during the statutory 90-day removal period, of aliens who have been ordered removed from the United States, including aliens who have been stopped at the border and were regarded as "excludable" under prior law. 8 U.S.C. 1231(a)(2).[2] IIRIRA further provides that an alien ordered removed who is inadmissible under 8 U.S.C. 1182 (2000 & Supp. I 2001) or deportable due to the commission of a specified crime, or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, "may be detained beyond the [90-day] removal period." 8 U.S.C. 1231(a)(6).

2. Respondent is one of approximately 125,000 Cuban nationals, many of them convicted of crimes in Cuba, who attempted to enter the United States illegally during the 1980 Mariel boatlift. App., *infra*, 6a. After Cuba refused to accept the return of Mariel Cubans who were stopped at the border and denied entry into the United States, the Attorney General paroled most of those Cubans, including respondent, into the

---

[2] Before IIRIRA, aliens subject to removal from the United States were divided into two statutory categories. Aliens seeking admission and entry into the United States were "excludable." See *Landon* v. *Plasencia*, 459 U.S. 21, 25, 28 (1982); 8 U.S.C. 1182 (1994). Aliens who had gained lawful admission to the United States or entered without permission were "deportable." See 8 U.S.C. 1251 (1994). Under IIRIRA, the new statutory category of "inadmissible" aliens includes both aliens who have not entered the country and formerly were termed "excludable," and aliens who entered the United States without permission and formerly were termed "deportable." See 8 U.S.C. 1182(a) (2000 & Supp. I 2001).

United States under 8 U.S.C. 1182(d)(5) (1976 & Supp. IV 1980).[3]

While on parole, in December 1981, respondent was convicted in California of carrying a concealed weapon. Gov't C.A. Mot. for Summary Disposition (Gov't C.A. Mot.) 3 & Attach. 2. In January 1990, respondent was convicted in California of second degree burglary, and was sentenced to 180 days in jail and 36 months of probation. *Ibid.* In 1994, he was convicted in California of battery with corporal injury, and was sentenced to jail and probation. *Ibid.* In February 1996, he was convicted of exhibiting a deadly weapon and vandalism, and was sentenced to jail and probation. *Ibid.* In December 1997, respondent was convicted in the County of Los Angeles, California, of corporal injury to spouse/co-habitant/child's parent and threats with intent to terrorize, in violation of the California Penal Code, and was sentenced to 5 years' imprisonment.

Respondent was returned to federal custody in May 2000, and following a review pursuant to the parole review procedures for Mariel Cubans, see 8 C.F.R. § 212.12(h), the INS District Director revoked his immigration parole. Gov't C.A. Mot. 3. In June 2000, the Immigration and Naturalization Service placed respondent in removal proceedings, on the ground that his

---

[3] In 1984, the United States and Cuba reached an accord that addressed, *inter alia*, the return to Cuba of 2746 specified individuals with serious criminal backgrounds or mental disabilities. See Immigration Joint Communique Between the United States of America and Cuba, Dec. 14, 1984, U.S.-Cuba, T.I.A.S. No. 11,057, 1984 WL 161941. Approximately 1652 Mariel Cubans have been repatriated to Cuba under that accord. See generally *Gisbert* v. *Attorney General*, 988 F.2d 1437, 1439 n.4, amended, 997 F.2d 1122 (5th Cir. 1993). The most recent repatriations occurred in January and February 2004.

conviction for corporal injury to spouse/co-habitant, in violation of Section 273.5 of the California Penal Code (West 2004), rendered him ineligible for admission to the United States, see 8 U.S.C. 1182 (a)(2)(A)(i)(I) (crime of moral turpitude). Gov't C.A. Mot. 4. An immigration judge subsequently ordered respondent removed to Cuba. *Ibid.* Respondent waived his right to appeal to the Board of Immigration Appeals. As required by the parole regulations applicable to Mariel Cubans, see 8 C.F.R. 212.12, respondent's custodial status was reviewed periodically by the government's Cuban Review Panel.

3. In August 2000, respondent filed a petition for writ of habeas corpus in district court. Adopting the magistrate judge's proposed findings and recommendation and following Ninth Circuit precedent, the district court granted respondent's habeas corpus petition and ordered him released, finding that the government would not be able to remove him to Cuba in the reasonably foreseeable future. App., *infra*, 3a-4a. In response to the Court's order, Immigration and Customs Enforcement then granted parole to respondent in November 2002. Gov't C.A. Mot. 4.

The court of appeals summarily affirmed the district court's decision. App., *infra*, 1a-2a.

