06-4216-cv

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MAHER ARAR,

Plaintiff-Appellant,

v.

JOHN ASHCROFT, Attorney General of the United States, LARRY D. THOMPSON, formerly Acting Deputy Attorney General, TOM RIDGE, Secretary of State for Homeland Security, J. SCOTT BLACKMAN, formerly Regional Director of the Regional Office of Immigration and Naturalization Services, PAULA CORRIGAN, Regional Director of Immigration and Customs Enforcement, EDWARD J. MCELROY, formerly District Director of Immigration and Naturalization Services for New York District, and now Customs Enforcement, ROBERT MUELLER, Director of the Federal Bureau of Investigation, JOHN DOES 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents, JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services, UNITED STATES,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR DEFENDANT-APPELLEE EDWARD J. McELROY

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PRELIMINARY STATEMENT

The decision of the district court was rendered by the Honorable David G. Trager, United States District Judge for the Eastern District of New York. *See* Special Appendix ("SPA") 1.

JURISDICTIONAL STATEMENT

Plaintiff invoked the District Court's jurisdiction under 28 U.S.C. §1331, 28 U.S.C. § 1350, note (Torture Victim Protection Act); 5 U.S.C. §§ 551, 559 (Administrative Procedure Act); and 28 U.S.C. § 2201 and 2202 (Declaratory Judgment Act). On February 16, 2006, the district court granted Defendants' motions to dismiss the complaint for failure to state a claim upon which relief could be granted. Counts I through III were dismissed with prejudice. Count IV, including all claims against John Doe law enforcement defendants, was dismissed without prejudice, with leave to replead.

Plaintiff filed a notice, dated July 14, 2006, titled Plaintiff's Notice of Intent Not To Replead, indicating his intention not to file an amended complaint as to Count IV. On August 16, 2006, the Clerk of Court entered judgment dismissing all claims with prejudice against the named individual defendants and John Doe law enforcement defendants.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the allegations in the complaint identifying Edward McElroy are sufficient to state a claim against Mr. McElroy for money damages under *Bivens*.

2. Whether plaintiff stated a claim that Edward McElroy should be personally liable for money damages, under *Bivens*, based on allegations of conduct committed by other employees within Mr. McElroy's agency.

3. Whether Mr. McElroy is entitled to qualified immunity in the absence of any specific, non-conclusory allegation of personal involvement in Plaintiff's due process/denial-of-access claim under Count IV.

STATEMENT OF THE CASE

This is an appeal by Plaintiff of the district court's decision dismissing all four claims against all Defendants, brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The first count alleges that Mr. McElroy and other individual U.S. government defendants violated the TVPA when they allegedly conspired with Jordanian and Syrian officials to bring about his torture. Joint Appendix ("A.") 38. In the second and third counts, Plaintiff alleges that Mr. McElroy violated his substantive due-process rights under the Fifth Amendment when Plaintiff was removed to Syria and allegedly subjected to " torture and coercive interrogation," A. 38-40 (second count), and to " arbitrary, indefinite detention " in that country. A. 40-41 (third count). In count four, Plaintiff alleges that

Mr. McElroy violated his due-process rights when, during Plaintiff's " domestic detention " in the United States, he was allegedly subjected to unconstitutional "conditions of confinement," "coercive and involuntary custodial interrogation," and interference with "his access to lawyers and the courts." A. 41-42.

A. Plaintiff's Allegations

The allegations in the complaint are taken as true for purposes of this appeal. Plaintiff, a native of Syria, is a dual citizen of Syria and Canada. A. 22-23. On September 26, 2002, he arrived at John F. Kennedy Airport ("JFK") in New York, on a flight from Switzerland, for the alleged purpose of transiting to Montreal. A. 28-29. Plaintiff presented his Canadian passport to a federal immigration inspector and was identified as "the subject of a . . . lookout as being a member of a known terrorist organization." A. 29. Plaintiff was detained and interrogated at JFK and then transferred the next day to the Metropolitan Detention Center in Brooklyn. A. 29-31.

