IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LUIS POSADA-CARRILES	§	
	§	
Petitioner,	§	
	§	
v.	§	**EP-06-CA-0130-PRM**
	§	**Magistrate Judge Norbert J. Garney**
ALFREDO CAMPOS, ET AL.,	§	
	§	
Respondents.	§	

RESPONDENTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S SEPTEMBER 11, 2006 REPORT AND RECOMMENDATION

Respondents Alfredo Campos, et al., object to Magistrate Judge Norbert Garney's Report and Recommendation ("R&R"), issued on September 11, 2006.

INTRODUCTION

In his decision recommending the release of Luis Posada-Carriles ("Posada"), an unrepentant criminal and admitted mastermind of terrorist plots and attacks on tourist sites, the magistrate judge erred in both his factual and legal findings, as well as by accepting Posada's grossly insufficient assertion that there was no significant likelihood that he could be removed from the United States within the reasonably foreseeable future. Despite extensive evidence bearing upon Posada's uncommon ability to facilitate his own removal through high level government connections in multiple Latin American countries, in assessing whether Posada met his burden under *Zadvydas v. Davis*, 533 U.S. 678 (2001), the magistrate judge erroneously failed to require much more from Posada than his conclusory assertion that his efforts "have all failed." Petitioner's Reply to Respondent's Motion to Dismiss, June 21, 2006 ("Pet. Reply") at

7.

The United States Court of Appeals for the Fifth Circuit rejected similarly self-serving statements aimed at triggering release of an alien upon expiration of the *Zadvydas* six-month presumptive period of custody, in *Andrade v. Gonzales*, — F.3d —, 2006 WL 2136397 at *3 (5th Cir., Aug. 1, 2006). The Court held that the alien could not meet his *Zadvydas* burden through "conclusory statements suggesting that he will not be immediately removed." Where the Fifth Circuit's recent decision involved an alien with only one country as a removal option, clearly the unverified and untested statements of a man such as Posada, who has multiple unexhausted removal-country options, should not be credited toward meeting his burden under *Zadvydas*. Yet, the magistrate judge found that Posada's threadbare showing satisfied his burden under *Zadvydas*. In so doing, the magistrate judge erred.

This Court should decline to adopt the magistrate judge's conclusions because (1) Posada identified an extraordinary range of foreign high profile contacts and prospects for removal that he only partially pursued, (2) he similarly failed to substantiate his expedient assertion that all efforts have failed, (3) his petition is not ripe under *Zadvydas*, and (4) *Zadvydas* requires, upon the threshold finding that an alien has met his burden of showing no prima facie removal prospects, that DHS have a reasonable interval to test and rebut the assertion and demonstrate substantial removal prospects before the court finally rules on the petition.

For these and other reasons discussed below, the Court should decline the magistrate judge's recommendation and grant the Government's motion to dismiss the habeas petition. In the alternative, should the Court deny the Government's motion to dismiss, the Court should allow DHS a reasonable opportunity, as provided under *Zadvydas* and the decisions of this Court,

to investigate the accuracy of Posada's assertions and, depending upon this investigation, either rebut his assertions, or pursue further avenues for detaining him notwithstanding a finding that his removal is not reasonably foreseeable.

BACKGROUND

Posada entered the United States illegally in March 2005, and for nearly two months evaded the Government's attempts to apprehend and charge him with removal as an un-admitted alien. Posada was arrested by Immigration and Customs Enforcement ("ICE"), on May 17, 2005, and placed in removal proceedings where he initially sought asylum. He later withdrew that application, conceding further that he was ineligible for the relief of withholding of removal because he had committed a serious non-political crime outside the United States. Exh. B (*Amended Decision of the Immigration Judge*, September 27, 2005), at 1-2, attached to the Government's Motion To Dismiss the Habeas Petition ("Motion to Dismiss").[1] Posada was ordered removed from the United States on September 27, 2005, but granted deferral of removal under the Convention Against Torture to Cuba and Venezuela -- a temporary form of relief which does not preclude the Government from removing him to other destinations, and which, on a proper showing, may be terminated even as to Cuba and Venezuela.

