UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN, et al.,	:	02 CV 2307 (DLI) (SMG)
Plaintiffs,	:	
- against -	:	**Oral Argument Requested**
JOHN ASHCROFT, et al,	:	
Defendants	:	

PLAINTIFFS' RESPONSE TO DEFENDANT HASTY'S LIMITED OBJECTIONS TO MAGISTRATE JUDGE GOLD'S REPORT AND RECOMMENDATION

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Rachel Meeropol
Michael Winger
Shayana Kadidal
Baher Azmy
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012-2317
Tel.: (212) 614-6432
Fax: (212) 614-6499

Alexander A. Reinert
55 Fifth Avenue
New York, New York 10003
(212) 790-0403

Nancy L. Kestenbaum
Jennifer L. Robbins
COVINGTON & BURLING LLP
The New York Times Building
620 Eighth Avenue
New York, New York 10018-1405
Tel.: (212) 841-1000
Fax: (212) 841-1010

David M. Zionts
Covington & Burling LLP
One City Center
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000

Attorneys for Plaintiffs

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In his Limited Objections to the Magistrate Judge's Report & Recommendation, ECF No. 839 ("Hasty Br."), Defendant Hasty argues that the Magistrate Judge erred in rejecting (1) Congressional silence and (2) the alternative remedy of equitable relief as special factors which preclude a court from modestly extending *Bivens* to allow for deliberate indifference claims by detainees, as well as convicted prisoners. For the reasons set forth herein, the Magistrate Judge was correct on both points, and the Court should adopt his reasoning.

I. CONGRESSIONAL SILENCE WHEN PASSING THE USA PATRIOT ACT

The Supreme Court did not identify Congressional silence when passing the USA PATRIOT Act as a potential special factor for this court to explore on remand. *Ziglar v. Abbasi,* 137 S. Ct. 1843, 1865 (2017).[1] Hasty advances the argument nonetheless. Because the USA PATRIOT Act created a mechanism for Congress to learn of prisoner abuse, and did not create a damages action to remedy such abuse, Hasty argues that this Court is precluded from extending *Bivens* to allow for damages cases by detainees. Hasty Br. at 5-6. The Magistrate Judge acknowledged and rejected this argument, finding Congressional intent too ambiguous to provide support for Hasty's position. *See* Report & Recommendation at 11-12, 16.

Hasty does not take issue with the Magistrate Judge's assessment; rather he argues that interpreting Congressional silence does not depend on assessing Congressional intent, which he asserts "is not the focus of the inquiry." Hasty Br. at 9. Thus, Hasty ignores legislative history, statutory structure, and other reasons that suggest Congress had no intent or desire to deny a

[1] The Court did identify Congressional silence when passing the Prison Litigation Reform Act as a potential special factor for the Court to explore on remand. *Ziglar,* 137 S. Ct. at 1865. The Magistrate Judge found it was not, as Congress assumed the continued existence of *Bivens* actions when it passed the PLRA, and subjected them to an exhaustion requirement. Report & Recommendation at 13-14. Despite having identified the PLRA as a special factor in his briefs to the Magistrate Judge, Hasty abandons it now. *See* Hasty Br. at 8 (referring to PLRA without challenging the Magistrate's analysis on same).

damages remedy for victims of constitutional violations by prison officials. Hasty asks this Court to interpret Congress's silence in the PATRIOT ACT in isolation from Congress's assumptions that detainees beaten by jailors already had a *Bivens* damages remedy available, and Congressional approval of that remedy. This argument makes no sense, and finds no support in the Supreme Court's *Bivens* jurisprudence; the Magistrate Judge was correct to reject it.

