UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-21553-Civ-COOKE/GOODMAN

PATRICK GAYLE, *et al.*,

Petitioners-Plaintiffs, on behalf of themselves and those similarly situated,

v.

MICHAEL W. MEADE, *et al.*,

Respondents-Defendants.
_____/

PETITIONERS' OBJECTION TO AMENDED REPORT AND RECOMMENDATION CONCERNING CLASS CERTIFICATION [ECF 123]

Petitioners[1] largely agree with the Magistrate's recommendations, specifically that class certification is proper to address ICE's inadequate and unconstitutional responses to the COVID-19 crisis. But the Amended R&R proposes two important limitations on the class that we contend are legally unjustified and if accepted, will gut the Court's ability to provide meaningful relief. Petitioners therefore object to the Amended R&R's proposals to exclude (1) habeas corpus claims seeking release and (2) the claims of transferred Class Members challenging ICE's insufficient measures to contain the risk of COVID-19 infection.

I. The Court Should Include the Habeas Claims in the Class.

A. The Court Can Adjudicate Common Issues Related to the Habeas Claims.

The Amended R&R erroneously concludes that the Court cannot adjudicate common issues concerning Petitioners' habeas claims. [*See* ECF 123 at 40.] In doing so, the Amended R&R focused on a single Illinois district court decision, *Money v. Pritzker*, concluding that class certification is not appropriate for Petitioners' habeas claims here. Relying on *Money*, the Amended R&R concludes that the decision of whether to release Petitioners is too individualized to satisfy the commonality element for class certification. *Id*. at 42-43.

[1] For ease of reference, we refer to the Petitioners-Plaintiffs as "Petitioners" and the Respondents-Defendants collectively as "ICE."

With respect, this reliance on *Money* is misplaced. In *Money*, people in criminal incarceration in Illinois sought class certification for their release based on violations of the Eighth Amendment. *Money v. Pritzker*, --- F.Supp.3d ----, 2020 WL 1820660, at *6 (N.D. Ill. Apr. 10, 2020). In response to the COVID-19 pandemic, the Illinois Department of Corrections enacted a host of measures to protect the inmates and prison employees, including, among other things, increased hygiene and sanitation, separating prisoners through administrative quarantine, suspending admissions of new prisoners from county jails, activating the National Guard to provide additional medical support, granting petitions for commutations, expedited procedures for releasing inmates early for good behavior, and granting additional medical furloughs. *Id*. at *4. Most importantly, the department had reduced its prison population by more than 1,000 prisoners. *Id*. It did so by conducting individualized reviews of inmates to determine whether they were eligible for early release. *Id*.

The Plaintiffs sorted themselves into six subclasses, each of which had a different characteristic relevant to their release. *See id.* at *13. This proved to be a problem for the district judge because while "[t]here are many questions common to the putative class members that bear on the subject of this litigation. . . . none of those questions is likely to drive the resolution of the case." *Id*. at *14. That is because the government in *Money* agreed and, by the plaintiffs' admission, were already taking many of the actions the plaintiffs requested. *Id*. "Plaintiffs simply want the Court to prod the defendants to act more quickly." *Id*. (internal quotation marks omitted). To do so, the Court held, would require too much of an individualized analysis. *Id*. at *14-15

Unlike the petitioners in *Money v. Pritzker*, Petitioners here all address a common threshold issue: that ICE has failed to consider them for release under the proper standard. Unlike the *Money* respondents, ICE has steadfastly refused to recognize how COVID-19 has unsettled the constitutional moorings for civil detention—and therefore that substantially greater justifications for the continued detention of Petitioners are needed to satisfy due process. Thus, here, threshold questions of what due process demands for civil detention under these circumstances and whether ICE is violating those demands by woodenly applying pre-Pandemic criteria for release are common to all putative Class Members because they are all in ICE custody due to ICE's unconstitutional standard. *See Zadvydas v. Davis*, 533 U.S.

678, 690 (2001) (noting Government's reduced justifications for civil immigration detention as compared to criminal incarceration). Petitioners' habeas claims therefore satisfy the commonality requirement of Rule 12(a)(2) because the claims present common questions, including what the constitutional standard for release is during the COVID-19 pandemic and whether ICE is applying it. These common questions satisfy Rule 23(b)(2) because ICE has acted commonly towards the class in failing to fundamentally alter its standard for release in light of COVID-19.