It is undisputed that Posada remains an un-admitted alien with no entitlement to be in the United States. Nor, apart from a general denial, does Posada seriously dispute that he poses a risk of flight, danger to the community, and danger to the national security. Rather, in his petition, Posada seeks release under the misconception that the Supreme Court's decision in *Zadvyas* would compel his release, because he asserts that he has been detained beyond the time

[1] References to "Exh.," hereinafter, are to the exhibits attached to the Motion to Dismiss.

period reasonably necessary to effectuate his removal.

The Government moved to dismiss the habeas petition on two grounds. First, although Posada asserted in his petition that he poses no risk of flight or danger to the community or national security, the Court lacks jurisdiction to review the agency's discretionary findings to the contrary, because they entail factual and discretionary judgements which lie outside the scope of habeas review. Second, the petition should be dismissed as unripe because Posada failed to show, as required under *Zadvydas,* a "good reason to believe" that there is no significant likelihood that he could be removed in the reasonably foreseeable future. 533 U.S. at 701.

The magistrate judge agreed that "the scope of habeas review does not extend to review of factual or discretionary determinations." R&R at 8. Although he did not recount all of the agency's findings on Posada's flight risk and dangerousness, he revised or contradicted none of them. He observed, with respect to the series of hotel and restaurant bombings in Cuba during 1997 which resulted in the death of an Italian tourist, that Posada "essentially admitted his involvement, showing no remorse." R&R at 5. He further noted Posada's concession during removal proceedings that he "committed a serious non-political crime outside the United States," a conviction for Crimes Against National Security which arose out of Posada's plot to kill Fidel Castro with a car bomb at a summit of Latin American leaders in Panama in 2000. R&R at 1; *see* Exh. G, attached to the Government's Motion To Dismiss the Habeas Petition ("Motion to Dismiss") (references to "Exh.," hereinafter, are to the exhibits attached to the Motion to Dismiss) at 2 (citing § 1231(b)(3)(B)(iii)); Exh. H at ¶ 7, 25 (reflecting that Posada's conviction for Crimes Against National Security, in particular, cannot be entered unless it is proven that the accused "possesses bombs or any explosive, flammable, asphyxiating or toxic substance or

material that are intended to make bombs."); Exh. I (*Unclassified Department of State Cable*, *2000PANAMA04397*) at 19 (Posada "freely admitted that his group had come to Panama intending to kill Castro with a car bomb.").

In short, the magistrate judge took issue with none of the DHS's findings on Posada's flight risk or dangerousness, and, in fact, underscored those findings with his own observation that Posada showed no remorse for his participation in terrorist plots and attacks on tourists in Cuba. *See* R&R at 5.

The magistrate judge disagreed that Posada's failure to meet his *Zadvydas* burden rendered his petition premature and subject to dismissal. Rather, he found that the Government's argument directly "addresses the merits of Petitioner's claim, not ripeness, " although he agreed that Posada's petition was premature to the extent that he "did not petition for a custody review after the expiration of the six-month [*Zadvydas*] presumptive period," as required under 8 C.F.R. §§ 241.4, 241.13. R&R at 11, 13. Exhaustion of administrative remedies is "generally required" in the Fifth Circuit "before seeking a writ in federal court." *Id.* at 12 (citing *Fuller v. Rich*, 11 F.3d 61, 62 (5th Cir. 1994)). He decided nonetheless, as a prudential matter, that to require Posada "to further exhaust his administrative remedies would be futile and only cause further delay." *Id.* at 13.

As to Posada's *Zadvydas* burden, the magistrate judge observed that the "information regarding [Posada's] many potential contacts undercut his contention that his removal was not reasonably foreseeable." R&R at 16-17. He nonetheless agreed with Posada that "both his and the government's efforts in obtaining removal documents have failed." *Id.* at 17.

