UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

MARIA FERNANDA RICO ANDRADE, individually and on behalf of the estate of Gerardo Lozano Rico, deceased, *Plaintiff*, v. UNITED STATES OF AMERICA, UNITED STATES CUSTOMS & BORDER PROTECTION, UNITED STATES OFFICE OF BORDER PATROL, JANET NAPOLITANO, DAVID V. AGUILAR, ALAN BERSIN, MICHAEL J. FISHER, ROSENDO HINOJOSA, DAVID COULS, REYES DIAZ, JOSE TEJEDA, and EBERTO CABELLO, *Defendants*.	**No. 15-cv-00103**

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR RECONSIDERATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Plaintiff, Maria Fernanda Rico Andrade, recognizes the consideration and care that went into this Court's Memorandum and Order, ECF No. 31 ("Order") resolving issues concerning multiple claims against three sets of defendants.[1] In bringing this narrowly focused motion, Andrade does not ask that the Court "rethink what the Court ... already thought through." *Sears ex rel. Sears v. Lee*, 08-cv-3418, 2010 WL 324385, at *2 (E.D. La. Jan. 20, 2010) (quoting *Z.K. Marine, Inc. v. M/V Archigetis*, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992)). Andrade instead requests reconsideration of certain issues because it appears that the Court overlooked two arguments raised in Andrade's opposition to Defendants' motion to dismiss.

First, regarding dismissal of Andrade's Federal Tort Claims Act ("FTCA") and *Bivens*[2] claims against the Supervisor defendants, the Court held that Andrade should have filed those claims within two years of her son's death. But the Court did not consider allegations crucial to Andrade's tolling theory. To be sure, the Court did consider Andrade's allegations about the Supervisors thwarting internal affairs investigations, but it never considered Andrade's other allegations that the Supervisors affirmatively concealed from Andrade essential information about other vehicle shootings. Without those facts, Andrade never knew, and could not have known, that the shooting of her son was part of a pattern and practice that the Supervisors knew of and condoned. A government-commissioned report exposed the unlawful pattern and practice, but the Supervisors concealed it until after the limitations period. Given the

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[1] There are three categories of defendants: (1) **"Government Defendants"** consist of the United States of America, United States Customs and Border Protection ("CBP"), and United States Office of Border Patrol (Border Patrol); (2) the **"Supervisor Defendants"** are Janet Napolitano, David Aguilar, Alan Bersin, Michael Fisher, Rosendo Hinojosa, David Couls, and Reyes Diaz; and (3) the **"Agent Defendants"** are Jose Tejeda and Eberto Cabello.

[2] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

Supervisors' concealment, the statute of limitations could not have accrued at the time of the shooting, as the Court held, because Andrade could not have discovered the factual predicate of her claims against the Supervisors until years later.

Second, Andrade seeks reconsideration of the Court's dismissal of her ATS claims against the Agents and Supervisors because the Court never considered her challenge to the scope-of-employment certification, as required under *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995). The Court believed Andrade had conceded "scope of employment" *for purposes of her ATS claims* because the Complaint alleged *for purposes of the FTCA claims* that the Agents' actions were committed within the scope of their employment. But Andrade's Complaint and opposition make clear that all of the conduct giving rise to her ATS claims were *outside* the scope of employment. Andrade's fundamental theory as to why the Agents and Supervisors were not immune from ATS liability is that by definition *jus cogens* violations are not within the perpetrators' scope of employment.

The Fifth Circuit has noted that challenging the scope-of-employment certification is the best, and perhaps only, viable means to prevent an immunity defense from precluding an ATS claim. It would therefore be a manifest error of law and be manifestly unjust for the Court to fail to consider Andrade's specific, timely, and meritorious challenge to the scope-of-employment certification.