On October 1, 2002, the Immigration and Naturalization Service ("INS") served Plaintiff with Form I-147 (Notice of Temporary Inadmissibility), initiating removal proceedings under 8 U.S.C. § 1225.[1] A. 31. Plaintiff was charged with being temporarily inadmissible on the ground that he was a member of al Qaeda, an organization designated by the Secretary of State as a foreign terrorist organization. *Id*. On October 4, 2002, federal officials asked Plaintiff to designate the country to

[1] On March 1, 2003, the INS was abolished, and its service and enforcement

which he wished to be removed, and he designated Canada. A.31-32. Thereafter, Plaintiff asserts that federal officials questioned him as to why he opposed being removed to Syria (having allegedly "refused" an earlier request that he " 'volunteer' to be sent" there). A.30. Plaintiff allegedly responded that he feared he would be tortured if removed to Syria. A. 32. On Sunday, October 6, 2002, Plaintiff alleges that he was questioned by approximately seven unidentified INS officials, and that the only notice given to his counsel regarding the questioning was a message left by Mr. McElroy on his counsel's voice mail that same day. *Id*. (Compl. ¶ 43).

On October 7, 2002, INS Regional Director Blackman determined that Plaintiff was inadmissible to the United States. A. 86. This decision was made based on information provided to him by the Office of the New York District Director. *See* A. 87. [2] Based largely on classified information, Blackman found that Plaintiff "is clearly and unequivocally" a member of al Qaeda, a designated foreign terrorist organization, and was therefore "clearly and unequivocally inadmissible to the United States" under 8 U.S.C. § 1182(a)(3)(B)(i)(V). A. 87, 89, 91. Blackman further determined "that there are reasonable grounds to believe that [Plaintiff] is a danger to the security of the United States," A. 92, and he ordered Plaintiff "removed from the United States." A. 93. Blackman signed the I-148 form, which ordered Plaintiff's removal "without

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functions were transferred to the new Department of Homeland Security ("DHS").

[2] Although not addressed in Plaintiff's complaint, Mr. McElroy provided this information pursuant to federal regulation. *See* 8 C.F.R. § 235.8(a).

further inquiry before an immigration judge;" advised Plaintiff of the sanctions he would face if he entered the United States (or tried to do so) without prior authorization from the Attorney General; and advised him that the INS Commissioner had found that his "removal to Syria would be consistent with Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment" ("CAT"). A. 86-94.

Plaintiff alleges that, on the morning of October 8, 2002, he learned that Blackman "had decided to remove [him] to Syria." A. 33. Plaintiff was served with Form I-148 and told "that he was barred from re-entering the United States for five years." A. 33. He alleges that he was flown to Jordan, where he was allegedly turned over to Jordanian officials on October 9, 2002. A. 33-34. After allegedly being interrogated and beaten by the Jordanians, Plaintiff was turned over to Syrian officials later that day. A. 34. Plaintiff then was detained in Syria and allegedly interrogated and tortured by Syrian officials. A. 34-37. In October 2003, Plaintiff was released and returned to Canada. A. 36, 37.

B. Allegations Against Defendant Edward McElroy

The complaint contains three allegations as to Mr. McElroy. First, as the District Director for the INS New York District he was "responsible for the enforcement of customs and immigration laws in the New York City area." A. 26. Second, Mr. McElroy left a voice mail message for Ms. Amal Oummih, Mr. Arar's

attorney, on her work voice mail, prior to Mr. Arar's questioning by unidentified INS officials. A. 32.

The third allegation, or reference, to Mr. McElroy in the complaint is found in Exhibit D of the Complaint, Decision of Regional Director J. Scott Blackman. A. 86. This decision indicates that Regional Director Blackman reviewed documentation, concerning the application of Mr. Arar for admission to the United States, submitted to him by the office of the New York District Director: "In accordance with my responsibilities as Regional Director, I have, pursuant to section 235(c)(2)(B) of the Immigration and Nationality Act (INA) and 8 C.F.R. § 235.8(b) reviewed the documentation submitted to me by the New York District Director . . . ." A. 87.

C. The District Court's Decision

The district court dismissed all four counts of the complaint. Counts I-III were dismissed with prejudice, while Count IV was dismissed without prejudice, and with leave to file an amended complaint. *See* SPA 87-88. In dismissing Count IV against Mr. McElroy, and all named individual capacity defendants, the district court found that "[a]lthough plaintiff's allegations. . . are presently borderline as to whether they constitute a due process violation of 'gross physical abuse,' an amended complaint might remedy this deficiency." SPA 82. The district court also dismissed Count IV to the extent that it sought to allege a denial-of-access claim. Relying on *Christopher v. Harbury*, 536 U.S. 403 (2002), the district court found that this branch of Plaintiff's

claim failed because it did not "identify 'a separate and distinct right to seek judicial relief for some wrong.' " SPA 82 (quoting *Harbury*, 536 U.S. at 414-15).