In November 2005, DHS requested travel documents for Posada from the consulates of

Canada, Honduras, Costa Rica, Panama, El Salvador, Mexico, and Guatemala. *Id.* Each declined. *Id.* at 15. However, Posada himself subsequently conceded that he had multiple removal prospects, notwithstanding the prior consulate refusals. On January 23, 2006, Posada advised DHS in writing that he had many associates, friends, and contacts arising out of his fifteen-year period of residence in Central America, in such countries as Panama, El Salvador, Honduras, and Guatemala, including "high rank government functionaries" in El Salvador. *See* Exh. K (*Letter to Office of Detention and Removal, ICE El Paso, from Attorney Soto*, January 23, 2006) and L (*Posada's written answers to ICE questionnaire*, January 23, 2006) at 6. He stated that these contacts could assist him in obtaining travel documents. *Id.* He stated that one of his contacts said he was informed by the Honduran foreign minister that "the government was changing," and "maybe [Posada's request for acceptance there] could be resolved with the new government." *Id.* at 19.

On April 12, 2006, Posada provided further promising leads regarding his removal options. He noted that a co-defendant in the Panamanian national-security case, who like Posada was convicted and later pardoned, now resides in Panama. Exh. M at 2. He provided further detail regarding his "high rank [Salvadoran] government" contacts, noting that they included two congressmen, a colonel, a general, an "ex Minister of Defense," as well as the current "Minister of Environment." *Id.* He added that he has "friends that have a close relationship with the current [Salvadoran] President Antonio Saca, and can get in contact with him." *Id.* at 3.

Additionally, he provided information on more than twenty individuals in countries such as Venezuela, Panama, Honduras, Guatemala, and El Salvador, who could assist him in his removal efforts, including the "Ambassador of El Salvador in Guatemala," a "Friend of ex

President of Panama," and the "ex President of Honduras Congress." *Id.* at 3-4. He noted that "[a]ll of these names are of individuals that have previously occupied high rank government positions and have relations with the present Government and will serve to negotiate a deportation." *Id.* at 4.

"As previously mentioned," he wrote, "my long time friends especially in El Salvador, assisted in the Presidential Campaign of Antonio Saca, and have a close relationship with him." *Id.* "[T]hey will intiate pertinent steps for my deportation," he said. *Id.* He added that another "friend, General Gustavo Adolfo Perdomo," is the "advisor of the President in the Department of Internal Affairs, Rene Figueroa, [and] is of easy access through his personal friend Jose Sanfeliu." *Id.* He stated that these "individuals that will be traveling soon to El Salvador will contact Mr. Sanfeliu and President Antonio Saca." *Id.* Finally, he notified ICE that in April 2006 he would send an intermediary by the name of Ignacio Castro Matos to "Panama, Honduras, and El Salvador . . . to make contacts and negotiate the acceptance of my deportation in one of those countries." *Id.*

At the August 14, 2006, hearing before the magistrate judge, Posada's friend, Miguel Jimenez, and not Matos or any others, testified regarding these efforts. R&R at 14-15. Jimenez testified that he acted as Posada's intermediary in seeking to negotiate his acceptance in Honduras, El Salvador, or Panama. *Id.* at 14. He said that he contacted "Fernando Valdez," another "friend of Mr. Posada's," who has "good relations in those countries," and that Valdez then acted on his behalf. Transcript of August 14, 2006, hearing before Magistrate Judge Norbert Garney ("Tr.") at 7. Jimenez testified that Honduras ultimately rejected their overtures at the presidential level. *Id.* Regarding El Salvador, Jimenez said that Valdez contacted "Carlos

Moran," an individual who Jimenez said has "very good connections in the political circles of El Salvador." *Id.* at 8. Jimenez said that Moran told Valdez that "some figures" close to the Salvadoran president said that "the government of El Salvador was also not willing to allow Mr. Posada [admission to the country]." *Id.* at 8.

However, on cross-examination, Jimenez conceded that, to his knowledge, "Moran never disclosed who in the Salvadoran government he contacted," or "even which government ministry he contacted with respect to this matter." *Id.* at 14. Significantly, although he said these communications occurred in May of 2006, *id.* at 12, Deportation Officer Donald George testified Posada informed him a month later, that he "was still 'waiting to hear from El Salvador.'" R&R at 15 (quoting Tr. at 32).

Regarding Panama, Jimenez stated that Valdez contacted an attorney in Panama named "Rogelio Cruz," who stated that he "didn't think that it would be proper to make any arrangements at that time, because an investigation was opened up . . . in relation to Mr. Posada's leaving Panama" in 2004, following his pardon for crimes against national security. *Id.* at 8; *see id.* at 17. Jimenez testified that, as a result, no "official contacts [were] made with the Panamanian government" to accept Posada there. *Id.* at 15.

