IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

DONATO DALRYMPLE, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.
_____/

CASE NO.: 03-20588-CIV-MOORE

Magistrate Judge: O'Sullivan

PLAINTIFF'S OPPOSITION TO DEFENDANT'S SECOND MOTION TO DISMISS

Plaintiffs, Gregory Paul Allen, Leslie Alvarez, Guillermo Arce, Joel Beltran, Teresa Benitez, Francia De La Concepcion Cabral, Maria Cancio, Eva Espinosa, Triburcio Estupinan, Lenia Fernandez, Jose Antonio Freijo, Jose Garcia, Ledia Betancourt Garcia, Rose Garcia, Carlos Gonzalez, Jose Gonzalez, Pablo Hernandez, Martha Lorenzo Lara, Felix Meana, Troadio Mesa, Mario Miranda, Jorge Morales, Zaida Nunez, Francisco Ondarza, Anna Ortega, Yuledis Ortiz, Sergio Perez-Barroto, Otoniel Ramos, Pedro Riveron, Eduardo Rodriguez, Tomas A. Rodriguez, Michael Stafford, Miriam Zaldivar, and Carlos Zayas, by counsel, respectfully submit this opposition to Defendant's second motion to dismiss. In support thereof, Plaintiff states as follows:

MEMORANDUM OF LAW

I. Introduction.

In the early morning hours of April 22, 2000, Plaintiffs were gathered peacefully in and/or around the home of Lazaro, Angela and Marisleysis Gonzalez. Since late-November 1999, the Gonzalez family had been caring for six-year old Cuban shipwreck

survivor Elian Gonzalez, and many persons, including Plaintiffs had gathered outside the family's home to show their support for the family's efforts to allow the child to remain in the Unites States. Other Plaintiffs, neighbors of the Gonzalez family, were going about their business inside or outside their own homes in Little Havana. Some were sleeping. Others were leaving for work.

At approximately 5:15 a.m., a convoy of vehicles containing federal agents dressed in combat gear and armed with semiautomatic weapons drove into the neighborhood and up to the Gonzalez family home. As the convoy arrived, the agents immediately began spraying gas indiscriminately to immobilize, restrain and suppress anyone in the neighborhood. Federal agents continuously sprayed gas throughout the duration of the raid, and gas wafted into many homes in the neighborhood. The heavily armed federal agents shouted obscenities, threatened to shoot, gassed, beat and restrained neighborhood residents, passers-by and persons peacefully assembled outside the Gonzalez family home as federal agents entered the home, seized Elian Gonzalez at gunpoint and carried him screaming and crying into a waiting van. As a proximate result, Plaintiffs suffered substantial injuries.

Plaintiffs submitted timely administrative claims to the U.S. Department of Justice. The U.S. Department of Justice failed to respond to the administrative claims within 6 months, as required by law. On March 13, 2003, Plaintiffs initiated this action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, seeking compensatory damages for assault, battery, false imprisonment, intentional infliction of emotional distress, and negligent infliction of emotional distress. On or about June 6, 2003, Defendant filed an answer and asserted various affirmative defenses to Plaintiff's Complaint. On June 20,

2003, this Court entered a scheduling order in this case. On or about July 18, 2003, Defendant filed a motion to dismiss eleven (11) of the Plaintiff's claims, allegedly for lack of subject matter jurisdiction. A ruling on that motion is currently pending before the Court.

Defendant now files a second motion to dismiss against certain Plaintiffs, allegedly for failure to state a cause of action. Defendant asserts that these Plaintiffs cannot maintain their causes of action because they allegedly interfered with the execution of a search warrant, and, accordingly, are prevented from obtaining any recovery based upon the affirmative defense of illegality. The particular Plaintiffs at issue are: Gregory Paul Allen, Leslie Alvarez, Guillermo Arce, Joel Beltran, Teresa Benitez, Francia De La Concepcion Cabral, Maria Cancio,[1] Eva Espinosa, Triburcio Estupinan, Lenia Fernandez, Jose Antonio Freijo, Jose Garcia, Ledia Betancourt Garcia, Rose Garcia, Carlos Gonzalez, Jose Gonzalez, Pablo Hernandez, Martha Lorenzo Lara, Felix Meana, Troadio Mesa, Mario Miranda, Jorge Morales, Zaida Nunez, Francisco Ondarza, Anna Ortega, Yuledis Ortiz, Sergio Perez-Barroto, Otoniel Ramos, Pedro Riveron, Eduardo Rodriguez, Tomas A. Rodriguez, Michael Stafford, Miriam Zaldivar, and Carlos Zayas.

Because Plaintiffs' allegations do not demonstrate forcible interference with the execution of a search warrant, their claims are not barred by the affirmative defense of illegality and Defendant's motion must be denied. At a minimum, any affirmative defense of illegality cannot be adjudicated at this early stage of these proceedings, but instead requires further factual development. Defendant's second motion to dismiss should be denied for this reason as well.

[1] Maria Cancio's claim was dismissed by stipulation of the parties.