The Magistrate Judge's analysis of the issue is straightforward and supported by *Ziglar,* 137 S. Ct. at 1862, where the Supreme Court relied on Congressional silence, among other factors, to deny a *Bivens* remedy for Plaintiffs' detention policy claims. In *Ziglar*, the Court explained, "This silence is notable because it is likely that high-level policies will attract the attention of Congress. Thus when Congress fails to provide a damages remedy *in circumstances like these*, it is much more difficult to believe that 'congressional inaction' was 'inadvertent.'" *Id.* (emphasis added)*, see also* Report & Recommendation at 15-16. As the Magistrate Judge correctly pointed out, "plaintiffs' prisoner abuse claim does not involve 'high-level policies,'" Report & Recommendation at 16, and so the crucial factor on which the Court relied in *Ziglar* is absent. The Supreme Court said nothing to imply that it would also expect the creation of a damages remedy against a warden for failure to protect detainees to attract the attention of Congress; and indeed, this seems implausible on its face. To the contrary, analogous claims against a warden under the Eighth Amendment are well accepted, and have drawn no negative attention from Congress. *See Carlson v. Green,* 446 U.S. 14 (1980), *Farmer v. Brennan*, 511 U.S. 825 (1994).

The Magistrate Judge's conclusion that Congressional intent is too ambiguous to either support or preclude a *Bivens* remedy took into account Plaintiffs' argument that Congress had no need to codify *Bivens*, or create a new freestanding damages remedy, because Congress learned,

through the OIG report and subsequent testimony, that *Bivens* actions regarding detainee abuse were already moving forward. Report & Recommendation at 12-13, 16; OIG Report at 3, n.4, 92,[2] *see also* U.S. Senate Judiciary Comm. Hearing on the Inspector General's Report on the 9/11 Detainees, 2003 WL 21470415 (June 25, 2003) (Glenn Fine testifying as to existence of ongoing litigation about unconstitutional policies and physical abuse at MDC). Given two competing narratives to explain Congressional inaction, the Magistrate wisely found the evidence "too ambiguous to provide meaningful support for either side's position," and held that Congressional silence could not function here as a special factor counselling hesitation. Report & Recommendation at 16, *quoting Wilkie v. Robbins*, 551 U.S. 537, 554 (2007) ("It would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim"). This interpretation is correct, and should be adopted by the Court.

Ignoring *Ziglar*'s analysis of Congressional intent, Hasty maintains that the only question is whether Congress has ever paid attention to the subject matter of a *Bivens* claim. Hasty Br. at 9. On this simplistic view, one could conclude that Congress disfavored a damages remedy simply by the mere fact that Congress held hearings regarding physical abuse that the plaintiffs were subjected to at the MDC and took steps to remain informed of similar future conduct. Hasty Br. at 6-7.

But in *Ziglar*, Congressional silence concerning a damages remedy to challenge high-level executive policy was meaningful because allowing a remedy in such a circumstance would be a major expansion of *Bivens*. *See* 137 S. Ct. at 1860 (challenge to "high-level executive

[2] *See* "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks," ("OIG Report") available at http:/www.usdoj.gov/oig/special/ 0306/full.pdf.

policy created in the wake of a major terrorist attack . . . bear[s] little resemblance to the three *Bivens* claims the Court has approved in the past…"). In contrast, physical abuse in prison has long been a subject of *Bivens* actions in various scenarios, and just as the Court thought it natural to suppose that Congress was happy with the existing practice in which *Bivens* actions did not challenge the policy decisions of high-ranking officials, it is equally natural to suppose that Congress is satisfied with the practice of *Bivens* actions against prison officials.