Reconsideration is appropriate where "controlling decisions or data that the court overlooked" are "reasonably … expected to alter the conclusions reached by the court." *United States v. Olis*, 07-cv-3295, 2008 WL 5046342, at *31 (S.D. Tex. Nov. 21, 2008) (quoting *Schrader v. CSX Transportation, Inc.*, 70 F.3d 255, 257 (2d Cir.1995)). Reconsideration also "may be appropriate if it is necessary in order to prevent manifest injustice." *Am. Registry of*

Radiologic Technologists v. Garza, 512 F. Supp. 2d 902, 904 (S.D. Tex. 2007) (internal quotations and citation omitted). Andrade therefore respectfully asks that the Court grant reconsideration to address these two issues.

STATEMENT OF THE ISSUES TO BE RULED UPON BY THE COURT

In making the determination of whether to reconsider its judgment, a court must balance two opposing needs: the need for finality of litigation and the need to render just decisions based upon all of the facts. *Templet v. HydroChem Inc*., 367 F.3d 473, 478 (5th Cir. 2004). A movant may prevail upon a Rule 59(e) motion based on the "need to correct manifest errors of law or fact…." *Garza*, 512 F. Supp. 2d at 904 (internal quotations and citations omitted). "Additionally, reconsideration may be appropriate if it is necessary in order to prevent manifest injustice." *Id.* The questions presented here are:

1. Is reconsideration warranted to correct a manifest error of fact, where the Court's Order dismissed Andrade's FTCA and *Bivens* claims against the Supervisor defendants for failing to plead the Supervisors' concealment of a pattern and practice but overlooked Andrade's allegations that the Supervisors affirmatively concealed from Andrade essential information about other similar shootings, as well as the report that found the unlawful pattern and practice to exist?

2. Is reconsideration warranted to correct a manifest error of law and prevent manifest injustice, where the Court's Order dismissed Andrade's ATS claims against the Agents and Supervisors under the Westfall Act, 28 U.S.C. § 2679, but never considered Andrade's challenge to the scope-of-employment certification, as required under *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995).

SHORT STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

Andrade's lawsuit seeks redress against Defendants for the death of her son, Gerardo Lozano Rico ("Lozano"), who was killed by border patrol agents on November 3, 2011. Plaintiff filed her administrative complaint on June 11, 2014. Compl. ¶ 23. After her claim was denied, she filed within 6-months a complaint in this Court on February 27, 2015.

Andrade's Complaint brings three types of claims: Alien Tort Statute ("ATS") claims under international law (Counts 1-3); *Bivens* claims under the Fourth and Fifth Amendments of the Constitution (Counts 4-7); and FTCA claims under state tort law (Counts 8-11). Defendants jointly moved to dismiss all claims on September 30, 2015. Andrade filed her opposition on November 16, 2015. ECF No. 18 ("P. Br."). On December 22, 2015, the Defendants filed their reply. ECF No. 21. On July 12, 2017, the Court issued a Memorandum and Order, dismissing all claims, which the clerk entered on July 13, 2017. ECF No. 31.

This motion pertains only to (1) the claims against the Supervisors under *Bivens* (Counts 4 and 6) and the FTCA (Count 11) against the Supervisors and the United States,[3] respectively, and (2) the ATS claims against the Agents (Count 3) and Supervisors (Count 2). Andrade is not seeking reconsideration pertaining to her *Bivens* and FTCA claims against the individual Agents, nor is she seeking reconsideration pertaining to her ATS claim against the Government.

As to the claims against the Supervisors, the Court dismissed Andrade's *Bivens* and FTCA claims for failing to meet the applicable two-year statute of limitations. Order, at 23. As to the ATS claims, the Court held that the Agents and Supervisors are entitled to absolute immunity under the Westfall Act, in light of the Attorney General's scope-of-employment certification, which was attached to Defendants' reply brief, and Andrade's allegations in their

[3] Pursuant to the Westfall Act, 28 U.S.C. § 2679(d)(1), the Court substituted the United States as party defendant for Andrade's FTCA claim against the Supervisors. Order, at 11-12.

FTCA claims that the Agents' actions were committed within the scope of their employment. Order, at 27.

ARGUMENT

I. The Supervisor Claims Should Be Revived Because Their Involvement In Lozano's Death Was Not, and Could Not Have Reasonably Been, Discovered Until Years Later.

