No. 05-14375-G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DONATO DALRYMPLE, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE APPELLEE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, the undersigned counsel certifies that, to the best of his knowledge, the certificate of interested persons contained in the opening brief of plaintiffs-appellants is complete, with the following additions:

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STATEMENT REGARDING ORAL ARGUMENT

The judgment of the district court is correct and the United States does not believe oral argument is necessary. We stand ready to present argument, however, if the Court believes argument will facilitate its deliberations in this case.

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BRIEF FOR THE APPELLEE

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STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1) & 2671-2680 ("FTCA"). R.1 at 14, ¶ 108 (complaint). On June 8, 2005, the district court entered final judgment against the plaintiffs on all claims. R.169. Plaintiffs filed a notice of appeal from that judgment on August 4, 2005, within the time prescribed by Fed. R. App. P. 4(a)(1)(B). R.179. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiffs seek damages from the United States for federal law-enforcement officers' use of tear gas while executing search and administrative arrest warrants for Elian Gonzalez. The questions presented are:

1. Whether the district court correctly dismissed the complaint as to eleven plaintiffs whose administrative FTCA claims, filed on the last day of the limitations period, failed to state a "sum certain"; and
2. Whether the district court correctly determined that the federal officers' use of gas was reasonable under the circumstances and therefore not tortious under Florida law.

STATEMENT OF THE CASE

A. Nature of the Case

In this FTCA action, more than one hundred plaintiffs seek damages for injuries allegedly sustained on the morning of April 22, 2000, when federal law enforcement officers, pursuant to valid search and administrative arrest warrants, entered the Miami home of Lazaro Gonzalez and took custody of Elian Gonzalez. This case marks the fourth time that these or other plaintiffs have brought suit for damages based on the events of that day. See Gonzalez v. John Does 1-6, No. 04-14958 (11th Cir. Apr. 14, 2005) (unpublished per curiam) (federal agents who entered Gonzalez home entitled to qualified immunity); Gonzalez v. Reno, No. 01-14475, 325 F.3d 1228 (11th Cir. 2003) (senior federal officials entitled to qualified immunity for ordering raid); Dalrymple v. Reno, No. 01-15990, 334 F.3d 991 (11th Cir. 2003) (same).

In this case, plaintiffs brought suit for damages based on the officers' use of tear gas to prevent a large and violent crowd of demonstrators from obstructing the April 22 operation.

Plaintiffs alleged that the officers' use of gas generally, and tear gas in particular, was not reasonable under the circumstances.

After dismissing the claims of eleven plaintiffs on jurisdictional grounds, the district court rejected each of plaintiffs' tort theories on the merits. The court concluded that the officers' use of gas was "objectively reasonable under the circumstances" and that "each time gas was deployed * * * it was in reaction to threatening activity by the demonstrators." R.163 at 11, ¶ 12; id. at 15, ¶ 63. This appeal followed.

B. Statement of Facts

1. Statutory and Regulatory Background

The Federal Tort Claims Act provides a limited waiver of the United States' sovereign immunity for tort claims and defines the exclusive substantive basis for such claims against the federal government. See generally Pate v. Oakwood Mobile Homes, Inc., 374 F.3d 1081, 1083-84 (11th Cir. 2004); Andrews v. United States, 121 F.3d 1430, 1438 (11th Cir. 1997). Subject to several restrictions and limitations, the Act provides that the government shall be liable to a plaintiff for a tortious injury "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1).

This case involves two features of the Federal Tort Claims Act. First, before filing a civil action for damages, a claimant must file an administrative claim with the appropriate federal

agency. 28 U.S.C. § 2675(a). That claim must be "accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident." 28 C.F.R. § 14.2(a). An administrative claim that fails to state a "sum certain" does not satisfy the statutory preconditions to suit under section 2675 and consequently "leaves the district court without jurisdiction to hear the case." Suarez v. United States, 22 F.3d 1064, 1065 (11th Cir. 1994) (per curiam); Tidd v. United States, 786 F.2d 1565, 1567 (11th Cir. 1986). A claimant has two years from the date of the alleged injury to submit a perfected administrative claim. See 28 U.S.C. § 2401(b); Adkins v. United States, 896 F.2d 1324, 1326 (11th Cir. 1990).