Next, the district court found that "given the serious national-security and foreign policy issues at stake, *Bivens* did not extend a remedy to Arar for his deportation to Syria and any torture that occurred there." SPA 82-83. Since *Bivens* did not extend a remedy for Counts I-III, the court concluded, it did not make sense to find the existence of a denial-of-access claim which, under *Harbury*, required a separate and distinct claim: "It would, therefore, be circular to conclude that a denial of access to counsel amounted to a violation of the Fifth Amendment when Arar cannot assert a 'separate and distinct right to seek judicial relief' against defendants in the first place." SPA 83.

Finally, the district court found that Count IV did not sufficiently allege the personal involvement of the named individual defendants:

> [T]he allegations against the individually named defendants [as to Count IV] do not adequately detail which defendants directed, ordered and/or supervised the alleged violations of Arar's due process rights . . . or whether any of the defendants were otherwise aware, but failed to take action, while Arar was in U.S. custody.

SPA 84. The district court dismissed this claim against all named defendants with leave to replead.[3] SPA 85. By a notice dated July 14, 2006, Plaintiff indicated his

[3] The district court also dismissed this claim as to all ten John Doe law enforcement agents. SPA 88.

intention not to replead count 4, and "instead stand on the allegations of his original complaint." A. 467-68. Plaintiff's appeal ensued.

SUMMARY OF ARGUMENT

1. The Complaint fails to state a claim with respect to Count IV. As an alien applying for admission, Mr. Arar's only constitutional protection was as against gross physical abuse. Plaintiff's allegations, about the nature of his interrogations, and that he was deprived of contact with his family, consulate and attorney do not constitute gross physical abuse. Plaintiff''s claim for denial-of-access fails to state a claim because his complaint does not allege the underlying cause of action, and its lost remedy, to which he was denied access.

2. Count IV fails to sufficiently allege Mr. McElroy's personal involvement in any constitutional violation. To hold federal officials liable under *Bivens* for money damages, a plaintiff must allege the personal involvement of the individual defendant. The complaint does not specifically allege any facts that Mr. McElroy was personally involved in the conditions of Plaintiff's confinement, or his denial-of-access claim. The only allegations made against Mr. McElroy on this issue is that he left a message for Mr. Arar's attorney, prior to questioning by unidentified INS officials. The complaint also alleges that, as District Director for the INS's New York District, he was responsible for the enforcement of customs and immigration laws in the New

York City area. These allegations, without more, are insufficient to create *Bivens* liability.

STANDARD OF REVIEW

The district court's decision on the motion to dismiss is subject to de novo review by this Court. *See Pena v. DePrisco*, 432 F.3d 98, 107 (2d Cir. 2005).

ARGUMENT[4]

I. Count IV Does Not State A Constitutional Claim Against Edward McElroy

Count IV alleges two types of Fifth Amendment due process violations: (1) conditions of confinement; and (2) denial-of-access. Count IV of Plaintiff's complaint does not state a constitutional claim against Mr. McElroy under either theory.

A. Plaintiff's Allegations Do Not Constitute "Gross Physical Abuse" To State A Claim Under The Fifth Amendment's Substantive Due Process Clause.

In *Correa v. Thornburgh*, this court stated clearly that aliens seeking entry into the United States have limited constitutional protections: "Other than protection against gross physical abuse, the alien seeking initial entry appears to have little or no constitutional due process protection." 901 F.2d 1166, 1171 n.5 (1990); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 623 (5th. Cir.) ("whatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the

[4] As indicated in Section IV *infra*, Mr. McElroy adopts and incorporates by reference the arguments made by Defendants Ashcroft and Thompson, and the United States, with respect to Counts I-III.

due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials."), *cert. denied*, 127 S. Ct. 837, 75 USLW 3311, 3312 (2006) (quoting *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th. Cir. 1987)); *see Mejia v. Ruiz v. I.N.S.*, 871 F. Supp. 159, 164 (E.D.N.Y. 1994).