Andrade seeks reconsideration of the Court's dismissal of her supervisory FTCA and *Bivens* claims. The Court held Andrade failed to plead that the Supervisors' actions prevented her from filing her claims within two years of her son's death, but overlooked Andrade's allegations that the Supervisors concealed the essential facts showing their involvement.

A. Andrade Alleged the Supervisors Affirmatively Concealed Their Involvement in Her Son's Death.

After the statute of limitations had run, Andrade learned that the Agents' use of excessive force against Lozano did not spring from spontaneity. Compl. ¶¶ 33, 72. When they shot and killed Lozano, they were following an unwritten policy and practice of agents' placing themselves in the paths of oncoming vehicles to justify their shooting of the drivers. Compl. ¶ 35 (referring to the unwritten pattern and practice as the "Vehicle Policy"). By condoning the practice that the Agents here followed, the Supervisors caused Lozano's death.

But the Supervisors prevented Andrade from discovering that link by affirmatively concealing all information that would reveal the pattern and practice. ¶¶ 69-73. The Supervisors concealed the case files from 15 other incidents involving border patrol agents using deadly force against a victim in a vehicle. Compl. ¶¶ 70-71. They also prevented anyone from knowing that those 15 cases even existed. *Id.* They took affirmative steps to ensure the futility of any requests

for information, and even refused to provide anyone with materials concerning their use of force policies and training. *Id.*

In 2012, the government commissioned the Police Executive Research Forum ("PERF") to review the concealed case files and the agency's use of force policies and practices. Compl. ¶¶ 46-51. As found by PERF, "CBP practice allows shooting at the driver of any suspect vehicle that comes in the direction of agents" even when "the subject driver [is] attempting to flee from ... agents who intentionally put themselves into the exit path of the vehicle." Compl. ¶ 48; *see also* ECF No. 18-1, at 8. PERF issued the report to the Supervisors in February 2013 (Compl. ¶ 46)—within two years of Lozano's death. But the Supervisors concealed the PERF report, its findings, and any information about PERF's investigation, until after Andrade's limitations period expired. Compl. ¶¶ 71e-h, 72.

Without this concealed information, Andrade had no way of knowing that the Supervisors were involved in her son's death. Compl. ¶ 72. She became aware of the pattern and practice only in November 2013, when Defendant Fisher, the then-chief of border patrol, announced the agency was rejecting PERF's recommendations for change, incidentally breaking the agency's silence and revealing the practice for the first time. Compl. ¶¶ 52, 72.

B. The Court's Order Never Considered Andrade's Allegations of Concealment, Which Warrant Denial of the Supervisors' Motion.

The Court held that Andrade's *Bivens* and FTCA claims against the Supervisors accrued concurrently with those against the Agents, because her knowledge that Lozano died at the hands of border patrol agents should have led her to discover her supervisory claims within two years of the incident. Order, at 23.

In so doing, the Court overlooked key allegations showing the Supervisors' affirmative concealment. To be sure, the Court did consider Andrade's allegation that Tomsheck, the former

head of internal affairs, stated that top officials perpetuated unlawful use of force practices by distorting the narratives around fatal shootings and thwarting internal affairs' investigations. Order, at 19, 20 & 21 (citing Compl. ¶ 42). And Andrade is not asking the Court to reconsider its ruling that that allegation alone is insufficient to show that Defendants prevented Andrade's timely filing. But Andrade argued that additional allegations establish that the Supervisors affirmatively concealed the Vehicle Policy. P. Br. at 18. The Court did not consider those allegations and so should grant reconsideration to address them now.

If the Court does so, it will find dismissal unwarranted. As the Court correctly noted, the law does not permit a statute of limitations to preclude a claim against a defendant where the "[plaintiff] did not know of the facts nor could have known of the facts linking [the defendant] to the [injury]." Order, at 22 (citing *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001)); *see also Stewart v. Par. of Jefferson*, 951 F.2d 681, 684 (5th Cir. 1992) ("The prescriptive period will not commence prior to the time the plaintiff is *or should be* aware of the causal connection between his injury and the acts of the defendant."). Because the Supervisors affirmatively concealed the Vehicle Policy, Andrade "could [not] have known of the facts linking the [Supervisors] to the injury."

