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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Obed Fuentes-Barnett,
Petitioner,
v.
Jeff B. Sessions, et al.,
Respondents.

No. CV 17-00858-PHX-DGC (JZB)

ORDER

Petitioner Obed Fuentes-Barnett, A#206-103-051, filed through counsel a Petition Under 28 U.S.C. § 2241 for a Writ of Habeas Corpus by a Person in Federal Custody (Doc. 1) and has paid the \$5.00 filing fee. Petitioner shortly thereafter filed a motion for a temporary restraining order or a preliminary injunction (“Motion”) (Doc. 5). The Court will require Respondents Sessions, Kelly, and Lucero to answer the § 2241 Petition and a response to the Motion.

I. Petition

In his Petition, Petitioner names as Respondents: Attorney General Jeff B. Sessions; Secretary of the Department of Homeland Security John F. Kelly; Executive Office for Immigration Review Director Juan P. Osuna; Immigration and Customs Enforcement (ICE) Phoenix Field Office Director Enrique Lucero; and United States Immigration Judge (IJ) Richard Phelps.

Petitioner is a native and citizen of Mexico. Petitioner most recently entered the United States on May 20, 2015. In July 2016, DHS sought to reinstate Petitioner’s prior

1 order of removal under § 241(a)(5) of the Immigration and Nationality Act (INA).
2 (Doc. 1-1 at 1, Ex. A.) Petitioner expressed fear of returning to Mexico and was detained
3 by ICE for a Reasonable Fear Interview by the United States Citizenship and
4 Immigration Services' Asylum Office, pursuant to 8 C.F.R. §§ 208.2, 208.30, and 208.31.
5 Reinstatement of Petitioner's previous removal order was suspended. Petitioner received
6 a positive reasonable fear determination and was referred to the Immigration Court in
7 Eloy, Arizona, where he applied for Withholding of Removal and relief under the United
8 Nations Convention Against Torture (CAT). An Individual Calendar Hearing (merits
9 hearing) is scheduled for July 18, 2017. (Doc. 1-3 at 2, Ex. C.)

10 On January 24, 2017, Petitioner filed a motion for bond redetermination in the
11 Immigration Court. (Doc. 1-4 at 2-22, Ex. D.) On January 30, 2017, the Immigration
12 Judge (IJ) found that "[a]pplicant is in Withholding Only proceedings" and that the IJ
13 lacked jurisdiction to consider Petitioner's release on bond. (Doc. 1-5, Ex. E.) Petitioner
14 remains in DHS custody as a result.

15 Petitioner contends that he is in "Withholding-Only Proceedings" before the
16 Immigration Court and has been detained longer than six months under the authority of
17 either 8 U.S.C. § 1236(a) or 8 U.S.C. § 1231(a). Petitioner requested a bond hearing
18 under *Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d 1060 (9th Cir. 2015). Petitioner
19 states the IJ denied the request, "reasoning that the holding in *Rodriguez III* does not
20 apply in the District of Arizona and does not apply to individuals whose prior orders of
21 removal have been reinstated pursuant to 8 U.S.C. § 1231(a)(5)." (Doc. 1 at 2.)
22 Petitioner asks that this Court find that "the holding in *Rodriguez III* applies to aliens
23 whose orders have been reinstated under 8 U.S.C. § 1231(a)(5), and applies to all aliens
24 detained in the Ninth Circuit." (*Id.* at 3.) Petitioner further asks the Court to "order
25 Respondents to release Petitioner, or to provide him with a proper bond hearing—where
26 the Immigration Judge must consider whether Petitioner is a danger to the community or
27 flight risk—at the earliest possible opportunity." (*Id.*)

28 The Court will Order Respondents Sessions, Kelly, and Lucero to answer the

1 § 2241 Petition and respond to the Motion.

2 **II. Dismissal of Defendants Osuna and Phelps**

3 In *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), the United States Supreme Court
4 held that the proper respondent to a habeas petition challenging a petitioner’s present
5 physical confinement is “the warden of the facility where the prisoner is being held, not
6 the Attorney General or some other remote supervisory official.” 542 U.S. at 435. The
7 Supreme Court expressly declined, however, to resolve whether this rule, known as the
8 “immediate custodian rule,” applies to petitions filed by aliens detained pending
9 deportation. *Id.* at 435 n.8.