The district court's opinion, that *Correa* is not controlling, is based in large part on the allegation in the complaint that "Arar was not seeking admission to the United States, and, thus, defendants' argument begins from an incorrect 'starting point.' " SPA 48 (emphasis in original). *See* A. 29 ("At around noon, on September 26, 2006, Mr. Arar debarked at JFK in order to catch his connecting flight. *He was not applying to enter the United States at this time*.) (emphasis added). Later in its opinion, the district court refer to *Correa* and *Mezei*[5] as "of questionable relevance" to this case "because Arar was not attempting to effect entry to the United States." SPA 81. The district court sought to distinguish *Correa* on the ground that Plaintiff, in his complaint, alleges that he was not seeking entry into the United States. Plaintiff's allegation that he was "not applying to enter the United States at this time," A.29, is inconsistent with the application of federal immigration law.

By statute an alien like Plaintiff, passing through the United States from one country to another, "shall be deemed for purposes of this chapter an applicant for

[5] *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

admission." 8 U.S.C. § 1225(a)(1).[6] This interpretation makes sense, because immigration officials must be able to monitor points of entry into the United States where people have an opportunity to enter the United States illegally. Otherwise, people "passing through" the United States en route to another destination-like Mr. Arar-could gain entry past our borders with little or no regulation or oversight. The district court's mistaken construction of immigration law undermines its substantive due process analysis with respect to Count IV.

Although the district court's opinion cites to cases in the First, Fifth and Eleventh Circuits, SPA 80-81, characterized as "developments" since *Correa* and *Mezei*, this does not change the standard applicable in this Circuit in 2002, and the standard to be applied to Plaintiff's claims. *See Moore v. Vega*, 371 F.3d 110, 114 (2d Cir. 2004) ("Only Supreme Court and Second Circuit precedent existing at the time of the alleged violation is relevant in deciding whether a right is clearly established.").

Other than the general allegations applicable to all defendants or John Does 1-10, the complaint alleges only that Mr. McElroy left a message for Plaintiff's counsel.

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[6] Section 1225(a)(1) states as follows:

(a) Inspection

(1) Aliens treated as applicants for admission

An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.

Id.

A. 32. This allegation does not rise to the level of conduct that shocks the conscience: "[O]nly a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." *County of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998). Under this standard, the allegations in the complaint, regarding "coercive[] interrogation[s]"; A. 20; "depriving him of contact with his family, his consulate and his lawyer[.]"; *id*.; do not rise to the level of gross physical abuse. *See, e.g.*, *Adras v. Nelson*, 917 F.2d 1552, 1559 (11th Cir. 1990) (finding of no gross physical abuse based on complaint alleging "severe overcrowding, insufficient nourishment, inadequate medical treatment and other conditions of ill-treatment arising from inadequate facilities and care.").

The allegations against Mr. McElroy do not allege, or even imply, that Mr. McElroy was involved in the decision to detain Plaintiff, A. 29, or the conditions of his confinement, A. 29-31. Nor does the complaint allege, or provide factual allegations upon which one could infer, that Mr. McElroy was present when Plaintiff was questioned, or that he participated in-or had knowledge of-the nature or conditions of any questioning of Plaintiff. The allegations against Mr. McElroy, without more, do not state a substantive due process claim against him.

While Plaintiff seeks to analogize Plaintiff to a pre-trial detainee under *Bell v. Wolfish*, 441 U.S. 520 (1979),[7] he fails to explain how *Correa* is not controlling law in this circuit. Plaintiff points to no other case in this circuit directly addressing this issue. This absence of case law to support Plaintiff's position is also relevant on whether the *Bell* standard, claimed by Plaintiff as controlling, could be considered clearly established in September 2002. *See Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (for purposes of qualified immunity, "reasonableness is judged against the backdrop of the law at the time of the conduct.").

B. Plaintiff Failed To Allege A "Separate And Distinct Right To Seek Judicial Relief" Required To Support A Denial-Of-Access Claim.

The district court properly held that Plaintiff's denial-of-access claim fails because, under *Christopher v. Harbury*, 536 U.S. 403 (2002), he failed to address in his complaint "the underlying cause of action and its lost remedy . . . sufficient to give fair notice to a defendant."*Id*. at 416. Plaintiff's argument, that *Harbury* does not apply because that case involved the "inability to bring an affirmative tort action[,]" Pl.'s Br. 52, is a distinction without a difference.

