

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

JANET PADILLA, ET AL.

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
GIOVANNI GAUDIOSO, ET AL.
Defendants,

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Civil Action No. EP 05-CA-0478

JUDGE MONTALVO

**PLAINTIFFS' SUR REPLY IN OPPOSITION TO THE UNITED STATES
GOVERNMENT'S MOTION TO DISMISS OR ALTERNATIVE MOTION FOR
SUMMARY JUDGMENT, AND BRIEF MEMORANDUM IN OPPOSITION**

Respectfully submitted,

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I.

Preliminary Statement

Plaintiffs respectfully submit this Sur Reply in Opposition to the United States of America's ("Defendant" or "government") Motion to Dismiss, or Alternative Summary Judgment and herein submits the memorandum of law in opposition and incorporates by reference the entire Appendix 1-13 filed separately. The plaintiffs Janet Padilla et al. ("Plaintiffs") collectively file this Sur Reply in opposition to the Defendant's motion pursuant to Rule 12(b)(6) and Rule 56.

The Plaintiffs show that the sovereign immunity is not available for abduction, torture and murder of individuals residing in the United States under the foreign country exclusion. Additionally, the federal officials cannot disobey the Department of Justice mandates to invoke the discretionary function exclusion. Accordingly, the motions to dismiss and summary judgment filed by United States government should be denied.

II.

Summary Judgment Evidence

The Plaintiffs present the following evidence to support their Federal Tort Claims Act ("FTCA") claim against the United States of America.

1. Philip Jordan, Drug Enforcement Administration SAC, Retired, Supplementary Affidavit.
2. U.S. Immigration and Customs Enforcement memorandum May 7, 2004
3. U.S. Immigration and Customs Enforcement memorandum May 27, 2004
4. Personnel Assistance Agreement
5. Instructions to Confidential Source¹

¹ The Plaintiffs also rely on evidence presented to the Court in document number 78 and 79.

III.

Background

This action arises under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80 as fully alleged in this Complaint. The Court has jurisdiction over the United States under the FTCA to the extent the federal agents committed the tortious acts within the scope of their federal employment pursuant to §2679(c)(d)(1). The Plaintiff decedents including Luis Padilla, and Abraham Guzman were the victims of torture and murder by the hands of an informant sponsored by federal officials of the U.S. government.

The United States government is liable under the FTCA for agent's violation of the 14th Amendment to the Constitution, the Department of Justice mandates: Attorney General Guidelines, and Immigration and Customs Confidential Informant Policies (virtually identical), and federal and state law. The government officials cannot violate these mandates and therefore the discretionary function exception to liability does not apply.

IV.

Authorities and Argument

A. Sovereign Immunity is Not Available for individuals Assaulted, Abducted, or Murdered in the United States

Sovereign immunity is not available for abduction, assault, and torture of individuals residing in the United States under the foreign country exclusion. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (U.S. 2004). "The Act accordingly gives federal courts jurisdiction over claims against the United States for injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." *Id.*

The foreign country exception does not apply to torts that occurred in the United States. The Due Process Clause of the Fourteenth Amendment prohibits governmental misconduct and guarantees persons who face deprivations of life, liberty, or property, the protections of due process of law. In this case the victims were deprived of their lives.

Clearly Luis Padilla was abducted and assaulted in the United States. Padilla was a target of Ramirez and the Juarez cartel. Arguably, Padilla may have been dealt the final coup de grâce in Juarez, Mexico. Nevertheless, the government is liable for the kidnapping and assault occurring on U.S. soil.

The Government's reliance on *Sosa v. Alvarez-Machain*, for the foreign country exclusion is clearly misplaced. The Government is liable for the assault and abduction of Padilla occurring in the United States at the hands of Ramirez and his henchmen. In *Sosa*, the plaintiff was abducted by federal officials in the aftermath of the killing of DEA agent Enrique Camarena in Mexico. The *Sosa* plaintiff was never assaulted or abducted on U.S. soil. The supposed ill-treatment of the plaintiff in this case was minor. The court concluded that "single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violate no norm of customary international law so well defined as to support the creation of a federal remedy." *Id.* at 738. The *Sosa* plaintiff also unsuccessfully argued for jurisdiction under the Alien Tort Statute, 28 U.S.C. §1350. No real tort on U.S. soil –therefore no jurisdiction.

In the present case, Padilla seeks redress for the torts that occurred in the United States under the FTCA not for torts that occurred in Mexico. The government attempts to mislead the Court, arguing that "multiple proximate cause connections, both foreign and domestic" result in foreign country exclusion. *See* Governments Reply, para. 2. There is no such authority. This argument is false.