Second, the FTCA defines the tort liability of the United States by analogy to the liabilities of a private person under state law. "Congress's chief intent in drafting the FTCA was not 'to create new causes of action' but 'simply to provide redress for ordinary torts recognized by state law.'" Pate, 374 F.3d at 1084 (quoting Howell v. United States, 932 F.2d 915, 917 (11th Cir. 1991)). Under the express terms of the Act, the United States may be liable to a plaintiff in tort only "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Thus, "'even where specific behavior of federal employees is required by statute, liability to the beneficiaries of that statute may not be founded on the Federal Tort Claims Act if state law recognizes no comparable

private liability.'" Pate, 374 F.3d at 1084 (quoting Sellfors v. United States, 697 F.2d 1362, 1367 (11th Cir. 1983)).

2. Facts and Allegations

On November 25, 1999, Elian Gonzalez, a six-year-old Cuban boy, was found floating on an inner-tube off the coast of Florida. R.163 at 1, ¶ 1. The Immigration and Naturalization Service ("INS") paroled Elian into the United States and released him into the custody of his great uncle, Lazaro Gonzalez. Id. ¶ 2. Shortly thereafter, Elian's father requested that his son be returned to Cuba, and the INS revoked Elian's parole into Lazaro Gonzalez's custody. Id. at 2, ¶¶ 10-11. When Lazaro refused to surrender the boy, the INS issued an administrative warrant for Elian's arrest and obtained a search warrant to enter Lazaro's Miami home.[1] Id. ¶¶ 13-14.

At approximately 5:15 a.m. on April 22, 2000, federal law enforcement officers executed the warrants. Officers entered the Gonzalez home, removed Elian, and reunited him with his father. Id. ¶ 16.

Plaintiffs in this action are more than one hundred protesters and other bystanders who were near the Gonzalez home at the time of the raid. On April 22, 2002, the final day of the two-year limitations period, plaintiffs filed administrative FTCA

[1] Although plaintiffs' complaint purports to identify flaws in these warrants, e.g., R.71 at 17-20, plaintiffs have stipulated that the warrants were supported by probable cause, see R.115 at 3, ¶ 5(A), and they do not otherwise challenge the validity of the warrants in this appeal.

claims with the Department of Justice.[2] See R.43, exh. 1; see also 28 U.S.C. § 2401(b) (two-year limitations period). When the government did not act on those claims within six months, see 28 U.S.C. § 2675(a), plaintiffs brought this lawsuit in federal district court in Miami.

In their complaint, plaintiffs alleged that upon arriving at the Gonzalez home, federal agents "immediately began indiscriminately spraying" chemical agents, including tear gas, at the protesters gathered behind nearby police barricades and at neighbors watching from their yards. R.71 at 25, ¶ 154. For this purpose, plaintiffs alleged, the federal agents used an "Israeli gas gun" that they had borrowed from the Miami police department. Id. at 26, ¶ 157. According to plaintiffs, the agents "shouted obscenities, pointed guns and/or threatened to shoot, beat, kicked and punched neighborhood residents, passers-by and persons who had assembled peacefully outside the [Gonzalez] home," id. ¶ 156, and they "sprayed persons, including Plaintiffs, directly in the face at point blank range with unidentified chemical agents," id. at 29, ¶ 162. Based on these and similar allegations, plaintiffs asserted claims of negligence, assault and battery, intentional and negligent infliction of emotional distress, and false imprisonment. Id. at 77-81.

[2] At that time, the INS was a part of the Department of Justice. Since then, the relevant portions of the former INS have been incorporated into the Department of Homeland Security.