The foregoing unfinished business notwithstanding, the magistrate judge found that Posada "has in fact met his burden" under *Zadvydas* to provide "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." R&R at 17-18. Citing a Middle District of Pennsylvania case, *Gui v. Ridge*, 2004 WL 1920719 (M.D. Pa. Aug 13, 2004) (not reported in F.Supp.2d), he noted that Posada was not required by *Zadvydas* to "show that removal is impossible." *Id.* "As a practical matter, considering Petitioner's notoriety,

the Court finds that it is unlikely that any country other than Cuba or Venezuela would be willing to accept him," despite Posada's demonstrated history of having lived and cultivated high level acquaintances for the past two decades in any number of these countries. *Id.* at 18.

"Once Petitioner meets his burden," the magistrate judge said, "the Respondents are required to respond with sufficient evidence to rebut that showing." *Id.* (citing *Zadvydas*, 533 U.S. at 701). However, the magistrate judge found that the Government presented no evidence to show that any "action has been taken in the last nine months to procure travel documents." Thus, he concluded that Posada's "removal is remote at best," *id.* (citing *Gui*, 2004 WL 1920719 at *6), and that he had met is burden under *Zadvydas.*

The magistrate judge observed that statutory and regulatory mechanisms exist for detaining an alien who presents "issues of terrorism, special circumstances, or matters of national security," when removal is not foreseeable. *Id.* at 20-22 (quoting *Zadvydas*, 533 U.S. at 696) (internal quotations omitted). He cited: (1) 8 U.S.C. § 1226a, authorizing continued detention for additional periods of up to six months of any alien whose removal is not reasonably foreseeable and who has engaged in terrorist activities, or otherwise presents a threat to the national security; (2) 8 U.S.C. §§ 1531-1537, authorizing the detention of alien terrorists, based upon classified information, during proceedings in the Alien Terrorist Removal Court; and (3) the continued detention, under 8 C.F.R. §§ 241.14(c) & (d), of aliens whose release would pose serious adverse foreign policy consequences for the United States, or who present national security or terrorism concerns. R&R at 20-22. He noted that the Government has "not moved to detain Petitioner under any" of these authorities thus far. *Id.* at 22.

DISCUSSION

This Court should decline the magistrate judge's recommendation and dismiss the petition because Posada has failed to meet his burden under *Zadvydas* to show "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701. Should the Court find that he has met this threshold burden, the Court should afford DHS the reasonable interval contemplated by *Zadvydas* to investigate and determine the validity of Posada's conclusory assertions that his unfinished efforts to effect his own removal are sufficient and "have all failed." Pet. Reply at 7. Should the Court decline the foregoing arguments, it should nonetheless grant the Government time to consider the post-*Zadvydas* regulatory framework under which an alien may be detained under special circumstances implicating national security and foreign policy concerns. *See* 8 C.F.R. §§ 241.14(c), 241.13(e)(6); *see also* Attachment A (Interim Decision to Continue Custody). Exercise of those authorities would moot this petition.

1. Posada's Failure To Meet The *Zadvydas* Burden Requires A Jurisdictional Dismissal

The magistrate judge erroneously concluded that Posada's threshold *Zadvydas* burden went to the merits, not ripeness, and therefore found Posada's petition ripe for review. R&R at 11. However, in this case "the jurisdictional question and the merits collapse into one." *Ye v. INS*, 214 F.3d 1128, 1131 (9th Cir. 2000). Where an alien cannot meet his initial burden under *Zadvydas*, his case is necessarily premature and must be dismissed, even if his showing would also speak to an ultimate merits inquiry under *Zadvydas*.

Prematurity here is further underscored by the magistrate judge's observation that Posada

failed to exhaust his administrative remedies when he failed to petition the agency for release as required by the regulations. R&R at 13 (finding that Posada "did not petition for a custody review after the expiration of the six-month presumptive period"). While he excused this default on grounds of futility, the magistrate judge highlighted the critical issue before the Court: whether his case is premature because Posada failed *to show the agency* that his removal was unlikely in the reasonably foreseeable future. See 8 U.S.C. 1231(a)(6) (assigning the agency as the primary decision maker in post-order custody matters); 8 C.F.R. 241.4, 241.13.