At the time of the USA PATRIOT Act, the Supreme Court had explicitly recognized one *Bivens* claim for mistreatment in prison, and the appropriateness of diverse prisoner and detainee *Bivens* claims was generally assumed. *See Carlson,* 446 U.S. at 19-20; *Cleavinger v. Saxner*, 474 U.S. 193 (1985) (Due Process *Bivens* claim arising from prison disciplinary proceedings); *Farmer v. Brennan*, 511 U.S. 825 (1994) (Eighth Amendment *Bivens* claim for failure to protect prisoner from harm); *Cale v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988) *abrogated on other grounds by Thaddeus—X v. Blatter*, 175 F.3d 378 (6th Cir. 1999) (en banc) (due process *Bivens* claim by prisoner); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (due process *Bivens* claim by arrestee); *Lyons v. U.S. Marshals*, 840 F.2d 202, 203 (3d Cir. 1988) (due process challenge to pretrial detainee's conditions of detention). Congress's failure to create an explicit cause of action for these types of claims does not indicate disapproval, as established by standard canons of statutory construction. Congress is presumed to know the background law upon which it regulates—and when the USA PATRIOT Act was adopted, the background law recognized the existence of *Bivens* causes of action for both medical and non-medical claims. Had Congress wanted to preclude non-medical *Bivens* claims, one would naturally expect it to do so. Failing to take action to abrogate existing *Bivens* liability sends a message of approval, not disapproval. Thus, if Congressional silence suggests anything in this context, it is consent to *Bivens* actions.

II. INJUNCTIVE RELIEF AS AN ALTERNATIVE REMEDIAL SCHEME

Hasty's second argument is that the Magistrate Judge was incorrect to reject injunctive relief as an alternative remedial scheme available to protect Plaintiffs' rights. Hasty concedes that a prisoner beaten once presents a "classic *Bivens* case" suitable for damages (Hasty Br. at 10), but when multiple prisoners are beaten multiple times, he argues, damages should be unavailable because an injunction could stop the abuse from continuing. The suggestion that a *Bivens* action is *less* available for persistent misconduct is peculiar at best; the Magistrate Judge's narrow and careful analysis avoids it by resting instead on the specific facts, which must be taken as true on Hasty's motion to dismiss, that *these plaintiffs* did not have meaningful and timely access to injunctive relief, because they were blocked from contacting lawyers and the court. His approach is correct, and should be adopted.

A. The Magistrate Judge Correctly held that Injunctive Relief was not Available to Plaintiffs, and thus Cannot Supplant *Bivens.*

As the Magistrate Judge recognized, neither administrative grievances, nor motions for injunctive relief nor petitions for a writ of habeas corpus were "sufficiently available to plaintiffs to provide them with alternative remedies warranting preclusion of their *Bivens* claim." Report & Recommendation at 24. This is because for the first month of their detentions—until mid-October 2001—Plaintiffs were barred from any communication with the outside world, including counsel and the court. Compl. ¶ 79; *see also* ¶ 80, 81 (attorneys who sought access to Plaintiffs during this period were lied to, and told Plaintiffs were not at MDC). After this initial communications blackout, Plaintiffs were supposed to be allowed one legal call a week, and non-contact legal visits, but actually they were denied even that. Compl. ¶ 83, 84, *see also* ¶ 85 (summarizing each Plaintiff's failed attempts to contact counsel through fall and winter of 2001); ¶ 92 (list of legal organizations provided to Plaintiffs contained outdate and inaccurate

information); ¶ 93 (detailing Abbasi's failed attempts to get legal advice); ¶ 98-99 (MDC illegally audio-recorded detainees' visits with their lawyers); *see also*, OIG Report at 112-118, 130-35, Suppl. OIG report at 31-33.[3] As a result, Plaintiffs' "ability to obtain, and communicate with, legal counsel" was "severely limited." OIG Report at 130, 134.

These restrictions significantly delayed Plaintiffs' access to the court, and they were unable to move for injunctive relief until April of 2002. *See* Compl., ECF No. 1 at 38. The Complaint (and the Amended Complaint, filed in July of 2002) sought appointment of a Special Master to fashion remedies and "such further relief as necessary to ensure that Defendants operate the MDC . . . in compliance with the United States Constitution." *Id.*; *see also* Am. Compl., ECF No. 8 at 62. But by the time the court was able to review their complaint Plaintiffs had been released, mooting their plea for injunctive relief.