3. District Court Proceedings

The district court addressed the plaintiffs' claims in three groups.

a. Dismissal for Lack of Jurisdiction

In November 2003, a federal magistrate judge recommended dismissing the claims of eleven plaintiffs for failure to comply with the administrative claim requirements of the FTCA.[3] See R.41. All 108 plaintiffs had filed their SF-95 administrative claim forms in a single box on April 22, 2002, the final day of the limitations period. Br. at 18; R.43, exh. 1. The eleven plaintiffs in question, however, failed to include with their administrative claims a demand for damages in a "sum certain." R.41 at 7; see 28 C.F.R. § 14.2(a) (FTCA administrative claim must be "accompanied by a claim for money damages in a sum certain"). Concluding that these eleven plaintiffs had thus failed to satisfy the FTCA's mandatory preconditions to suit, the magistrate judge recommended dismissal of their claims for lack of subject-matter jurisdiction. R.41 at 7 (citing Suarez, 22 F.3d at 1065).

On March 29, 2004, the district court agreed and dismissed the eleven plaintiffs' claims.[4] R.52.

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[3] The eleven plaintiffs were Conception Maria Cabral, Francia de la Conception Cabral, Mirtha Maria Falcon, Antonio Ortega, Juliet Colon, Vanessa G. Gonzalez, Nelva Martin, Misael Pandiello, Angela Taina Toro, Alexei Torres, and Carlos R. Zayas. R.52 at 1.

[4] Plaintiffs filed an interlocutory appeal from this (continued...)

b. Summary Judgment

After discovery, the same magistrate judge recommended in December 2004 that the district court enter summary judgment against nearly all of the remaining plaintiffs. R.119. The magistrate concluded that "[e]very plaintiff who had physical contact with an INS officer either jumped over and/or passed through the front barricade, was in the front or back yard of the Gonzalez home, was in the path of the officers who were securing the area, or was inside the Gonzalez home." R.119 at 6. He found that "[c]ertain protesters jumped over or pushed down the barricades, ran to the Gonzalez house, formed human chains, and/or threw objects," and observed that forty of the plaintiffs freely admitted that they "intended to interfere with the INS officers' efforts to remove Elian." Ibid.

Under these circumstances, the magistrate judge concluded, federal agents' use of tear gas and pepper spray was "objectively reasonable." Id. at 16. Officers first deployed the gas gun, he found, because "numerous people were running toward the barricade, objects including a stool, rocks and bottles were thrown over the barricade, and [the officer with the gas gun] was hit by a rock and a flag pole." Id. at 10. This and other "undisputed evidence" established that "the conduct of many protesters and certain plaintiffs would constitute obstruction

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[4](...continued)
dismissal, but this Court dismissed the appeal for lack of appellate jurisdiction. See Dalrymple v. United States, No. 04-14476-AA (dismissed Nov. 5, 2004).

and/or interference under both Florida and federal law." Id. at 15. In the face of such mass interference, the magistrate determined, the officers' "use of CS [tear] and/or OC [pepper] gas" was "justified * * * under the circumstances" and consequently not actionable under Florida tort law. Id. at 16.

On January 18, 2005, the district court adopted the magistrate's recommendation and entered summary judgment in favor of the government, specifically endorsing the magistrate judge's finding that "the use of CS and/or OC gas was objectively reasonable under the circumstances." R.133 at 1. The court concluded, however, that summary judgment was not appropriate as to 12 plaintiffs who were allegedly gassed at close range either behind the barricades or on their own property.[5] Id. at 2.

c. Bench Trial and Judgment for the Government

3. On June 8, 2005, after a six-day bench trial, the district court entered judgment against the remaining thirteen plaintiffs on all claims.[6] R.169.