The Supreme Court's decision addresses two categories of claims: (1) those that "systemic official action frustrated a plaintiff or plaintiff class in preparing and filing suits at the present time"; and (2) cases where "official acts . . . may allegedly have

[7] Plaintiff's brief does not explain how Plaintiff's condition is analogous to a pre-trial detainee, defined in *Bell* as "those persons who have been charged with a

caused the loss or inadequate settlement of a meritorious case . . . or the loss of an opportunity to seek some particular order[.]" *Id.* at 413-14. The Court's opinion did not rest on the nature of the claim to be asserted, nor does the Court's language limit the scope of *Harbury* to a particular claim or class of claims.

To the extent that Plaintiff asks this court to divine a new right separate and apart from the access to courts claim described in *Harbury*, Mr. McElroy would be entitled to qualified immunity since any such new right would not have been clearly established at the time of Mr. Arar's detention. *See Moore*, 371 F.3d at 114.

Again, even if the Court finds that Plaintiff has stated a viable substantive due process claim based on denial-of-access, this claim should be dismissed against Mr. McElroy for the same lack of personal involvement arguments made regarding Plaintiff's conditions of confinement branch of Count IV. *Bivens* does not provide for liability based merely on someone's position on an organizational chart. *Richardson v. Goord*, 347 F.3d at 435.

II. Count IV Does Not Sufficiently Allege Edward McElroy's Personal Involvement In Any Constitutional Violation.

Even if a *Bivens* remedy were available to Plaintiff,[8] the Complaint does not sufficiently allege facts that Mr. McElroy was personally involved in the conditions or actions alleged in Plaintiff's confinement.

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crime but who have not yet been tried on the charge." *Id*. at 523.

[8] As indicated supra Section IV, Mr. McElroy incorporates by reference the briefs

A. The Personal Involvement Standard

To maintain a *Bivens* suit, some personal involvement on the part of each named defendant is necessary for Plaintiff to survive a motion to dismiss. *See e.g.*, *Johnson v. Newburg Enlarged Sch. Dist.*, 239 F.3d 246, 254 (2d Cir. 2001) ("It is well established in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983"); *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995); *see Black v. United States*, 534 F.2d 524, 528 (2d Cir. 1976) (applying rationale to *Bivens* cases). The personal involvement of a supervisory defendant may be shown by evidence that:

> (1) the defendant participated directly in the alleged constitutional violation,
> (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong,
> (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom,
> (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or
> (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

Colon, 58 F.3d at 873 (quoting *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir. 1986)).

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of Defendants Ashcroft, Mueller and Thompson as to Counts I through III, including the issue of whether special factors counsel hesitation against implying a cause of action under *Bivens*.

B. The Complaint Fails to Allege Mr. McElroy's Personal Involvement In Plaintiff's Conditions of Confinement.

Even if, however, this Court were to conclude that Count IV states a constitutional claim, any such claim must be dismissed as against Mr. McElroy because it fails to allege his personal involvement. "Because the doctrine of *respondeat superior* does not apply in *Bivens* actions, a plaintiff must allege that the individual defendant was personally involved in the constitutional violation." *Thomas v. Ashcroft*, 470 F.3d 491, 496 (2d Cir. 2006) (emphasis in original). Holding a "high position of authority" alone is not enough to trigger *Bivens* liability. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 127 (2d Cir. 2004). *See also Poe v. Leonard*, 282 F.3d 123, 140 ("[a] supervisor may not be held liable . . . merely because his subordinate committed a constitutional tort"). Where a complaint fails to allege the personal involvement of a particular defendant, the claim must be dismissed. *See Alfaro Motors, Inc v. Ward*, 814 F.2d 883, 886 (2d Cir. 1987) ("Having failed to allege, as they must, that these defendants were directly and personally responsible for the purported unlawful conduct, their complaint is ' fatally defective' on its face.") (quoting *Black v. United States*, 534 F.2d 524, 527-28 (2d Cir.1976)).

The district court correctly held that Plaintiff's complaint fails to sufficiently allege Mr. McElroy's personal involvement in Plaintiff's due process claim. SPA 84-85. The complaint makes no factual allegation about Mr. McElroy's personal involvement in Plaintiff's conditions of confinement. Aside from the general

allegations applicable to all individual capacity defendants, the only specific allegation in the complaint relating to Mr. McElroy is that he left a message for Plaintiff's attorney, Ms. Oummih, on October 6, 2001, prior to an interview by INS officials: "The only notice given Ms. Oummih was a message left by Defendant McElroy, District Director for Immigration and Naturalization Services for New York City, on her voice mail at work that same evening." A. 32 (Compl. ¶ 43).