As the Fifth Circuit has noted, exhaustion of remedies and ripeness are related principles designed to prevent the courts from rendering advisory opinions on premature disputes. *See, e.g., American Airlines, Inc. v. Herman,* 176 F.3d 283, 287 (5th Cir. 1999) (observing that courts often decline to review an agency action because it is not final, it is not ripe, or the petitioner did not exhaust available administrative remedies, and that "in many circumstances, the three doctrines are difficult to distinguish, because the same considerations of timing and procedural posture often can support a holding based on ripeness, finality, or exhaustion") (citing Kenneth C. Davis & Richard J. Pierce, Jr., 2 *Administrative Law Treatise* § 15.1 at 305-06 (3d ed. 1994) (citing *Ticor Title Ins. Co. v. Federal Trade Comm'n*, 814 F.2d 731 (D.C.Cir. 1987), in which each of the panel judges relied on a different doctrine in reaching the same result)); *see also United States v. White*, 431 F.3d 431, 436 (5th Cir. 2005) (holding that the "district court's order is not ripe for review" where "exhaustion of administrative procedures" was lacking.); *Liberty Mut. Ins. Co. v. Brown*, 380 F.3d 793, 799 (5th Cir. 2004) ("Because Liberty Mutual did not avail itself of adequate state procedures for obtaining compensation, its federal takings claim is not ripe.").

In short and as demonstrated below, Posada's petition remains unripe because he has failed to show DHS "good reason" to believe there is no significant likelihood of removal in the reasonably foreseeable future. Neither *Zadvydas*, nor the applicable regulations, required the agency to release Posada or further consider his request for release, based upon that deficient showing, and the magistrate judge erred in finding otherwise.

2. Posada Cannot Meet His Burden Under *Zadvydas* With Conclusory Assertions

The magistrate judge erroneously concluded that Posada's conclusory, non-specific, and unverified submissions satisfied his *Zadvydas* burden. In *Zadvydas,* the Supreme Court emphasized that "an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future," and imposed the initial burden upon the alien seeking release to show "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701. The magistrate judge significantly erred in finding that Posada had offered such a "good reason," despite the conclusory and unverified nature of his contentions.

Posada's showing under *Zadvydas* was plainly deficient. It must first be evaluated in relation to the expectations Posada himself raised in his prior statements to ICE. In January and April 2006, in written submissions bearing his signature, Posada touted his high-level government connections abroad and declared his intention to dispatch as an emissary, Ignacio Castro Matos, to negotiate with the governments of three countries which Posada regarded as especially promising as potential removal destinations: El Salvador, Honduras, and Panama. *See* Exh. M (*Supplemental Requirements to Assist in Removal of Luis Posada-Carriles*, April 12,

2006) at 2 (listing among the "high rank government functionaries" with whom he socialized in El Salvador, two congressmen, a colonel and a general, an "ex Minister of Defense," as well as the current "Minister of Environment"); *id.* at 3 (adding that he has "friends that have a close relationship with the current [Salvadoran] President Antonio Saca, and can get in contact with him); *id.* at 3-4 (providing a list of more than twenty individuals, from the countries of Venezuela, Panama, Honduras, Guatemala, and El Salvador, including the "Ambassador of El Salvador in Guatemala," a "Friend of ex President of Panama," and the "ex President of Honduras Congress," individuals, moreover, that he noted "have previously occupied high rank government positions and have relations with the present Government and will serve to negotiate a deportation"); *id.* at 5 (declaring that "my long time friends especially in El Salvador, assisted in the Presidential Campaign of Antonio Saca, and have a close relationship with him"); *id.* (referencing others who were "of easy access" to the President of El Salvador); *id.* (promising to send "Mr. Ignacio Castro Matos to Panama, Honduras, and El Salvador . . . to make contacts and negotiate the acceptance of my deportation in one of those countries, especially in Honduras where they are open-minded to my petition.").