In its extensive findings of fact, the district court rejected nearly every significant factual contention offered by the plaintiffs. See R.163. While plaintiffs alleged that

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[5] These plaintiffs were Elsa Anderson, Sandra Cobas, Ramon Diago, Antonio Ortega, Madeline Peraza, Maria Riera, Eduardo Rodriguez, Gloria Sanchez, Illena Santana, Carmen Valdes, Leslie Alvarez, and Nancy Canizares. R.133 at 3.

[6] In addition to the twelve plaintiffs who survived summary judgment, plaintiff Armanda Santos went to trial because the government had inadvertently omitted her name from its motion for summary judgment. See R.133 at 3 n.3.

federal officers sprayed chemical agents "indiscriminately," R.71 at 25, ¶ 154 (complaint), the court found that the officers used tear gas and pepper spray only in response to "the surge of demonstrators who continued to move towards the front of the street barricade and throw projectiles at the federal officers." R.163 at 6, ¶ 48. The gas was "not targeted at any specific individuals" but rather was "sprayed in the direction of the threats," id. ¶ 50, and the Israeli gas gun "was never used closer than 10 to 15 feet from the front of the street barricade," id. ¶ 54. Moreover, the court concluded, "[w]hen the demonstrators receded and stopped throwing objects, the officer stopped deploying gas from the Israeli gas gun." Id. ¶ 51.

The district court also studied videotapes of the April 22 raid that were introduced in evidence. Those tapes, the court found, depicted demonstrators "actively interfering [with] and/or obstructing the INS officers," id. at 9, ¶ 83, and showed officers "deploying gas at demonstrators who were advancing toward the officers, throwing objects at the officers and running towards the Gonzalez's house," id. ¶ 86. Indeed, as the operation proceeded, "many demonstrators appeared to become more violent and aggressive." Id. ¶ 87.

The district court further observed that, contrary to the plaintiffs' allegations, "[t]he tapes do not depict any officers spraying gas at close range at the demonstrators who are standing on their own property or who are standing behind the barricades." Id. ¶ 88. And while "a few individuals are seen rubbing their

eyes and coughing," the court noted, "it does not appear that the deployment of gas was excessive; no one appears to be incapacitated by the gas." Id. ¶ 90. The district court thus concluded that the tapes "corroborate[d] the material portions of the testimony of the federal officers regarding their conduct," id. at 9-10, ¶ 94, and "contradict[ed] the material portions of Plaintiffs' testimony regarding whether and how they were exposed to gas." Id. at 10, ¶ 95.

In light of these findings, the district court readily determined that each of the plaintiffs' tort claims failed under Florida law. See generally id. at 10-19 (conclusions of law). The court held that the plaintiffs had "failed to establish by a preponderance of the credible evidence that the federal officers['] use of force was unreasonable under the circumstances, or that any of the remaining thirteen plaintiffs were sprayed at close range while on their own property or behind the police barricades." Id. at 11, ¶ 14.

Concluding that the plaintiffs had failed to prove any intentional or negligent tort under Florida law, the district court entered judgment for the government on all counts. See id. at 19; R.169.

SUMMARY OF THE ARGUMENT

Plaintiffs do not dispute the district court's finding that a large crowd of demonstrators — including many of the plaintiffs themselves — surged past police barricades on the morning of April 22, 2000, with the specific goal of preventing federal officers from accomplishing their mission. Nor do they deny that other demonstrators hurled objects at the officers, formed human chains, and ran toward the Gonzalez house, ignoring warnings from federal agents and Miami police officers to desist. Nor do they challenge the district court's finding that, contrary to the allegations in plaintiffs' complaint, federal officers used chemical agents only in response to these threats, only to the extent necessary to repel them, and never in a targeted or malicious fashion.

Nevertheless, plaintiffs advance two reasons why, in their view, the district court was not justified in entering judgment in favor of the government. Neither has merit.