Notably, the complaint does not allege, or even infer, that Mr. McElroy was involved in the decision to detain Plaintiff, A. 29, or the conditions of his confinement, *see* A. 29-31. Further, the complaint does not allege the Mr. McElroy was present when Plaintiff was questioned, that he participated in any questioning, or had any knowledge of, the nature or conditions of any questioning of Plaintiff. Again, the only factual allegation as to Mr. McElroy on this point is that he placed a telephone call to Plaintiff's attorney, and left a message on her voice mail. A. 32. Without more, Plaintiff has not alleged Mr. McElroy's involvement in the actions which are attributed to the John Doe law enforcement agents.

Moreover, paragraph 22 of Plaintiff's complaint specifically describes the involvement of John Does 1-10, unnamed FBI and INS officers as the individuals involved in the allegations of his Count IV: "Singly or collectively, the Doe Defendants have subjected Mr. Arar to coercive and involuntary custodial interrogation and unreasonably harsh and punitive conditions of detention." A. 27.

The complaint, however, does not make any such allegations against Mr. McElroy. *Compare* compl. ¶ 22 (A. 27) with ¶ 20 (A. 26).[9]

The complaint seeks to compensate for this factual deficiency by conflating Mr. McElroy's involvement with those of unnamed INS officials, by including this allegation in a paragraph which indicates that "seven INS officials questioned [Arar] about his opposition to removal to Syria." A. 32. Plaintiff alleges that unidentified U.S. law enforcement officials questioned him, but does not allege, or even infer, that Mr. McElroy was present for any such interrogation of Plaintiff. *See* A. 30-31. Absent such allegations, Plaintiff is left only with allegations made against unidentified INS officials, which Plaintiff seeks to attribute to Mr. McElroy by virtue of his position.

The absence of any factual allegation tying Mr. McElroy to the claims alleged warrants dismissal of the complaint against Mr. McElroy. Plaintiff's allegation that McElroy is "responsible for the enforcement of customs and immigration laws in the

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[9] Paragraph 20 of the Complaint alleges the following:

> Defendant EDWARD J. McELROY was formerly District Director for the Immigration and Naturalization Services for the New York City District and is presently District Director of U.S. Immigration and Customs Enforcement. In these capacities, Defendant McElroy was, and is responsible for the enforcement of customs and immigration laws in the New York City area. Conspiring with and/or aiding and abetting Defendants Ashcroft, Blackman, Mueller, and others, as well as Syrian government officials, Defendant McElroy removed Mr. Arar to Syria so that Syrian authorities would interrogate him in ways that they believed themselves unable to do directly, including the use of torture. Further, in the alternative, Defendant McElroy removed Mr. Arar to Syria knowing that Mr. Arar would be in danger of being subjected to torture there.

New York City area[,]" A. 26, is not sufficient to state a claim against Mr. McElroy, since the doctrine of respondeat superior is inapplicable to *Bivens* actions. *Colon*, 58 F.3d at 873.

The complaint relies on general allegations of Mr. McElroy's position as then-District Director of Immigration and Naturalization Services for the New York District, with no allegations that Mr. McElroy participated in the decisions to detain and/or interrogate Plaintiff, or that Mr. McElroy was ever advised of the nature or conditions of any interrogation of Plaintiff. Mr. McElroy's position as New York District Director for INS is not enough to state a claim under *Bivens*. *Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir. 2003) ("mere 'linkage in the prison chain of command' is insufficient to implicate supervisor in § 1983 claim").

The district court's characterization of the conditions of confinement branch of Count IV's as "borderline" does not require reversal. Even though the district court's use of the word "borderline" might leave its decision open to more than one interpretation, his subsequent statement in that same sentence that "an amended complaint might remedy this deficiency[]" indicates the district court' belief that the complaint, as alleged by Plaintiff, failed to state a claim under Rule 12(b)(6).

Defendant McElroy is sued in his individual capacity.

