UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMIR MESHAL, Plaintiff, v. CHRIS HIGGENBOTHAM, et. al, Defendants.	No. 09-cv-2178 (EGS)

PLAINTIFF'S RESPONSE TO
DEFENDANTS' MAY 11, 2012 NOTICE OF SUPPLEMENTAL AUTHORITY

On May 11, 2012, Defendants notified this Court of the decision of the United States Court of Appeals for the Ninth Circuit in *Padilla v. Yoo*, No. 09-16478, 2012 WL 1526156 (9th Cir. May 2, 2012) ("*Padilla*"). Defendants argue that *Padilla* supports dismissal on qualified immunity grounds of Mr. Meshal's Fourth and Fifth Amendment claims challenging his prolonged, arbitrary and indefinite detention, illegal rendition, and coercive interrogation. Even if *Padilla* were correctly decided, these arguments are unpersuasive for three main reasons.

First, there is no dispute that unlike Jose Padilla, Mr. Meshal was a criminal suspect under investigation by the Defendants and not "a suspected terrorist designated an enemy combatant and confined to military detention by order of the President"—a critical factor in the Ninth Circuit's qualified immunity analysis. *Padilla*, 2012 WL 1526156 at *11. The Ninth Circuit recognized that "it may sometimes be permissible to rely on cases involving one type of detainee to establish clearly established constitutional rights of another type of detainee." *Id*. at *9. But it concluded that Padilla could not rely on cases concerning "ordinary" prison or criminal settings because, according to Supreme

Court precedent, "a citizen detained as an unlawful combatant could be afforded *lesser* rights than ordinary prisoners or individuals in ordinary criminal proceedings." *Id*. at *10 (emphasis in original). It similarly concluded that *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), "suggested" that the rights of U.S. citizens detained as enemy combatants "may not be coextensive with those enjoyed by other kinds of detainees." *Padilla*, 2012 WL 1526156 at *11. Mr. Meshal, however, has never been designated an "enemy combatant" by any U.S. authority at any time. Any asserted lack of clarity regarding the constitutional and statutory rights of an alleged "enemy combatant" thus does not bear on the question of whether Mr. Meshal, a civilian U.S. citizen, had clearly established rights under the Constitution to be free from illegal detention, rendition, and coercive interrogation by U.S. law enforcement officers. In fact, the Ninth Circuit's analysis supports Mr. Meshal because the cases addressing the Fourth and Fifth Amendment rights of civilian U.S. citizens against law enforcement misconduct clearly established the rights Mr. Meshal seeks to enforce through this action. *See* Supp. Opp. Br. 9, ECF No. 53.

Defendants nevertheless contend that this case presents a different context from "garden variety criminal cases" because Mr. Meshal "was detained on foreign soil in the physical custody and under the legal authority of a foreign government." Defs.' Notice of Supp. Authority 3, 5, ECF No. 54. As Mr. Meshal has previously argued, the mere fact that the Defendants' misconduct took place abroad does not support qualified immunity because he asserts clearly established Fourth and Fifth Amendment rights protecting civilian U.S. citizens against U.S. law enforcement misconduct regardless of where they are located. *See* Supp. Opp. Br. 9–10; Opp. Br. 23–25, ECF No. 35. Nor

does Defendants' use of foreign proxies to carry out the illegal detention and rendition alter the qualified immunity analysis. *See* Supp. Opp. Br. 9; Opp. Br. 18–21, 28–29. Defendants' reliance on *Padilla* and the "unique circumstances" of Mr. Meshal's detention is a renewed demand for a case on all fours, which is not required to defeat qualified immunity. Defs.' Notice of Supp. Authority 5; *see* Supp. Opp. Br. 10.[1]

Second, although the Ninth Circuit determined that Padilla failed to point to cases decided prior to the challenged conduct in 2001-2003 that clearly established his asserted rights, a similar conclusion is unwarranted here. The Supreme Court's 2004 decision in *Hamdi* may have post-dated the conduct challenged in *Padilla*. *Padilla*, 2012 WL 1526156 at *11. But it long predated the conduct here by the Defendants, who were on notice in 2007 of Mr. Meshal's clearly established Fifth Amendment right to some form of process prior to undue deprivations of his physical liberty. *See* Supp. Opp. Br. 9; Opp. Br. 29–30, 32–34. Similarly, while the Ninth Circuit concluded that "it was not clearly established in 2001-03 that the treatment to which Padilla says he was subjected amounted to torture," Defendants fail to show that there was any lack of clarity or "considerable debate" in 2007 over the law prohibiting federal law enforcement officers from using torturous interrogation techniques against civilian criminal suspects. *Padilla*,