First, plaintiffs contend that the district court erred in dismissing the claims of eleven plaintiffs who failed to include on their administrative FTCA claim forms a demand for a "sum certain," as required by the governing regulations. Yet this Court's decisions make clear that the "sum certain" requirement is both mandatory and jurisdictional; a claim that lacks a sum certain fails to satisfy the statutory requirements for suit against the government, thereby denying the district court jurisdiction over the claim. And while plaintiffs did attempt to

cure their error, they did so after the two-year statute of limitations had expired. Having waited to submit their FTCA claims until the last day of the limitations period, plaintiffs are in no position to claim an entitlement to cure their default.

Second, plaintiffs insist that the federal officers' use of tear gas was inherently unreasonable because internal INS policies and procedures prohibited the use of tear gas during the April 22 operation. As this Court has recognized, however, the FTCA does not authorize claims premised on federal agents' violation of federal law unless the conduct at issue is independently a tort actionable under applicable state law. Plaintiffs make no effort to establish that the INS policies in question support liability under Florida tort law. Nor do plaintiffs offer any reason to believe that the choice between tear gas and pepper spray was independently significant under Florida law.

Rather, as the district court recognized, the relevant question for purposes of Florida tort law is whether the officers' use of force was reasonable under the circumstances. Plainly it was. Because a private person would not be liable on any reading of Florida tort law for the use of reasonable, non-lethal force "under like circumstances," 28 U.S.C. § 2674, the district court correctly rejected plaintiffs' FTCA claims and entered judgment for the government.

STANDARD OF REVIEW

In an action under the FTCA, this Court reviews a district court's factual findings for clear error and its legal conclusions de novo. Cohen v. United States, 151 F.3d 1338, 1340 (11th Cir. 1998).

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE CLAIMS OF ELEVEN PLAINTIFFS FOR FAILURE TO FILE PERFECTED ADMINISTRATIVE CLAIMS WITHIN THE LIMITATIONS PERIOD.

1. The district court correctly dismissed the claims of the eleven plaintiffs in this case who, by their own admission, failed to include with their administrative FTCA claims a demand for money damages "in a sum certain." 28 C.F.R. § 14.2(a).

Although it is not a significant hurdle for most plaintiffs, this Court has recognized that the requirement that FTCA claimants distill their claims into a demand for a "sum certain" is both mandatory and jurisdictional. "When the sum certain is omitted, the administrative claim fails to meet the statutory prerequisite to maintaining a suit against the government, and leaves the district court without jurisdiction to hear the case." Suarez v. United States, 22 F.3d 1064, 1065 (11th Cir. 1994) (per curiam); Tidd v. United States, 786 F.2d 1565, 1567 (11th Cir. 1986). Here, although 97 of the 108 claimants in this case demanded a "sum certain" of $250,000 on their administrative claim forms, eleven plaintiffs simply left the relevant box blank.

Plaintiffs now downplay that omission as a mere "technical deficiency," protesting that they corrected the error within a month after submitting their administrative claims. Br. at 16-17. But plaintiffs did not file their administrative claims until April 22, 2002, the last day of the limitations period. By the time plaintiffs discovered and corrected their mistake, therefore, the limitations period had expired, and with it any opportunity plaintiffs may have had to cure their omission. See Adkins v. United States, 896 F.2d 1324, 1325 (11th Cir. 1990) (per curiam) (FTCA claim was barred where plaintiffs failed to specify a sum certain within the two-year limitations period); accord, e.g., Kokotis v. U.S. Postal Serv., 223 F.3d 275, 278 (4th Cir. 2000) ("Failure to request a sum certain within the statute of limitations deprives a district court of jurisdiction over any subsequently filed FTCA suit."); Kokaras v. United States, 980 F.2d 20, 22 (1st Cir. 1992) ("[A] timely-presented claim stating a sum certain is necessary for a court to have jurisdiction to entertain a suit against the United States under the FTCA."); Cizek v. United States, 953 F.2d 1232, 1234 (10th Cir. 1992); Wardsworth v. United States, 721 F.2d 503, 505-06 (5th Cir. 1983).[7] Having left themselves no room for error,

[7] See also 14 Wright, Miller & Cooper, Federal Practice & Procedure, Juris. 3d § 3658 ("No relation back exists for the late or inadequate filing of administrative claims. If the statute of limitations has run, an inadequate administrative tort claim divests the federal court of jurisdiction over the suit.").

plaintiffs are hardly in a position to complain that the district court enforced the jurisdictional deadline.