10 Prior to *Padilla*, the Ninth Circuit declined to apply the immediate custodian rule
11 in a § 2241 petition filed by an immigration detainee. *Armentero v. INS*, 340 F.3d 1058,
12 1073 (9th Cir. 2003) (“*Armentero I*”). The Ninth Circuit concluded that the Attorney
13 General and the Secretary of Homeland Security were proper respondents, stating that
14 “the most appropriate respondent to petitions brought by immigration detainees is the
15 individual in charge of the national government agency under whose auspices the alien is
16 detained.” *Id.* at 1071. After *Padilla* was decided, the Ninth Circuit granted a petition
17 for rehearing in *Armentero I* and withdrew its original opinion. *Armento v. INS*, 382 F.3d
18 1153 (9th Cir. 2004). Subsequently, the Ninth Circuit dismissed the case on other
19 grounds because the petitioner had absconded. *Armentero v. INS*, 412 F.3d 1088 (9th
20 Cir. 2005) (“*Armentero II*”). Judge Berzon, in dissent, indicated that she would reaffirm
21 the holding in *Armentero I*. *Armentero II*, 412 F.3d at 1090. There is no other Ninth
22 Circuit authority addressing this specific issue.

23 In the absence of any Ninth Circuit authority precluding Petitioner from naming
24 the Attorney General, the Secretary of Homeland Security, or the ICE Phoenix Field
25 Office Director as Respondents, the Court will require these Respondents to answer the
26 Petition and will not dismiss the Petition for failure to name a proper respondent at this
27 stage of the proceedings. See *Rivera v. Holder*, 307 F.R.D. 539, 544 n.1 (W.D. Wash.
28 2015) (declining to apply immediate custodian rule in immigration context and noting

1 that the Attorney General, Secretary of Homeland Security, and ICE Field Office
2 Director had been appellants/defendants in a recent Ninth Circuit case where a habeas
3 petitioner challenged his bond hearing); *Bogarin-Flores v. Napolitano*, 2012 WL
4 3283287, at *2 (S.D. Cal. Aug. 10, 2012) (finding Attorney General and Secretary of
5 Homeland Security were proper respondents in § 2241 petition seeking immediate release
6 from ICE detention). The Court will, however, dismiss Respondents Osuna and Phelps
7 because the rationale articulated in *Armentero I* would not extend to these Respondents.

8 **IT IS ORDERED:**

9 (1) Respondents Osuna and Phelps are **dismissed without prejudice**.

10 (2) The Clerk of Court must serve a copy of the Summons, the
11 Petition (Doc. 1), Motion (Doc. 5), and this Order upon the United States Attorney for the
12 District of Arizona by certified mail addressed to the civil process clerk at the office of
13 the United States Attorney pursuant to Rule 4(i)(1)(A) of the Federal Rules of Civil
14 Procedure. The Clerk of Court must also send by certified mail a copy of the Summons,
15 the Petition, and this Order to the United States Attorney General pursuant to Rule
16 4(i)(1)(B) **and** to Respondents pursuant to Rule 4(i)(2) of the Federal Rules of Civil
17 Procedure.

18 (3) Respondents Sessions, Kelly, and Lucero must answer the Petition within
19 **20 days** of the date of service. Respondent shall not file a dispositive motion in place of
20 an answer without first showing cause as to why an answer is inadequate.

21 (4) Respondents Sessions, Kelly, and Lucero must respond to the Motion (Doc.
22 5) within 20 days of the date of service.

23 (5) Petitioner may file a reply to the Answer within **30 days** from the date of
24 service of the answer.

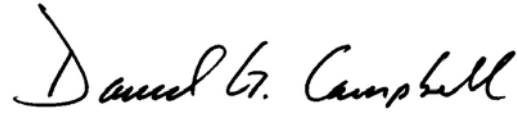
25 (6) Petitioner may file a reply to the response to the Motion within **10 days** of
26 service of the response.

27 (7) This matter is referred to Magistrate Judge John Z. Boyle pursuant to Rules
28 72.1 and 72.2 of the Local Rules of Civil Procedure for further proceedings and a report

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and recommendation.

Dated this 31st day of March, 2017.



David G. Campbell
United States District Judge