The Plaintiff decedents Padilla –assaulted, and Guzman –murdered in the United States by an informant sponsored by federal officials. *See* document 79 App. 1-6, Jordan affidavit; App. 91-122, DEA executive summary, App. 126-141, Ramirez declaration.

Abraham Guzman was murdered in the United States as a result of the actions of the informant Ramirez. At the time of the murder, Ramirez was an active agent under the supervision of ICE. According to Ramirez's own admissions he was present and observed the murder of Guzman. Even after twelve (12) bodies were uncovered and Ramirez had been publicly implicated in murder, there is no evidence he had been deactivated or blacklisted by the ICE. According to ICE policy the informant should have been deactivated. Instead Ramirez continued unabated and eventually orchestrated the murder of Guzman.

B. ICE Officials Violated Their Own Confidential Informant Policy

"If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy." *U.S. v. Gaubert*, 499 U.S. 315, 324 (1991). A discretionary act is one that involves choice or judgment. *Id.* at 325. A federal official does not have discretion to refuse to follow the Justice Department mandates. *See Buchanan v. United States*, 915 F.2d 969, 971 (5th Cir. 1990); *United States v. Salemm*, 91 F.Supp. 2d 141 (D.Mass. 1999).

In the present case, Secretary Garcia cites the DOJ mandates. Without question, the ICE Informant Policy guidelines adopted from the DOJ (Department of Justice) and Attorney General Guidelines are virtually identical and apply to this case. App. 1-13, Jordan affidavit and ICE Informant Policy Addendum. The policies are cut from the same DOJ cloth.

Accordingly, "If a federal statute, regulation, or policy specifically prescribes a course of conduct, the discretionary function exception does not apply." *Berkovitz v. United States*, 486 U.S. 531, 536 (U.S. 1988). "When an employee effectively has no choice, the only issue is whether the employee followed the directive." *Dalehite v. United States*, 346 U.S. 15, 36 (U.S. 1953). "In such a case, there can be no discretionary act protected by the exception." *Cazales v. Lecon, Inc.*, 994 F.Supp. 765, 771 (S.D. Texas 1997).

Ramirez continued to operate despite blatant violations of the Confidential Informant Policy for ICE operations. The Addendums to the Confidential Policy were issued on May 7, 2004, and May 27, 2004, by the Assistant Secretary, Michael Garcia. Yet, Ramirez working under ICE authority, orchestrated a drug payoff that resulted in the murder of Abraham Guzman on August 2004, three months later. The directive or Confidential Policy Addendum reads as follows:

[I]f an active informant ... is believed to have engaged in unauthorized, unlawful conduct, including any act of violence ... **the use of the CI should be immediately suspended.** This pertains to information regarding any act of violence by the CI; whether alleged or confirmed, whether anticipated, current or historical. (Emphasis in original).

-Assistant Secretary, Michael Garcia - Memorandum to All Directors, App. 4-9.

In this case Ramirez had a history of violence and unlawful activity. According to the ICE's own guidelines he should have been deactivated immediately. Ramirez' history of killing was anticipated, current and historical. See App 1-3, Jordan affidavit. It is important to note that the ICE Confidential Informant Policy and Confidential Informant Policy Addendum is identical to the Attorney General Guidelines regarding the use of informants. See App 1-3, Jordan affidavit.

Furthermore, "in the absence of an ICE policy or directive" the agency is directed to follow Department of Justice guidelines Resolution 20 titled Federal Law Enforcement Agencies' Issuance of Warnings. This policy uses the same language as the Attorney General Guidelines. This policy requires warning to an individual upon threat to his life or threat of serious bodily injury as set forth in DOJ Resolution 20. The directive requires that "ICE ... will attempt to notify the intended victim." The ICE informant policy conclusively proves that the federal officials cannot disobey the Department of Justice mandates to invoke the discretionary function exclusion. In the present case, therefore, Curtis Compton's argument that ICE agents do not follow Attorney General Guidelines has no merit. Compton neglected to attach the ICE informant guidelines for

obvious reasons. ICE has not discretion to ignore DOJ or ICE guidelines. App. 1-3, Jordan affidavit and App. 4-13, ICE guidelines.

It is not coincidental that the Secretary's directive also requires ICE to "notify other law enforcement agencies that have jurisdiction over the threat." This ICE provision is a direct reference to the attempted murder of two DEA agents in Juarez by Ramirez henchmen. ICE should have notified the Drug Enforcement Administration, the agency that routinely exercises jurisdiction in Mexico through the PGR. Instead, ICE official misled the Mexican authorities stating that the informant "witnessed" a murder and suggested they didn't know where the murder took place. Court document 79, ICE letter to Mexican PGR. ICE officials deliberately concealed information in order to continue the Ramirez operation and cover-up the murders. The murders would have been avoided had ICE notified the DEA of the first murder of Reyes.