2. Plaintiffs' remaining arguments on this score are similarly without merit. It is irrelevant under the FTCA that the eleven plaintiffs at issue submitted their incomplete administrative claims at the same time, and in the same box, as the 97 plaintiffs who did name a sum certain. The FTCA plainly contemplates that each plaintiff must file his own timely and complete administrative claim. See 28 U.S.C. § 2675(a) (barring tort actions against the United States "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied . . . ." (emphasis added)); see also Haceesa v. United States, 309 F.3d 722, 734 (10th Cir. 2002) ("If there are multiple claimants in an FTCA case, each claimant must individually satisfy the jurisdictional prerequisite of filing a proper claim." (internal quotation marks omitted)), cert. denied, 540 U.S. 814 (2003); Muth v. United States, 1 F.3d 246, 249 (4th Cir. 1993).

The fact that 97 plaintiffs filed properly perfected claims therefore has no bearing on whether the district court correctly dismissed the remaining 11. Plaintiffs identify no authority that would permit, let alone obligate, the government to supply an omitted "sum certain" in one claimant's SF-95 by implication from other plaintiffs' filings.

3. Plaintiffs also contend that they satisfied the "sum certain" requirement by attaching to their administrative claims

a copy of the amended complaint in Dalrymple v. Reno, No. 00-01773 (S.D. Fla.), rev'd, 334 F.3d 991 (11th Cir. 2003), which sought $100 million in damages from senior federal officials based on the April 22 raid. Br. at 21. From this, plaintiffs assert, the government should have inferred that the eleven plaintiffs here each seek $2 million. Br. at 21-22.

On its face, that argument conflicts with plaintiffs' contention that the government should have inferred from the remaining 97 plaintiffs' claims that the eleven claimants at issue each seek only $250,000. See Br. at 18. The internal inconsistency in plaintiffs' brief only underscores their failure to submit a claim for damages in a sum certain.

In any event, plaintiffs' reliance on the Dalrymple complaint is flawed in multiple respects. First, seven of the eleven plaintiffs at issue here were not parties to the earlier Dalrymple action, so the complaint obviously adds nothing to their claims.[8] Second, an aggregate ad damnum clause in a multi-plaintiff complaint like that in Dalrymple cannot, in any event, satisfy the FTCA "sum certain" requirement, because it does not provide meaningful information about the amount of damages to which any individual plaintiff may be entitled.[9] A basic purpose

[8] Those seven plaintiffs are Mirtha Maria Falcon, Antonio Ortega, Juliet Colon, Vanessa Gonzalez, Nelva Martin, Misael Pandiello, and Angela Taina Toro.

[9] Plaintiffs' reliance on Williams v. United States, 693 F.2d 555 (5th Cir. 1982), is therefore misplaced. In Williams, the Fifth Circuit held that an FTCA plaintiff satisfied the "sum (continued...)

of the "sum certain" requirement is to provide agencies with notice of the government's maximum liability — and thereby promote settlement — by eliciting such specific information from each FTCA claimant. See 28 U.S.C. § 2675(b); Kokotis, 223 F.3d at 279; Coska v. United States, 114 F.3d 319, 322 (1st Cir. 1997).