On June 21, 2006, however, anticipating the habeas hearing, Posada declared through counsel that, "unfortunately," his "attempts to secure travel documents . . . have all failed." Petitioner's Reply at 7. In an affidavit, also dated June 21, 2006, Posada attested that he "personally attempted to obtain travel documents from the government of Honduras," without success, and that he "personally contacted" various individuals "in order to get travel documents from the country of El Salvador," also without success "until now." *See id.* at Exhibit A (Affidavit of Luis Posada-Carriles, dated June 21, 2006). Absent was any indication of efforts

with respect to Panama, or that, as previously indicated, Mr. Ignacio Castro Matos – or any individual – had been dispatched to negotiate directly with the governments of Honduras, El Salvador, or Panama. *See id.* These material omissions on the eve of his hearing, with regard to the expectations that he had so recently and dramatically raised, clearly did not satisfy his *Zadvydas* burden, because they fell so far short of the active negotiations that Posada had promised would take place.

At the hearing on August 14, 2006, Miguel Jimenez testified that efforts to secure Posada's admission to Honduras, El Salvador, or Panama were unsuccessful, and that Honduras's President specifically declined, but Jimenez offered only conclusory and non-specific testimony regarding El Salvador. Tr. at 6-17. He said that one individual (Valdez) contacted another individual (Moran) who contacted other individuals in the Salvadoran government. These unnamed and unspecified individuals from unspecified government ministries reportedly stated that El Salvador would not accept Posada. *See* Tr. at 14. Jimenez testified that these negotiations had been completed in "the month of May 2006." *Id.* at 12. This directly contradicted ICE Officer Donald George's testimony that in early July 2006, more than a month later, Posada informed him he was still "waiting to hear from El Salvador." Tr. at 32. Officer George stated Posada's outlook was "hopeful" in early July. Although Officer George allowed that as the month progressed, "it didn't look good," he said Posada "was still hopeful." *Id.* On this record, Posada has a significant and unresolved conflict between Jimenez's assertion that their request was definitively refused in May 2006 and Posada's own statement, more than a month later, that he was still "waiting to hear from El Salvador." *Id.*

The evidence regarding Panama was equally unhelpful to Posada. Having included

Panama among his three most promising removal destinations, Posada failed in his June 21, 2006, pre-hearing affidavit to report on any efforts whatsoever to gain admission there. *See* Exhibit A to Petitioner's Reply. At the August 14th hearing, his witness, Miguel Jimenez, provided startling testimony that Panama had recently initiated an official investigation into the circumstances surrounding Posada's departure from Panama following a pardon for his conviction for Crimes Against National Security. Tr. at 8, 17. Clearly, a reasonable inference could be drawn that Posada himself would be a critical witness in such an investigation, or that the very fact of the investigation implied a reexamination of the legality of Posada's pardon and release from a lengthy prison sentence. The magistrate judge improperly disregarded the implications of this testimony, as well as its relevance to assessing any likelihood that Panama might be interested in having Posada transferred to that country to submit to an investigation.

Similarly, the magistrate judge erroneously accepted Jimenez's bare explanation for their decision to ignore the Panamanian option. Jimenez merely noted that "the officials that could assist were under investigation by the government." R&R at 14. But closer scrutiny reveals that of the officials that Jimenez said were under investigation, only one – "Carlos Bares – ex Panama Chief of Police" – was mentioned by Posada in his April 12, 2006, submission to ICE, as one of the "high rank government" officials in Panama who would "serve to negotiate a deportation." Exh. M at 4. Posada's list identified two other prospective contacts, Carlos Arece and Mireya Rodriguez, and Jimenez provided nothing to indicate that they are targeted in the Panamanian investigation or are unable to act on Posada's behalf. *Id.* Thus, the magistrate judge failed to reconcile conflicts in the evidence which called into question Posada's assertion that his efforts "have all failed." Indeed, through his witness's testimony and the material omissions in his

statements to ICE in January and April 2006, Posada has openly conceded that some of those efforts have not even been undertaken.