Not surprisingly, the Secretary's directive also requires ICE to inform the Confidential Informant Program Manager of any information of a threat obtained through a Title III intercept. App. 5. In this case, ICE deliberately failed to disclose to Judge Martinez the threats and imminent murders that were discovered through the wire intercept.

C. The Government is Liable for the Foreseeable Death of Guzman

Generally, under Texas law, a person is under no legal duty to control the conduct of another. *Graff v. Beard*, 858 S.W.2d 918, 919 (Tex. 1993). The general rule does not apply when there is a special relationship between the actor and another that imposes on the actor a duty to control the other's conduct. *Texas Home Mgmt. v. Peavy*, 89 S.W.3d 30, 36 (Tex. 2002). The courts also consider whether one party had superior knowledge of the risk. *Graff*, 858 S.W.2d at 920-22. For example, in *Golden Spread Council*, the Texas Supreme Court held the defendants, a regional boy-scout council, had a duty to the members of a church boy-scout group not to recommend a particular person as a potential scoutmaster. *Golden Spread Council v. Akins*, 926 S.W.2d 287, 292 (Tex. 1996). The

court noted that the council had full knowledge of complaints of the scoutmaster's earlier molestation of boys but nonetheless recommended him. *Id.* at 290.

In the present case, ICE officials knew of the informant's history of violence and murder. On numerous occasions, Ramirez was called in for a "carne asada" or barbeque—the code for murder. The ICE officials monitoring the informant's calls knew well in advance that abductions were to take place. The ICE officials had superior knowledge before a murder would take place. See Court document 79 App. 1-6, App. 123-125.

The factors the court use when applying the risk-utility test are the risk, foreseeability, and likelihood of injury balanced against the social utility of the actor's conduct, and the magnitude of the burden of guarding against injury. *Smith-Kline Beecham Corp. v. Doe*, 903 S.W.2d 347, 353 (Tex. 1995). The most important factor to consider is foreseeability of the risk. *Peavy*, 89 S.W.3d at 36.

Death at the hands of the informant was clearly foreseeable: The informant had recorded his participation in one murder. The officials monitored the telephones announcing the next "carne asada." Afterwards, the informant debriefed with ICE regarding the bodies that were "piling up." ICE chose to ignore this.

Furthermore, the Defendants have a duty to use ordinary care in not placing others in harm's way of foreseeable criminal activity. *Doe v. Franklin*, 930 S.W.2d 921, 928-29 (El Paso 1996, *no writ*). The Defendants also have a duty to use ordinary care in aiding or protecting others from peril when the peril is under the individual's control. *Abalos v. Oil Dev. Co.*, 526 S.W.2d 604, 608 (Tex. App. 1976)(relying on RESTATEMENT SECOND OF TORTS §314 comment d. In addition, the Defendants have a duty to take affirmative action to control or avoid increasing the danger from conduct which the individuals at least partially created. *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311-311-12 (Tex. 1987). Furthermore, there is a duty to use ordinary care in making representations and in ascertaining the accuracy of information given to others. *EDCO Prod. Inc. v. Hernandez*, 794 S.W.2d 69, 76-77 (S.A. 1990, *denied*).

In the present case, Secretary Garcia spelled out the responsibility of the officials to deactivate the informant and report threats of murder obtained by the Title III intercept. Again, Ramirez states that ICE and the agents knew of the planned murders:

“Being in Chicago with the agents from ICE, and they knew because I authorize for them to hear my phone conversation. And besides that, I told them what’s going on, and in El Paso they were listening my phone calls.”

See Court document 79, App. 21, Ramirez Court transcript, August 11, 2005, page 88.

The statements of Ramirez are relevant and admissible under Federal Rules of Evidence 801(d)(1) prior statements by a witness, 801(d)(2) Admission by a party-opponent, and 804(2) the Court’s order for the deposition of Ramirez.

V.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs respectfully request that the Court:

- (1) Deny the Defendant’s Motion to Dismiss for Failure to State a Claim under Rule 12(b)(6);
- (2) Deny the Defendant’s motion for summary judgment under Rule 56.
- (3) Grant such further and additional relief as the Plaintiffs may show themselves justly entitled.

CERTIFICATE OF SERVICE

This is to certify that on October 21st, 2006, this document was filed with the Clerk for the United States District Court for the Western District of Texas, El Paso Division, using the CM/ECF filing system as ordered by the Court. The system will send a Notice of Electronic Filing to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means all others will be sent a copy through the United States postal service. The attorney of record for the Defendant authorized to accept Notice is listed below.

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