Finally, even if it were possible to ascribe to the plaintiffs here a portion of the aggregate damages claim in the earlier Dalrymple litigation, that calculation would yield little useful information about the value of their FTCA claims. The prior Dalrymple action was premised on a Bivens theory, not on Florida tort law, and sought several types of damages that are not available under the FTCA, including punitive damages and pre-judgment interest. See 28 U.S.C. § 2674; cf. FDIC v. Meyer, 510 U.S. 471, 477-78, 114 S. Ct. 996, 1001-02 (1994) (constitutional tort claims not actionable under the FTCA). Because the Dalrymple complaint could not reasonably have apprised the government of the value of plaintiffs' tort claims in this action, the district court correctly dismissed the complaint as

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[9](...continued)
certain" requirement by providing the government with a copy of a related state-court tort complaint. Id. at 558. Unlike the Dalrymple complaint at issue here, the complaint in Williams asserted claims on behalf of only one plaintiff, and it included not merely an ad damnum clause but also an "itemized listing of damages" for which the plaintiff sought recovery. Id. at 556. The government was therefore fully "apprised of the specifics of [the plaintiff's] claim by the information contained in his state court complaint." Id. at 558. The Dalrymple complaint, by contrast, provided no similarly concrete basis for the government to estimate the value of plaintiffs' claims.

to the eleven plaintiffs who failed to supply the requisite demand for "money damages in a sum certain."

II. PLAINTIFFS FAILED TO ESTABLISH THAT FEDERAL OFFICERS' USE OF TEAR GAS WAS UNREASONABLE OR OTHERWISE TORTIOUS UNDER FLORIDA LAW.

1. The district court rejected the remaining 97 plaintiffs' claims on the ground that, in light of all the evidence, federal officers' use of tear gas and pepper spray during the April 22 operation was "objectively reasonable under the circumstances" and, thus, not actionable under Florida tort law. R.133 at 1 (summary judgment); R.163 at 11, ¶ 14; id. at 17, ¶ 82.

Although plaintiffs now appeal that ruling, their precise objection to the district court's reasoning is not clear. Plaintiffs argue at length that internal INS policies prohibited the use of CS gas (tear gas) during the April 22 operation. E.g., Br. at 29-32. Yet even assuming that is true, nothing turns on that point. As the district court recognized, see R.133 at 2, a federal employee's violation of federal policies, regulations, or even statutory obligations does not create a cause of action under the FTCA unless the challenged conduct is independently tortious under applicable state law. See, e.g, Pate, 374 F.3d at 1084 ("'[E]ven where specific behavior of federal employees is required by statute, liability to the beneficiaries of that statute may not be founded on the Federal Tort Claims Act if state law recognizes no comparable private liability.'" (quoting Sellfors, 697 F.2d at 1367)). Plaintiffs make no effort in their appellate brief to establish that the INS

policies in question somehow support liability under Florida tort law.[10] Nor do plaintiffs articulate any other theory that would make the INS's (apparently unintentional, see R.119 at 11) use of tear gas rather than pepper spray actionable under the FTCA.

Similarly, plaintiffs emphasize that the district court stated in its findings of fact that the Israeli gas gun was loaded with OC gas (pepper spray), even though the parties had stipulated that the gun contained tear gas. Compare R.163 at 4, ¶ 32 (findings of fact), with R.115 at 3, ¶ 5(B) (stipulations). But again, nothing turns on this. The district court's disposition of plaintiffs' claims did not depend on the nature of the gas used. To the contrary, the court explicitly found that the officers' "use of CS and/or OC gas was objectively reasonable under the circumstances." R.133 at 1 (emphasis added); see also R.163 at 11, ¶ 12. Nowhere do plaintiffs explain why, in their view, the fact that federal agents used one type of crowd-control