Notably, as the Amended R&R notes on page 42, commonality need not be perfect, and the mere fact that the Court may need to make some individual inquiries to resolve the remedial issues does not defeat class certification. *See generally In re Disposable Contact Lens Antitrust,* 329 F.R.D. 336, 420 (M.D. Fla. 2018) (quoting *Leyva v. Medline Indus., Inc.,* 716 F.3d 510, 514 (9th Cir. 2013)). Instead, even in a Rule 23(b)(3) damages class action (which, in contrast to Rule 23(b)(2), entails the tall burden of showing **predominance** of common issues), certification can be proper if "damages are capable of measurement on a classwide basis . . . and questions of individual damage calculations cannot overwhelm questions common to the class." *In re Disposable Contact Lens Antitrust,* 329 F.R.D. at 421 (quoting *Comcast Corp. v. Behrend,* 569 U.S. 27, 34 (2013)). Nearly all class actions require courts to make some sort of individualized tailoring to determine remedy issues, but that does not defeat certification so long as **liability** can be established through classwide adjudication.

Here, Petitioners' habeas claims focus on ICE's overall policy and practice of not releasing people despite the increased dictates of due process in light of the COVID-19 pandemic. To be sure, once the Court decides where the constitutional line falls in light of COVID-19 and whether ICE has been applying that line appropriately, additional work may be needed at the remedy phase to conclude which side of the line a given Class Member falls on. But this type of claims process is typical of certified classes and in no way shows that these claims fail to satisfy the low threshold that applies to a Rule 23(b)(2) class in a civil rights case.

Because common questions exist and because ICE has acted, and continues to act, commonly towards the Class, Petitioners' habeas claims are amenable to class treatment.

B. *Padilla* Does Not Presumptively Deprive this Court of Jurisdiction Over the Habeas Claims of Putative Class Members Transferred Outside this District.

Petitioners respectfully submit that the Amended R&R errs in reading *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), to preclude jurisdiction over the habeas claims of putative Class Members who were transferred after this suit was filed. [ECF 123 at 52-54.] According to the Amended R&R, *Padilla* qualified the Supreme Court's earlier case in *Ex parte Mitsuye Endo*, 323 U.S. 283, 306 (1944), and in the wake of *Padilla*, the transfer of a habeas petitioner outside of the District deprives the Court of jurisdiction unless the petitioner shows that the transfer was an attempt to "manipulate" the district courts' respective jurisdiction. [*Id.* at 53-54 (emphasis omitted).] But this overlooks the key factual component of *Padilla*: the *Padilla* petitioner transferred out of the district where he filed his petition "**before** his lawyer filed a habeas petition on his behalf." 542 U.S. at 441 (emphasis added). Petitioners here seek only to include in the Class people who have been in custody at one of the relevant facilities **since** the suit was filed. *Padilla* therefore does not apply.

The seminal case in this area is *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944). In *Endo*, an American citizen of Japanese dissent was interned in California by the War Relocation Authority (WRA) and filed a habeas petition in the Northern District of California, naming an official of the WRA as the respondent. 323 U.S. at 285. After she filed her petition, the government transferred her to Utah. *Id.* at 285. The Supreme Court held that the Northern District of California retained jurisdiction over the habeas petition, even though the petitioner and her immediate custodian were now in Utah. *See Endo,* 323 U.S. at 306. As the Court explained, "the District Court acquired jurisdiction in this case and . . . the removal of Mitsuye Endo did not cause it to lose jurisdiction where a person in whose custody she is remains within the district." *Id.*

In *Padilla*, the Court acknowledged its prior holding in *Endo* that "the District Court could effectively grant habeas relief despite the Government-procured absence of petitioner from the Northern District." *Padilla*, 542 U.S. at 441. But the *Padilla* petitioner could not avail himself of *Endo* because "Padilla was moved from New York to South Carolina **before** his lawyer filed a habeas petition on his behalf." *Id.* (emphasis added). And, "[u]nlike the District Court in *Endo*, . . . the Southern District [of New York] **never acquired** jurisdiction over Padilla's petition." *Id.* (emphases added).

Accordingly, the order of operations is key. If the transfer occurs **before** the habeas action is filed, then *Padilla* applies, and the petition must be filed in the district where the petitioner resides at the time of filing. But, if the petition is filed before the transfer, then *Endo* applies and the subsequent transfer by the government does not oust the Court of jurisdiction.[2]