The Fifth Circuit in *Piotrowski* reversed a dismissal on statute of limitations grounds, where, as here, the plaintiff pleaded that the defendant concealed the policy that linked defendant to the injury. *Piotrowski v. City of Houston*, 51 F.3d 512, 516-17 (5th Cir. 1995). This Court found *Piotrowski* distinguishable because Andrade's allegation concerning Tomsheck's admissions did not establish the Supervisors' affirmative concealment of the Vehicle Policy. Order, at 22 ("Andrade has not shown with a level of plausibility that, though the use of force policy was in the control of Defendants, a reasonable person could not obtain the information

even with a diligent investigation"; distinguishing *Piotrowski* because "[t]he revelation of facts in *Piotrowski* showed that the department took active and affirmative steps in suppressing the police department's involvement") (internal citations and quotations omitted). But unlike Tomsheck's admissions, Andrade's other allegations (Compl. ¶¶ 69-70, 71a-i, 72-73) *do* establish the Supervisors' concealment and, just like *Piotrowski*, can defeat the Supervisors' motion to dismiss.

The Supervisors cannot avoid this outcome by referencing Andrade's knowledge soon after the incident that her son died at the hands of the Agents. That does not link *the Supervisors* to the injury, only the Agents. The Supervisors did not shoot Lozano, nor are they vicariously liable for the agents' shooting. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) ("In a § 1983 suit or a *Bivens* action … masters do not answer for the torts of their servants…."). The Supervisors are linked only by their deliberate indifference to the Vehicle Policy, which was unknown to Andrade at the time of the shooting. The plaintiff in *Piotrowski* indisputably knew of the individual officers' involvement at the time of the shooting, but the claims against the policy-making city-defendant did not accrue until years after the incident because that was when she first discovered the city's policy, and thus its involvement. *Piotrowski*, 237 F.3d at 577 n.12. Similarly, Andrade's claim against the Supervisors accrues differently than her claim against the agents because it was not until years later that she discovered the Vehicle Policy and hence the Supervisors' involvement.

Nor can Defendants save their motion by arguing that she could have discovered the Vehicle Policy sooner. Also like the city in *Potrowski*, the Supervisors here implemented a "code-of-silence," affirmatively and effectively preventing Andrade from suspecting that the agents were adhering to an unwritten policy. *Id.* The Supervisors concealed the essential facts

relating to the 15 other vehicle shootings, and ensured no person could obtain any useful information about the agents' use of force practices. Compl. ¶¶ 70-71. Without information about the other vehicle shootings, no investigation could uncover the Supervisors' involvement. Andrade could have brought a timely claim had the Supervisors promptly disclosed the PERF report, or its findings, after the report was issued in February 2013. But that too was tightly concealed from Andrade, and the rest of the nation, until November 2013—more than two years after Lozano's death. Compl. ¶¶ 71-72.

In sum, Plaintiffs' allegations show that Andrade could not have known the shooting was part of a pattern and practice that the Supervisors knew of and condoned, because the Supervisors prevented anyone from knowing the pattern and practice existed. The Court did not consider these allegations, and it should grant reconsideration to address them. If it does so, the Court will find that the Supervisors' concealment precludes their dismissal.

II. The ATS Claims Against the Individual Defendants Should Be Revived So That Andrade May Challenge the Government's Belated Scope-of-Employment Certification.

Plaintiffs also seek reconsideration of the Court's dismissal of their ATS claims against the individual Agents and Supervisors. The Court dismissed the claims because the Attorney General certified that the Supervisors and Agents were acting within the scope of employment. Order, at 27. The Court overlooked, however, Andrade's request to challenge the validity of the certification.