[10] In the district court, plaintiffs argued that federal agents' use of tear gas in violation of internal INS policies created a "zone of risk" sufficient to support liability for negligence under Florida law. See R.119 at 34. The magistrate judge and the district court both rejected that argument, see id. at 34-35; R.133 at 2 & n.2, and plaintiffs have not raised it in their opening brief. The argument is therefore waived. See, e.g., Gonzalez-Jiminez De Ruiz v. United States, 378 F.3d 1229, 1231 (11th Cir. 2004); Draper v. Reynolds, 369 F.3d 1270, 1277 n.12 (11th Cir. 2004). In any event, the argument is entirely without merit. Because the district court found that the officers' use of tear gas and pepper spray was objectively reasonable under the circumstances, any negligence claim premised on that conduct must necessarily fail. R.133 n.2; see Gross v. Sand & Sea Homeowners Ass'n, 756 So. 2d 1073 (Fla. Dist. Ct. App. 2000) (duty of a defendant in "zone of risk" case is "to act with reasonable care").

gas rather than another was inherently unreasonable, or why the choice between the two made any difference under Florida law.[11]

3. Liability under the FTCA turns on whether a private individual would be liable "under like circumstances." 28 U.S.C. § 2674. Because of the inherent difficulty in identifying private analogues for certain types of government conduct — such as the armed law enforcement operation at issue here — this Court has recognized that "the 'comparison of activities need not be exact.'" Pate, 374 F.3d at 1084 (quoting Howell, 932 F.2d at 918).

As this Court has observed in a related context, the demonstrators' hostile advances during the April 22 operation "undoubtedly caus[ed] the agents to feel uncertainty and perhaps alarm regarding the plaintiffs' possible intentions to interfere with the agents' mission." Dalrymple v. Reno, 334 F.3d 991, 997 (11th Cir. 2003). Here, the district court found that the federal officers' decision to use tear gas was a direct response to "the surge of demonstrators who continued to move towards the front of the street barricade and throw projectiles" in a concerted effort to interfere with the arrest of Elian Gonzalez, R.163 at 6, ¶ 48, and that as the operation proceeded, "many

[11] In fact, the government introduced undisputed expert testimony at trial establishing that tear gas and pepper spray have essentially identical effects on the human body. See Trial Tr. Vol. V, 1/28/05, at 22-23 (reproduced as an addendum to this brief). Dr. Bryan Ballantyne, a toxicologist with extensive experience in the health effects of riot-control substances, testified that the "signs and symptoms" of exposure to CS and OC gas are basically "the same." Ibid.

demonstrators appeared to become more violent and aggressive," id. at 9, ¶ 87.

In the unlikely event that a private person confronted similar circumstances, the use of reasonable, non-lethal force to hold a violent mob at bay would plainly be privileged under Florida law, whether as an act of self-defense, see Fla. Stat. § 776.012; accord Restatement (Second) of Torts § 63 (hereinafter "Restatement"); as a good-faith effort to defend others, see Fla. Stat. § 776.031; accord Restatement § 76; or as a step reasonably necessary to effectuate a citizen's arrest, or to prevent a third party from interfering with such an arrest, see Nelson ex rel. Bowens v. Howell, 455 So. 2d 608, 610 (Fla. Dist. Ct. App. 1984) (authorizing use of reasonable force to effectuate citizen's arrest); accord Restatement §§ 119, 138. See also Restatement §§ 141-142 (privilege of private person to use reasonable force to suppress riot, affray, or breach of peace). Indeed, the Florida statute that the district court cited, Fla. Stat. § 776.05, not only privileges law enforcement officers to use reasonable force in the course of making arrests, but also extends the same privilege to private persons "summoned or directed to assist" such officers. Ibid.

In light of the district court's factual finding that the federal officers' "use of CS and/or OC gas was objectively reasonable under the circumstances," R.133 at 1; R.163 at 11 ¶ 12, no theory of Florida tort law would impose civil liability on a private person in like circumstances. The district court

therefore correctly entered judgment for the United States on plaintiffs' FTCA claims.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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OCTOBER 2005

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B). The brief contains 5,448 words, as counted by Corel WordPerfect 12.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2005, I filed and served the foregoing brief by causing an original and six copies to be delivered to the Clerk of the Court by Federal Express, and by further causing two copies to be delivered by hand-messenger to:

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A D D E N D U M

ADDENDUM CONTENTS