DISCUSSION

On January 16, 2004, this Court granted review in *Benitez* v. *Mata*, No. 03-7434, to address the lawfulness of the detention of a Mariel Cuban who was apprehended at the border of the United States, was denied admission, and was subsequently ordered removed from the United States as a criminal alien. On March 1, 2004, this Court granted review in *Crawford* v. *Martinez*, No. 03-878, which also presents that ques-

tion. The government's petition in this case seeks review of the same question presented in *Benitez* and *Crawford*. Therefore, this case should be held pending the Court's decision in *Benitez* v. *Mata*, No. 03-7434, and *Crawford* v. *Martinez*, No. 03-878, and disposed of in accordance with the Court's decision in those cases.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Benitez* v. *Mata*, No. 03-7434, and *Crawford* v. *Martinez*, No. 03-878, and disposed of in accordance with the Court's decision in those cases.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor General

DONALD E. KEENER
MICHELE Y. F. SARKO
Attorneys

APRIL 2004

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-17534
D.C. No. CV-00-1839-WBS

RIGOBERTO C. PEDROSO, PETITIONER-APPELLEE

v.

JOHN ASHCROFT, ATTORNEY GENERAL,
RESPONDENT-APPELLANT

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, Chief Judge, Presiding

Submitted: Jan. 12, 2004 **
[Filed: Jan. 16, 2004]

MEMORANDUM *

Before: BEEZER, HALL and SILVERMAN, Circuit Judges

Appellant's motion for summary disposition is granted. See *Xi v. INS*, 298 F.3d 832 (9th Cir. 2002).

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Accordingly, we summarily affirm the district court's judgment. *Id.*

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV S-00-1839 WBS JFM P

RIGOBERTO C. PEDROSO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

[Filed: Nov. 5, 2002]

ORDER

Petitioner, an inmate proceeding with counsel, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On October 15, 2002, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within ten days. Respondent has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has

conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed October 15, 2002, are adopted in full;

2. Petitioner's application for writ of habeas corpus is granted; and

3. Respondent's September 13, 2002 request for a stay is denied.

DATED: November 4, 2002.

/s/ Illegible signature
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CASE NUMBER: CIV S-00-1839 WBS JFM P

RIGOBERTO C. PEDROSO, PETITIONER

v.

INS

[Filed: Nov. 5, 2002]

JUDGMENT IN A CIVIL CASE

XX - Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF NOVEMBER 5, 2002.

Jack L. Wagner,
Clerk of the Court

ENTERED: November 5, 2002

by: C. FORESTER
C. FORESTER,
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV S-00-1839 WBS JFM P

ROBERTO C. PEDROSO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

[Filed: Oct. 15, 2002]

FINDINGS AND RECOMMENDATIONS

Petitioner is an individual detained by the Immigration and Naturalization Service proceeding through counsel with an application for writ of habeas corpus pursuant to 28 U.S.C. § 2241.

Petitioner arrived in the United States from Cuba in 1980 during the "Mariel Boatlift". Since arriving in the United States, petitioner has been convicted of several offenses. After the expiration of his most recent criminal sentence, petitioner was remanded to the custody of respondent on or about May 1, 2000 for deportation proceedings. Petitioner was ordered excludable on August 18, 2000. The problem is, Cuba will not accept petitioner so he has remained in respondent's custody since well before he was ordered excludable.

The United States Court of Appeals for the Ninth Circuit has recently issued an opinion that is directly applicable to this case and demands that petitioner's habeas application be granted. *Xi v. U.S. I.N.S.*, 298 F.3d 832 (9th Cir. 2002).[1] Respondent asks that the court not make findings and recommendations at this time, but stay this action until the Ninth Circuit decides whether to grant respondent's motion for rehearing in *Xi*. But, as respondent points out, the Ninth Circuit has held that "the filing of a petition for rehearing is not sufficient to preclude the effect of a court's judgment as *stare decisis* within this circuit. *See Wedbush Noble, Cooke, Inc. v. S.E.C.*, 714 F.2d 923, 924 (9th Cir. 1983)."

Accordingly, IT IS HEREBY RECOMMENDED that:

1. Petitioner's application for writ of habeas corpus be granted; and

2. Respondent's September 13, 2002 request for a stay be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within five days after service of the objections. The parties are advised that failure to file objections

---

[1] Respondent does not dispute this, nor does respondent present anything indicating petitioner's continued detention is "reasonable." *See Zadvydas v. Davis*, 121 S. Ct. 2491, 2498 (2001).

within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: October 11, 2002.

/s/ Illegible signature
UNITED STATES MAGISTRATE JUDGE