If the alien's burden under *Zadvydas* is to have any meaning, it must require more than conclusory statements, unverified assertions, and unexplained failures to pursue previously outlined prospects for removal. In a recent application of the *Zadvydas* framework, the Fifth Circuit observed that "[t]he alien bears the initial burden of proof in showing that no such likelihood of removal exists," and held that the alien could not meet that burden through "conclusory statements suggesting that he will not be immediately removed to Cape Verde." *Andrade v. Gonzales*, — F.3d —, 2006 WL 2136397 at *3 (5th Cir., Aug. 1, 2006). *Andrade* involved an alien "detained for more than three years at the time his habeas appeal," and the Fifth Circuit decided that he may nonetheless be held "'in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.'" *Id.* (citing 533 U.S. at 701).

Andrade is instructive not only because Posada's conclusory evidence should be similarly rejected, but also because *Andrade* involved an alien with only one country as a removal option. Posada's multiple, as-yet unexhausted options, should thus increase his burden because the Supreme Court recognized the need for a flexible application of the burden in relation to the circumstances presented in each individual case. *See* 533 U.S. at 701 (construing the presumptive period from "practical[] necess[ity]," and observing that the Ninth Circuit erred by resting its release decision "solely upon the 'absence' of an 'extant or pending' repatriation agreement without giving due weight to the likelihood of successful future negotiations").

Emphasizing that Posada "has been in compliance with all requests for information, and

has cooperated with removal efforts," the magistrate judge short-circuited the required analysis. R&R at 17. It was not Posada's failure to provide information, but the significance of information he provided (and his subsequent failure to follow through) that disables his *Zadvydas* showing. The Fifth Circuit has cautioned against effectively allowing the alien to control the outcome of his custody review by, for example, manipulating the success of his own efforts to his advantage. *See Balogun v. INS*, 9 F.3d 347, 351 (5th Cir. 1993) (holding "that if petitioner by his conduct intentionally caused the delay of which he now complains, it would be inequitable to allow him to benefit from that delay."). Yet that is precisely what the magistrate judge is allowing Posada to do in this case by accepting his deficient efforts and unsupported statements.

In sum, this Court, on de novo consideration of this record, must find that Posada has not met his *Zadvydas* burden, and as such, that the petition must be dismissed for lack of jurisdiction.

3. The Magistrate Judge Erred In Prematurely Requiring The Instantaneous Rebuttal of Posada's Insufficient Showing

Even if the Court were not to dismiss the petition, it must find that the magistrate judge erred by depriving the Government an opportunity to investigate and test Posada's insufficient showing, and then prepare a rebuttal case.

This Court affords the Government an opportunity to present a rebuttal case *after* it has been determined that the alien has met his *Zadvydas* burden and following the disposition of the Government's motion to dismiss. *See Abdulle v. Gonzales*, 422 F.Supp.2d 774, 779 (W.D. Tex. 2006) (ordering Government to present rebuttal only after determination that the petitioner had shown "a good reason to believe" he would not be removed in the reasonably foreseeable future). The magistrate judge's recommendation violates *Abdulle*, because it deprives the Government of

an adequate opportunity to investigate Posada's insufficient allegations – some of which surfaced for the first time at, or just prior, to the habeas hearing on August 14th – and to present a rebuttal case. The magistrate judge condensed into one step what the Supreme Court, and this Court in *Abdulle*, contemplate as a two step process.

In *Abdulle*, a Somalian alien was detained for more than one year after the expiration of the *Zavydas* presumptive period before the Court decided that he had "sufficiently pled a good reason to believe that Respondents will not effectuate his removal in the reasonably foreseeable future." 422 F.Supp.2d at 779. Only at that point did the Court require the Government to rebut the "Petitioner's showing," and in doing so, the Court afforded the Government one month in which to present its case. *Id.* at 779 (ordering on March 28th that the Government show cause by April 28th why the petition should not be granted).

Like the Fifth Circuit's *Andrade* case, *Abdulle* involved an alien with only one potential removal destination. The breadth of Posada's options and multiple unfinished leads in his case warrant more time for Government examination and response than the month accorded there.

Finally, the magistrate judge excused Posada's filing nearly a month prior to the expiration of the presumptively reasonable six-month removal period specified in *Zadvydas*, because eventually the period expired and Posada's action then matured, at least to that extent. *See* R&R at 10-11. But Posada's premature filing, though perhaps cured by the passage of time, is emblematic of his overall effort in this case, to jump the gun and reach the end of a process before its proper completion, and to simply declare that all his efforts have failed, when many have not even been made.