In *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995), the Supreme Court held that courts must consider any challenge to an Attorney General's scope-of-employment certification before conferring absolute immunity. It was thus an error of law to not consider

Andrade's challenge, and the Court should grant reconsideration to correct for this important procedural mis-step.

The Court seemed to think that Andrade conceded the issue because her Complaint contains two allegations that the Agents were acting within the scope of employment. Order, at 27 (citing Compl. ¶¶ 149-150). But Andrade's Complaint and opposition do not concede this.

Both cited paragraphs of the Complaint were pleaded as part of Andrade's claim under the FTCA (count 8), as necessary to plead jurisdiction under that statute. See Compl. ¶ 150 (citing 28 U.S.C. § 2671, et seq.); *see also* 28 U.S.C. § 1346. By no means did Andrade plead Defendants were acting within the scope of their employment as part of her *ATS claims*.

The Federal Rules permit plaintiffs to plead inconsistent or alternative claims. Fed. R. Civ. P. 8 (d)(3); *see Leal v. McHugh*, 731 F.3d 405, 414 (5th Cir. 2013) (holding "inconsistent factual allegations" are "not fatal" to plaintiff's complaint); *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 674 (5th Cir. 2003) ("Plaintiffs are permitted to plead in the alternative."). Andrade's Complaint and opposition showed that the Complaint plainly alleges that the conduct giving rise to her ATS claims were outside the scope of employment. P. Br. at 25 (citing Compl. ¶¶ 61-65).

Andrade's opposition also made clear that, although Defendants as of then had not yet obtained one, any certification would be vigorously contested—and for good reason. P. Br. at 25. Andrade alleges that Defendants' actions constitute *jus cogens* violations, which, under international law, are not legitimate official acts. *Id.* By definition, conduct that constitutes a *jus*

cogens violation is *deemed as a matter of law* not to be within the scope of a worker's employment. *Id.*[4] Thus, any certification to the contrary would be invalid. *Id.*

Several judges on the Fifth Circuit specifically noted that challenging the scope-of-employment certification is the best, and perhaps only, viable way of protecting an ATS claim from an immunity defense. *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015) (en banc) (Haynes, J. joined by Southweick J. and Higginson, J. concurring; Graves, Jr., J. concurring). In her concurring opinion, Judge Haynes noted that "given Plaintiff's argument that *jus cogens* violations are not legitimate official acts, Plaintiff[has] a strong basis for raising such a challenge." *Id.* at 142. This Court dismissed the claim against the United States based on sovereign immunity, citing the Fifth Circuit's decision in *Hernandez*. Order, at 27. But the plaintiffs in *Hernandez* never challenged the scope-of-employment certification, which Judge Haynes found critical. *Id.* ("Plaintiffs could have sought (but did not seek) federal-court review of the Attorney General's scope-of-employment certification under the Westfall Act.").

Here, Andrade did specifically challenge the scope-of-employment certification. And she was entitled to plead in the alternative, so her scope-of-employment allegations regarding the FTCA claims are not relevant to, let alone determinative of, the ATS certification issue.

In sum, both Andrade's Complaint and opposition make clear her intention to challenge the scope-of-employment certification. Courts are required to review a challenge to the scope-

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[4] For this reason, there in fact is nothing inconsistent in Andrade's scope-of-employment allegations in her ATS claims and FTCA claims. The Agents and Supervisors plainly were at work and doing the functions the government hired them to do, so for purposes of the FTCA they were within the scope of their employment. For purposes of the ATS, however, workers are *deemed as a matter of law* not to be in the scope of their employment when they commit a *jus cogens* violation, even if they are at work and doing the functions the government hired them to do. In any event, as noted above, Andrade was entitled to plead alternative or even inconsistent facts and theories.

of-employment certification, and Andrade vigorously contests its validity here. The Court should grant reconsideration to prevent a manifest error of law and a manifest injustice.

CONCLUSION

For the foregoing reasons, Andrade respectfully requests that the Court grant her motion for reconsideration.

Dated: August 9, 2017

/s/ Robert C. Hilliard

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