C. The Complaint Fails to Allege Mr. McElroy's Personal Involvement In Plaintiff's Denial-of-Access Claim.

Plaintiff's denial-of-access claim fails for the same failure to allege Mr. McElroy's personal involvement. The complaint contains no factual allegation in stating that Mr. McElroy was in any way involved in the conditions of Plaintiff's denial-of-access claim.

Again, the same allegation in paragraph 43 is all that connects Mr. McElroy to any denial-of-access claim.[10] Plaintiff's personal involvement argument is undermined further by comparing Plaintiff's allegations made against Mr. McElroy with those made against the John Doe law enforcement agents.

Neither paragraph 20, nor any other allegations against Mr. McElroy, mentions anything about Plaintiff's domestic detention, other than alleging that Mr. McElroy "was, and is responsible for the enforcement of customs and immigration laws in the New York City area." A. 26. For these reasons, the district court correctly concluded that the complaint failed to allege Mr. McElroy's personal involvement as to Count IV.

[10] To the extent Plaintiff might seeks to have this court interpret Count IV as a conspiracy claim, this count would still fail because, under F.R.C.P. 8(a), plaintiff must still allege "some factual basis for a finding of a conscious agreement among the defendants," *see Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 26 (2d Cir. 1990), and state "the purpose of or any overt acts perpetrated by defendants which reasonably relate to the claimed conspiracies." *See Hall v. Dworkin*, 829 F. Supp. 2d 1403, 1412 (N.D.N.Y. 1993).

III. Edward McElroy Is Entitled To Qualified Immunity Based On Plaintiff's Failure to Allege Mr. McElroy's Personal Involvement In a Clearly Established Constitutional Violation.

A. Plaintiff's Complaint Does Not Allege The Violation Of A Clearly Established Constitutional Right Committed By Mr. McElroy.

Correa states that the only constitutional right for an unadmitted alien is against gross physical abuse. 901 F.2d at 1171 n.5. Even if this Court were to find that Plaintiff had a substantive constitutional right above what this Court stated in *Correa*, and that any such right was violated, it was not clearly established. *See Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985) (where there is a "legitimate question" whether the conduct that underlies the *Bivens* claim is constitutional, the qualified immunity doctrine requires dismissal). *See Moore v. Vega*, 371 F.3d at 114. Here, the district court's opinion, citing to conflicts among the circuits in discussing the uncertainty about the extent of the rights possessed by aliens at the border, is further evidence that any such right above protection against gross physical abuse was not clearly established. *Mitchell*, 472 U.S. at 535 ("The decisive fact is not that [defendant]'s position turned out to be incorrect, but that the question was open at the time he acted.").

In assessing the qualified immunity defense, the first step is to determine whether, when viewing the facts in the light most favorable to Plaintiff, "the facts alleged show [Mr. McElroy]'s conduct violated a constitutional right[.]" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The second step is to determine whether that right

was "clearly established." *Id*. This determination "must be undertaken in light of the specific context of the case, not as a broad general proposition[.]" *Id*. The purpose of this analysis is to protect officers when they make a mistake, but that mistake is reasonable: "Qualified immunity shields an officer from suit when 'he makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstance []he confronted." *Brosseau*, 543 U.S. at 198.

As discussed in Section I.A, in light of *Correa* there is a significant legal issue of whether Plaintiff, an alien at the border, possessed any substantive constitutional right other than as against gross physical abuse. 901 F.2d at 1171 n.5. More importantly however, as discussed in Section II, plaintiff has failed to allege conduct by Mr. McElroy that violates any constitutional rights possessed by him. In the absence of a showing that a constitutional right was violated by Mr. McElroy, he is entitled to qualified immunity. *Saucier*, 533 U.S. at 201 ("If no constitutional right would have been violated where the allegations established, there is no necessity for further inquires concerning qualified immunity."); *see Salim v. Proulx*, 93 F.3d 86, 90-91 (2d Cir. 1996) (recognizing qualified immunity defense based on lack of personal involvement).

All other allegations that might be attributed to Mr. McElroy involve Plaintiff's interrogation by unidentified INS or FBI agents. Mr. McElroy's status as District Director of Immigration and Naturalization Services for the New York District is

insufficient to attach *Bivens* liability. *Thomas*, 470 F.3d at 496. Simply because Plaintiff alleges INS officials interrogated him, and controlled the conditions of his confinement, does not mean that Mr. McElroy is liable for damages under *Bivens*. *Johnson*, 239 F.3d at 254. For these reasons, the Court should affirm the dismissal of Claim IV as alleged against Mr. McElroy.