Multiple courts have recognized this distinction. For example, in *Stokes v. U.S. Parole Comm'n*, 374 F.3d 1235, 1236 (D.C. Cir. 2004), the petitioner (who was then incarcerated in an Ohio prison and subsequently moved to a facility in South Carolina) filed his habeas petition in the District of Columbia. In determining that *Endo* did not help the petitioner's cause, given that he filed his petition in the District of Columbia (and not in Ohio where he was first incarcerated), the D.C. Circuit explained that *Endo* did not relax the immediate custodian rule, "but rather recognized the **continuing jurisdiction** of the court in which that rule is first satisfied." *Stokes,* 374 F.3d at 1238 (emphasis added). Specifically, the D.C. Circuit reasoned that "if Stokes had filed his petition in the. . . Northern District of Ohio, naming the Ohio warden as the respondent, then under *Endo* that court would have retained jurisdiction over his petition notwithstanding Stokes's later transfer to the federal penitentiary in South Carolina where he is now incarcerated." *Id.* at 1239. However, because Stokes instead filed his petition in the District Court for the District of Columbia, like in *Padilla*, the District for the District of Columbia "**never acquired jurisdiction** over his petition." *Id.* (emphasis added); *see Rolin v. Parole Comm'n,* No. CIV.A. 10-00540-CG-N, 2011 WL 836682, at *3 (S.D. Ala. Feb. 8, 2011), *report and recommendation adopted*, No. CIV.A. 10-00540-CG-N, 2011 WL 855353 (S.D. Ala. Mar. 9, 2011) (recognizing that under *Padilla*, petitioner's subsequent transfer to the Oklahoma FTC did not divest the Alabama district court of jurisdiction over his previously filed § 2241 habeas petition seeking immediate release); *Guan-Hua Qiang v. Dist. Dir. for Immigration Customs Enf't*, No. CIV.A. 3:06-1508, 2006 WL 3762029, at *2 (M.D. Pa. Dec. 20, 2006) (under *Padilla*, "when a prisoner is transferred out of a judicial district **after** he has filed a petition for writ of habeas corpus . . . the district court in which the

[2] The Amended R&R does not discuss this sentence where *Padilla* distinguished *Endo*, making clear the dividing line that exists between a transfer that occurs before and a transfer that occurs after the petition is filed.

petition was filed retains jurisdiction over the case despite the fact that the prisoner, and his immediate custodian, lie in another federal district." (emphasis added)).

Here, like in *Endo*—and unlike in *Padilla* and *Stokes*—Petitioners only seek to represent a class of people who were being detained under the Miami Field Office's authority *when the petition was filed*. The fact that ICE **later** decided to transfer some of them does not divest the Court of jurisdiction.

Nor were the putative Class Members required to file separate actions or to join this one to preserve their rights. The Supreme Court has long recognized that "[a] federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 550–51 (1974) (providing that "claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) ("Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are **safeguards provided for his protection**." (emphasis added)). Because Petitioners are only asking to include in the class those who were held at Krome, Glades, or BTC **after** this action was filed, *Endo*—and not *Padilla*—is the controlling authority. The Amended R&R's contrary conclusion is incorrect as a matter of law, and the Court should reject it.

II. The Court Should Exercise Continuing Jurisdiction over the Claims of Transferred Putative Class Members Challenging their Conditions of Confinement.

The Amended R&R also concludes that "transfers to other facilities *do* moot claims for declaratory and injunctive relief" aimed at improving Petitioners-Plaintiffs' conditions of confinement. [ECF 123 at 56.] And on that basis, it recommends excluding the post-transfer conditions claims by putative Class Members who were transferred from this jurisdiction after this action was filed. [*Id.*] In doing so, the Magistrate relied on *McKinnon v. Talladega County, Alabama*, 745 F.2d 1360, 1363.

Respectfully, this is an error because it misconstrues Petitioners' claims as being specific to the three named facilities. To be sure, the class is held together on the ground that all putative Class Members were held by the same detaining authority in one of those three

facilities. But Petitioners are not challenging the conditions in those facilities as such; they are challenging the constitutionality of **their conditions of confinement** in ICE detention. And their claims do not focus on brick, mortar, or plumbing; they focus on policies, practices, and a virus—all of which will follow the putative Class Members wherever they go in ICE detention. Thus, when ICE transfers a putative Class Member, the Court's continuing jurisdiction follows.

Especially illustrative on this point is *Spears v. Thigpen*, 846 F.2d 1327, 1328 (11th Cir. 1988) (per curiam). In that case, the petitioner brought two sorts of claims. First, he alleged that the conditions of his administrative segregation at a specific facility "compared unfavorably to such segregation at other Alabama facilities." *Spears*, 846 F.3d at 1328. The Eleventh Circuit held that this facility-specific claim was mooted when he was transferred "to one of the facilities which he had alleged was better equipped and more adequate." *Id.* Second, he "asserted that the extended use of administrative segregation violate[d] the requirements of due process." *Id.* Because, following the transfer, the petitioner "remained in administrative segregation at the facility" to which he was transferred, his "due process claim continue[d] to present a live controversy" and was not moot, notwithstanding the transfer. *Id.*; *see also Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007), *abrogated on other grounds by Sossamon v. Texas*, 563 U.S. 277 (2011).[3]

So too, here: Petitioners challenge their conditions of confinement in ICE detention under the Fifth and Eighth Amendments and the *Accardi* doctrine on the grounds that ICE is violating the law and the Constitution and therefore exposing them to the risk of COVID-19 infection. Transferring putative Class Members to another facility does not magically cure that violation—quite the contrary, the record shows that ICE has been conducting the transfers in ways that **increase** the risk of infection. Thus, transferring putative Class Members to points distant does not moot these claims.