For these reasons, the Court must reject Posada's showing as insufficient under *Zadvydas*.

It should find that the merits and jurisdictional inquiries in this case have merged, requiring the dismissal of this petition for lack of ripeness. Alternatively, the Court should enforce the burden-shifting framework set forth in *Zadvydas* and applied by this Court in *Abdulle*, and provide the agency additional time to carry out its primary role in administering Posada's post-removal-order custody, to investigate and test the sufficiency of his assertions, and to present a rebuttal of his *Zadvydas* showing.

4. In the Absence of a Jurisdictional Dismissal, Or a Rebuttal Opportunity, The Court Should Grant the Government Time To Consider Continued Detention Under the Regulations Authorizing Detention In Special Circumstances

Should the Court decline the foregoing arguments, it should nonetheless grant the Government time to consider the post-*Zadvydas* regulatory framework under which an alien may be detained under special circumstances implicating national security and foreign policy concerns. *See* 8 C.F.R. §§ 241.14(c), 241.13(e)(6); *see also* Attachment A (Interim Decision to Continue Custody)(including notification to Posada that review proceedings have been initiated to determine whether he may be further detained under § 241.14(c) because his release would pose a serious adverse foreign policy consequence for the United States). Exercise of this authority would moot the claims raised in this petition.

Regulations promulgated in the wake of the *Zadvydas* decision provide for the orderly analysis of first, removal prospects, and second, for continued custody while the Government considers whether an alien whose removal is not reasonably foreseeable should be continued in custody under one of multiple authorities in 8 C.F.R. § 241.14. The magistrate judge's Report and Recommendation addressed only the first issue and left open the possibility of detention

under 8 C.F.R. § 241.14. R&R 20-22. Following the magistrate judge's Report and Recommendation and out of an abundance of caution, DHS initiated the procedures for considering whether Posada's custody should be continued under such regulation. On October 5, 2006, it notified Posada of its Interim Decision to Continue Custody and its commencement of the procedures provided in 8 C.F.R. § 241.14. *See* Attachment A (Interim Decision To Continue Custody, including notification to Posada of the commencement of procedures under 8 C.F.R. § 241.14); *see also* 8 C.F.R. § 241.13(e)(6). The regulations provide that in appropriate cases ICE "may initiate review proceedings under § 241.14 before completing the HQPDU review under this section [241.13]." 8 C.F.R. § 241.13(e)(6). They further require ICE to continue the detention of any alien "for whom it has determined that special circumstances exist and custody procedures under § 241.14 have been initiated." 8 C.F.R. § 241.13(b)(2)(i). Thus, the regulations require preservation of the status quo in cases where a final determination has not yet been made on whether the alien's removal is not significantly likely under the *Zadvydas* analysis and accompanying regulations, but where special circumstances in the alien's case may require his continued detention pursuant to the special provisions in 241.14, should a final determination be made that his removal is not likely in the reasonably foreseeable future. *Id.* (providing that ICE "shall continue in custody any alien" for whom there is no significant likelihood of removal, pending a further determination on whether such an alien's detention is required under the special circumstances provided in

§ 241.14).

Thus, ICE initiated review proceedings regarding Posada under 8 C.F.R. § 241.14(c), one of the authorities for continued custody referenced in the magistrate judge's

decision. *See* R&R at 20-22. Accordingly, should this Court order Posada's release upon a finding that there is no significant likelihood of removal in the reasonably foreseeable future, the contingent custody authority provided under the regulations will take effect. The activation of that authority, moreover, will moot the claims in the instant petition because they only challenge the prior custody basis. *See Al Najjar v. Ashcroft*, 273 F.3d 1330 (11th Cir. 2001).

CONCLUSION

For these reasons, the Court should grant the Government's motion to dismiss the habeas petition for lack of jurisdiction. Alternatively, the Court should enforce the burden-shifting framework set forth in *Zadvydas* and applied by this Court in *Abdulle*, and provide the agency additional time to present a rebuttal case. Should the Court deny these requests, however, the Court should provide the Government an opportunity to consider and brief Posada's further detention under 8 C.F.R. § 241.14(c).

Respectfully submitted,

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