Hasty argues that a more targeted petition for relief was available, citing a habeas petition filed by detainee Shakir Baloch in December of 2001 (Hasty Br. at 13), but as the Magistrate Judge recognized, Mr. Baloch's petition actually *corroborates* Plaintiffs' claims, for it was not filed until three months into his detention, it includes allegations that he was unable to communicate with an attorney for at least a month, and most important, it was dismissed as moot before the Court could decide whether relief was warranted. Report & Recommendation at 24 (*citing* Order dismissing Case as Moot, *Baloch v. Ashcroft*, No. 01-cv-8515 (E.D.N.Y. Dec. 21, 2001), Docket Entry 4).

That Baloch, and the other detainees, had no realistic way to get actual relief doesn't matter to Hasty, who insists that "success of a particular alternative remedy" is not determinative

[3] *See* "The Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York," ("Suppl. OIG Report") available at http://www.usdoj.gov/oig/special/0312/final.pdf.

of *availability*, and that a class complaint to address an ongoing pattern of abuse would have been effective. Hasty Br. at 13. This response is misguided. First, the Supreme Court made it explicit long ago that alternative remedies are not "available" if they are rendered moot: after the plaintiff in *Davis v. Passman* was fired for being a woman, she initially sought equitable relief, including reinstatement, but by the time the Supreme Court heard her case the Defendant was no longer a Congressman, rendering this relief "unavailable" and resulting in the Court's famous analysis that "for Davis, as for Bivens, 'it is damages or nothing.'" *Davis v. Passman*, 442 U.S. 228, 231 n.4, 245 (1979). For Plaintiffs, just as for Ms. Davis, injunctive relief is not an available alternative remedy.

And as for a class action seeking relief from a pattern of abuse, this is precisely what Plaintiffs filed, and it was mooted before the claims for injunctive relief could be heard. Contrary to what Hasty might assume (Hasty Br. at 14), one does not put together a class action complaint, documenting allegations of patterned abuse of detainees held in solitary confinement, with minimal access to legal calls or visits, overnight. And the federal judiciary, upon receiving such a complaint, might reasonably require an answer from defendants, and the production of evidence, before ordering abuse to stop.

The Magistrate Judge correctly determined injunctive relief was not available. Because Defendants have failed to show how Plaintiffs—with minimal access to lawyers and the court—could have obtained an injunction or habeas to get relief from prison abuse *before their claim was moot*—they are left in the same position as Mr. Bivens and Ms. Davis: with damages or nothing. As the Supreme Court acknowledged, "if equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm[s] and deter future violations." 137 S. Ct. at 1858.

B. Neither Habeas nor Injunctive Relief are "Alternative Remedies" Counselling Against an Extension of *Bivens*.

Even if the Court were to reject the Magistrate Judge's narrow and well-founded determination that injunctive relief and habeas were not available to Plaintiffs and thus cannot supplant a *Bivens* remedy, Hasty's argument must be rejected for an independent reason: treating these avenues of relief as alternative remedies excluding *Bivens* relief cannot be squared with Supreme Court precedent.

If a Congressional scheme provides "meaningful remedies," this counsels against an additional *Bivens* remedy, because Congress, having designed the system, is presumed to have weighed the costs and benefits of possible remedies. *Bush v. Lucas,* 462 U.S. 367, 388 (1983) ("an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations" should not be augmented by a judicially created remedy); *Schweiker v. Chilicky,* 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations . . . we have not created additional *Bivens* remedies").

But Congress did not design injunctive relief and habeas as remedies for a specific context, and certainly not the context presented by this case. They are generally available to challenge unlawful detention, and thus provide no indication that Congress would disfavor a further judicially-created damages remedy. Raising no inference of Congressional attention, injunctive relief and habeas could only counsel against *Bivens* if they provided "roughly similar incentives for potential defendants to comply with the [Constitution] while also providing roughly similar compensation to victims of violations." *Minneci v. Pollard,* 565 U.S. 118, 130 (2012); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72 (2001) (involving alternative remedies that "are at least as great, and in many respects greater, than anything that could be had

under *Bivens*"). Because neither injunctive relief nor habeas relief can provide *any* compensation, let alone "roughly similar compensation," 565 U.S. at 130, they simply cannot satisfy the test for alternative remedies set forth in *Minneci*.