Nor can ICE rightly object that including in the Class the people who it unilaterally chose to transfer somehow expands the geographic scope of the case. Each of these people met the class definition before the transfer. Petitioners unsuccessfully moved the Court to preclude ICE from making additional transfers. And it was ICE who then unilaterally

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[3] *Smith*'s application here is discussed at page 10 of ECF 94.

decided to transfer them. Thus, if anything has expanded the geographic reach of the case, it is ICE. ICE's unilateral transfer decisions—made over Petitioners' objections—cannot now deprive the transferred putative Class Members of their day in court, and Petitioners do not understand that the Court intended this result in leaving ICE the power to continue transfers.

III. Excluding Habeas Claims and Transferred Individuals from the Class Would Severely Impair the Court's Ability to Provide Meaningful Relief.

It bears noting that the Amended R&R's proposed limits on the class definition are not just legally unjustified; they would also severely hamper the Court's ability to provide meaningful relief to the Petitioners and the putative Class as a whole. This, in turn, would erode the lawful purposes of this action under Rule 23.

The gravamen of the complaint is ICE's various violations of the law and the Constitution have put all people incarcerated at these three facilities at a legally intolerable, increased risk of contracting a highly contagious, potentially fatal virus. But as ICE's own arguments have emphasized, there is a hydraulic interrelationship between the various claims here. If ICE does not substantially reduce the populations at these facilities, then adequate social distancing and other measures will not be feasible. Likewise, if ICE reduces the populations at these facilities only by transferring the putative Class Members under unsanitary conditions to facilities that lack the ability to social distance, then the net result is only to shift (and indeed, worsen) the problem. Thus, taking releases and transfers off the table would hamstring the Court's ability to ameliorate the situation.

Indeed, this appears to be ICE's strategy: to insist that the Court has no authority to question either its detention-release decisions or its transfer detentions, and then, having taken the two biggest drivers of the risk off the table, to insist that it is doing its best under the circumstances that it created. The Amended R&R's proposed limits would only reward that strategy.

In this respect, it is notable that the Amended R&R [ECF 123 at 51] seeks to reassure that relief on behalf of the named Petitioners would benefit unnamed putative Class Members, citing *Dixon v. Ivey*, 2:20-CV-248-WHA, 2020 WL 2831065, at *1 (M.D. Ala. May 6, 2020), *report and recommendation adopted*, 2:20-CV-248-WHA, 2020 WL 2830983 (M.D. Ala. May 29, 2020). But *Dixon* has no bearing here. In that case, the court merely refused to certify a class because "a *pro se* inmate unschooled in the law" sought to represent the interests of all

inmates at his facility, and the court found that, given his lack of sophistication, he could not adequately represent the class as required by Rule 23(b)(4) and due process. *Id.* But, of course, neither ICE nor the Amended R&R suggested that Petitioners and their counsel lack the sophistication to prosecute this case.

More to the point, it is simply not the case that certifying a class with the Amended R&R's proposed limits would materially vindicate the unnamed putative Class Members' rights. Even if ICE released the named Petitioners still in its custody, that would do virtually nothing to help the remaining putative Class Members, as it would only reduce the population at the three facilities here by a collective total of 4.3 percent. It would not materially increase the opportunities for the social distancing that the record shows are the key to limiting COVID-19 spread. It would not prevent ICE from transferring the remaining putative Class Members in unsanitary circumstances to facilities where they could face similar or greater risks of infection. And it would not change ICE's refusal to get serious about releasing people given how the risk of COVID-19 infection fundamentally upsets the justifications for civil immigration detention. While mandating adequate soap, PPE, cleaning materials, and other protocols would help the unnamed putative Class Members, as the record shows, social distancing is the key. In short, imposing the Amended R&R's limits on the class here would fundamentally undermine the Court's ability to provide meaningful relief.

If the putative class members all filed separate suits in this Court, it is almost certain the claims would be consolidated together before one judge for common adjudication. While that would effectively recreate the class action, it would do so only at substantial administrative cost and the loss of invaluable time.

CONCLUSION

Petitioners have satisfied the requirements of Rule 23(a) and (b)(2). The Court should therefore certify the proposed class, without putting the Magistrate's proposed limits on the definition. Petitioners therefore request that the Court certify the following class:

> All civil immigration detained individuals held by Respondents at the Krome Service Processing Center ("Krome"), the Broward Transitional Center ("BTC"), or at Glades County Detention Facility ("Glades") when this action was filed, since this action was filed, or in the future.

Date: June 3, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all counsel of record.

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