[1] The Ninth Circuit itself recognized in *Padilla* that under Supreme Court precedent in *Hope v. Pelzer*, 536 U.S. 730 (2002), and *United States v. Lanier*, 520 U.S. 259 (1997), a decision directly on point is not required for a claim to survive qualified immunity. *See Padilla*, 2012 WL 1526156 at *12 ("The absence of a decision defining the constitutional and statutory rights of citizens detained as enemy combatants need not be fatal to the plaintiff's claims."). Mr. Meshal does not advocate for a different standard. Defendants' Notice misconstrues the colloquy between Plaintiff's counsel and the Court concerning *Pearson v. Callahan*, 555 U.S. 223 (2009). Defs.' Notice of Supp. Authority 2. That colloquy concerned the uncontroversial proposition that a court may rely upon criminal cases establishing the Fourth Amendment rights of criminal suspects in analyzing qualified immunity in a damages action concerning law enforcement misconduct toward a criminal suspect. *See* Tr. of Oral Arg. 67–68, July 11, 2011.

2012 WL 1526156 at *12, *14. The Defendants' use of such techniques violated Mr. Meshal's clearly established constitutional and statutory rights. *See Miller v. Fenton*, 474 U.S. 104, 109–110 (due process condemns use of "psychological torture" to extract inculpatory statements); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (due process prohibits FBI interrogation techniques that inflict severe mental harm); Opp. Br. 41–43 (discussing Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, prohibition of interrogations involving psychological torture).

Third, *Padilla* does not support a grant of qualified immunity to Defendants Hersem, Higgenbotham or John Doe 1 on Mr. Meshal's Fifth Amendment coercive interrogation claim. The Ninth Circuit held that Defendant John Yoo was entitled to qualified immunity from Padilla's Fifth Amendment coercive interrogation claim because it was "not . . . beyond debate" that the challenged conduct constituted torture. *Padilla*, 2012 WL 1526156 at *14. Even assuming that the Ninth Circuit properly concluded that it was not clearly established that the conduct to which Padilla was subjected in 2001–2003 constituted torture at the time (a proposition Mr. Meshal disputes),[2] the Ninth Circuit failed to consider that due process protects against the use of coercive and abusive interrogation techniques that may fall short of torture, but nevertheless shock the conscience. *See Beecher v. Alabama*, 389 U.S. 35, 38 (1967) (due process condemns

[2] The Ninth Circuit relied on outdated and incomplete case law in finding that Padilla's allegations that months of incommunicado detention, death threats, "stress positions," subjection to cold, and sleep deprivation did not rise to the level of torture. *See Padilla*, 2012 WL 1526156, at *12–13. The European Court of Human Rights—which authored the principal case relied upon by the Ninth Circuit, *United Kingdom v. Ireland*, 25 Eur. Ct. H.R. (ser. A) (1978)—recognized in 1999, years before Padilla's abuse, that "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future." *Selmouni v. France* [GC], App. No.. 25803/94 § 101 ECHR 1999-V.

confession elicited through "gross coercion"); *Wilkins*, 872 F.2d at 195 (due process condemns interrogation techniques that inflict "severe . . . mental harm").[3]

Defendants Hersem and Higgenbotham psychologically tortured Mr. Meshal by threatening him with forced disappearance, physical torture, and forced transfer, and refusing to permit him to return home absent a false confession—actions that caused Mr. Meshal severe emotional pain and suffering particularly because they were carried out in the context of his prolonged and incommunicado detention thousands of miles from home. Am. Compl. ¶¶ 206, 210–11; *see* Opp Br. 42–43 (TVPA claim). But even if this Court were to find that this conduct did not constitute torture, it still amounted to interrogation through gross coercion and the infliction of severe mental harm in violation of Mr. Meshal's clearly established Fifth Amendment rights. *See Beecher*, 389 U.S. at 38; *Wilkins*, 872 F.2d at 195; *see also* Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd (defining "cruel, inhuman, and degrading treatment" to include detainee abuse prohibited by the Fifth Amendment and expressly prohibiting such treatment of any detainee in U.S. custody or control regardless of location).

For the foregoing reasons, and those expressed previously, Defendants' motion to dismiss should be denied.

Respectfully submitted,

s/ Nusrat J. Choudhury

[3] The Ninth Circuit incorrectly concluded that it was not clearly established that the conduct to which Padilla was subjected in 2001–2003 was prohibited by law. It mistakenly held that only torture—not cruel, inhuman, and degrading treatment—was clearly forbidden against all people, including terrorism suspects detained by the military as enemy combatants. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 629–631 (2006) (Common Article 3 of the Geneva Conventions, which prohibits cruel treatment and outrages against personal dignity, including humiliating and degrading treatment, applies in all circumstances, including to suspected enemy combatants).

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