Thus, in *Wilkie v. Robbins*, 551 U.S. 537 (2007), the general availability of a "patchwork" of administrative and judicial processes for vindicating Mr. Robbins' complaints did not counsel against a *Bivens* remedy because it did not raise an inference "that Congress expected the Judiciary to stay its *Bivens* hand," nor was it adequate to both compensate Mr. Robbins *and* deter future abuse. *Id.* at 553-54. Although the Court declined to extend a remedy to that plaintiff under the *Bivens* special factors analysis; that was after "weighing reasons for and against the creation of a new cause of action, the way common law judges have always done." *Id.* at 554-55. If the existence of *any* alternative remedy "precluded" *Bivens*, this inquiry would have been unnecessary.

Far from providing roughly "similar incentives" and "similar compensation," habeas actions and claims for injunction relief provide no incentives for defendants to comply with the Constitution, nor any compensation for individuals whose rights have been violated. Thus it is no surprise that we have been unable to locate any Court of Appeals case holding that the prospect of obtaining prospective relief is sufficient to exclude a *Bivens* remedy.

Plaintiffs recognize that the *Ziglar* court suggested that prospective relief, if available, might be considered an alternative remedy precluding *Bivens*, but the Court deliberately refrained from deciding that issue, remanding it to the lower courts. 137 S. Ct. at 1865. In fact, that possibility stands in direct contradiction to binding Supreme Court precedent that, as of today, remains good law. Unless or until the Supreme Court holds otherwise, purely prospective remedies like injunctions or habeas actions do not in themselves counsel against implying a

Bivens remedy, as they involve no suggestion that Congress has considered and rejected the appropriateness of a *Bivens* remedy, they provide no incentives for Defendants to comply with the Constitution, and they provide no compensation for those whose Constitutional rights have been violated.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court adopt those portions of the Magistrate Judge's Report & Recommendation which find that injunctive relief is not an available alternative remedy, and Congressional intent is too ambiguous to amount to a special factor counseling against a *Bivens* remedy, and, pursuant to Plaintiffs' objections to other portions of the Report and Recommendation, deny Defendants' renewed Motions to Dismiss and allow Plaintiffs' deliberate indifference claim to proceed against Defendants Hasty, Lopresti, and Cuciti.

Dated: October 8, 2018

Respectfully submitted,

s/ Rachel Meeropol
Rachel Meeropol
Michael Winger
Baher A. Azmy
Shayana Kadidal
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012-2317
Tel.: (212) 614-6432
Fax: (212) 614-6499

Alexander A. Reinert
55 Fifth Avenue
New York, New York 10003
(212) 790-0403

Nancy L. Kestenbaum
Jennifer L. Robbins
Covington & Burling LLP

The New York Times Building
620 Eighth Avenue
New York, New York 10018
(212) 841-1000

David M. Zionts
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000

Attorneys for Plaintiffs

Certificate of Service

I certify that on October 8, 2018, I caused Plaintiffs' Response to Defendant Hasty's Limited Objections to Magistrate Judge Gold's Report and Recommendation to be served via ECF and email on the counsel listed below.

Dated: October 8, 2018

/s/ Rachel Meeropol
Rachel Meeropol

Counsel for Defendant Dennis Hasty
Clifton Elgarten
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2595
slahlou@crowell.com
celgarten@crowell.com
kgrowley@crowell.com
joleksyk@crowell.com
jcho@crowell.com

Counsel for Defendants Salvatore Lopresti & Joseph Cuciti
James J. Keefe
1225 Franklin Avenue Suite 325
Garden City, NY 11530
james@jamesjkeefepc-law.com