B. Mr. McElroy Is Entitled To Qualified Immunity For Actions Taken By Him Pursuant To Federal Regulation.

To the extent that Plaintiff seeks to impose *Bivens* liability against Mr. McElroy based on the allegation that he provided information to the Regional Director, for his decision whether or not to admit Mr. Arar into the United States, *see* A. 87, Mr. McElroy's compliance with a facially valid federal regulation entitles him to qualified immunity.

In Mr. Blackman's decision to remove Mr. Arar from the United States, he "reviewed the documentation submitted to [him] by the New York District Director." *Id*. The allegation of Mr. McElroy's role in providing documentation to the Regional Director, in the course of his federal duties, and pursuant to regulation, entitles him to qualified immunity.[11] Mr. Blackman's decision was made pursuant to 8 C.F.R. § 235.8(b): "In accordance with my responsibilities as Regional Director, I have,

[11] Although neither Plaintiff's complaint, nor his brief, raises this issue, we address it in recognition of this Court's obligation to conduct a *de novo* review of the district court's decision to dismiss the complaint, to ascertain whether the allegations in the complaint, or any inferences derived therefrom, state a claim

pursuant to . . . 8 C.F.R. 235.8(b), reviewed the documentation . . . . submitted to me by the New York District Director concerning the application of [Maher Arar] for admission to the United States." A. 87. Even as alleged in the complaint, this documentation would have been provided pursuant to section 235.8(a), which states that "[t]he district director shall forward the report to the regional director for further action as provided in [235.8(b).]" *Id*. The reference to Mr. McElroy in Exhibit D of the complaint does not give rise to conduct that is prohibited by federal law, and demonstrates that his actions were clearly consistent with the federal laws that he is required to enforce. Plaintiff makes no such argument to the contrary.

The allegation regarding Exhibit D demonstrates only that Mr. McElroy was lawfully performing his duties as District Director, which requires him to enforce the provisions of the Immigration and Naturalization Act. Such actions are presumptively entitled to qualified immunity. *Connecticut v. ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 101-104 (2d Cir. 2003) ("enforcement of a presumptively valid statue creates a heavy presumption in favor of qualified immunity").

Even if this Court were to determine that this allegation amounted to a constitutional violation, Mr. McElroy's compliance with a federal regulation was objectively reasonable and, therefore, entitles him to qualified immunity. *Ford v. Moore*, 237 F.3d 156, 162 (2d Cir. 2001) (qualified immunity is warranted "even if

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upon which relief can be granted. *See Pena*, 432 F.3d at 107.

believing in the lawfulness of his actions."); *Salim v. Proulx*, 93 F.3d 86, 91 (2d Cir. 1996) ("The objective reasonableness test is met if 'officers of reasonable competence could disagree' on the legality of the defendant's actions." (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

IV. Plaintiff's Claims Should Be Affirmed For The Reasons Set Forth In Other Appellants' Briefs.

In addition to the arguments made herein, this Court should affirm the judgment of the district court for the reasons set forth in the Brief of Defendants Ashcroft, Mueller and Thompson, as well as those in the Brief of the United States. *See* FED. R. APP. P. 28(i).

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court' dismissal of the complaint.

Date: Washington, D.C.
February 22, 2007

Respectfully submitted,

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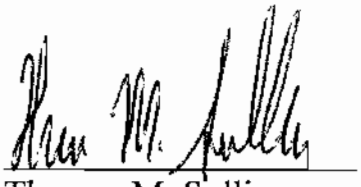

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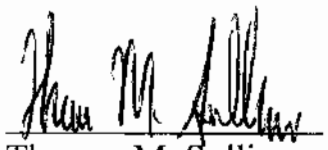

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2007, I filed and served the foregoing Brief for Defendant-Appellee Edward J. McElroy by causing an original and ten copies to be delivered to the Court via FedEx overnight delivery (and e-mail delivery to briefs@ca2.uscourts.gov) and two copies to counsel of record via FedEx overnight (and e-mail delivery):

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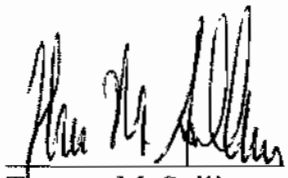

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