II. Discussion.

A. Standards Governing Motions to Dismiss.

On a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court must determine whether, in ". . . taking the allegations of the complaint as true and giving them a liberal construction in favor of the plaintiff, it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Bussey v. Safeway Stores,* 1978 U.S. App. LEXIS 8947, (10th Cir. 1978), (*citing*, *Bogosian v. Gulf Oil Corp.,* 561 F.2d 434, 444 (3rd Cir. 1977)). The *Bussey* court went on to state that "[a] motion to dismiss for failure to state a claim should not be granted unless it is absolutely clear that the plaintiff could not recover under any set of facts provable to support his claim. The fact that viable defenses to the action might exist is generally irrelevant in considering appropriateness of dismissing for failure to state a claim." *Id.* *See*, *Goldmen v. Avita, Inc.,* 1998 U.S. Dist. LEXIS 19148 (S.D.N.Y. 1998).

According to Rule 8 (c) of the Federal Rules of Civil Procedure, affirmative defenses such as illegality may only be raised in an answer. *See, Goldmen.* Although Defendant contends that the Plaintiffs' claims are barred by the affirmative defense of illegality and therefore should be dismissed for failure to state a cause of action, Defendant does not cite a single case to support its contention that such a determination can be made on a motion to dismiss. "Courts have decided the merits of an affirmative defense on a motion to dismiss when there is no disputed issue of facts raised by the defense or when the facts are completely disclosed on the face of the pleadings and nothing further can be developed by pretrial discovery or a trial on the issue." *Id.*

In the instant case, Plaintiffs' allegations simply do not demonstrate forcible interference with the execution of a search warrant. At a minimum, any such affirmative defense cannot be adjudicated at this early stage of these proceedings, but instead requires further factual development in discovery and at trial. Thus, it is inappropriate to decide the merits of the case at this early stage of the proceeding.

B. 18 U.S.C. § 2231.

Defendant contends that the aforementioned Plaintiffs violated 18 U.S.C. § 2231 and thus their claims are barred by the illegality doctrine. 18 U.S.C. § 2231 reads:

> (a) Whoever forcibly assaults, resists, opposes, prevents, impedes, intimidates, or interferes with any person authorized to serve or execute search warrants or to make searches and seizures while engaged in the performance of his duties with regard thereto or on account of the performance of his duties with regard thereto or on account of the performance of such duties, shall be fined under this title or imprisoned not more than three years or both; and
>
> (b) Whoever, in committing any act in violation of this section, uses any deadly or dangerous weapon, shall be fined under this title or imprisoned not more than ten years, or both.

As the statute clearly and plainly states, the perpetrator must use force in resisting or interfering with the execution of s search warrants. Although Defendant tries to imply that a use of force is not necessary to violate the statute, all of the cases cited by Defendant in its motion involved obvious uses of force, and the courts in those cases declared that the use of force must be found in order for there to be a violation of the statute.

In *Lewin v. United States*, 62 F.2d 619, 620 (1st Cir. 1933), the Court, in interpreting 18 U.S. C. § 2231, held, "[w]e agree that the statute contemplates opposition to, or interference with, the officers by ***the use of force***, that it does not apply to escape by

stealth, and that, if the smoke screen had no effect except to obscure the [U.S. Coast Guard vessel], no crime would be committed under it." In *United States v. Johnson,* 412 F.2d 906, 908 (5th Cir. 1969), special agents wearing badges and clearly identifying themselves as law enforcement officers were assaulted when the defendant ". . . well aware that federal agents were attempting to gain entry into his house he appeared at the side door and caused Agents Hilker and Mennitt to withdraw by pointing the loaded gun at them."

Likewise, in *Palmquist v. United States*, 149 F.2d 352, 353 (5th Cir. 1945), in which the issue involved whether or not the defendant knowingly opposed officers or if he thought he was being robbed, the Court stated ". . . the defendant came out of the truck with a double-barreled shotgun and drove the officers away . . .." In *Bray v. United States*, 289 F. 329, 331 (4th Cir. 1923), the defendant, while in a meeting with a person he knew was an IRS agent conducting an investigation, struck the agent, causing him to fall or be thrown on the floor. Thereafter the defendant immediately began grappling with the agent on the ground for some time until the defendant got up and attempted to strike the agent with a big arm chair. *Id.* Thus, the Court determined that Bray violently and forcibly attacked the officer and was found guilty of the offense. Lastly, in *Bailey v. United States,* 278 F. 849, 854 (6th Cir. 1922), the defendants were found guilty and the Court affirmed their convictions finding that "[t]here is evidence in this record of an assault with deadly and dangerous weapons in a menacing manner upon these officers when they were in the execution of their duty."

Therefore, the statute and the case law require force to be used by the offending party in order to violate 18 U.S. C. § 2231. In the case at bar, all of the Plaintiffs were unarmed and were either peacefully assembled or going about their business in their homes or neighborhood. None of the Plaintiffs allege that they used any force against the federal agents participating in the para-military raid on the Little Havana neighborhood. Additionally, the federal agents were in unmarked vehicles, wore unidentifiable combat gear, did not identify themselves as federal agents, nor did they announce their purpose. Thus, the Plaintiffs did not know who had sent this army to attack them. Furthermore, Defendant's agents immediately began attacking Plaintiffs upon their arrival, before any of the Plaintiffs had time to react to what was taking place. Hence, the facts do not allege that Plaintiffs committed any illegal acts. At a minimum, further factual development is needed in discovery and at trial before the Court can properly consider the merits of any such affirmative defense.

Additionally, 18 U.S.C. § 2231 is criminal in nature and sets out the punishment for those who violate it. Defendant's agents did not arrest, charge, or prosecute any of the Plaintiffs who have asserted claims against Defendant in this action. Had Plaintiffs violated 18 U.S.C. § 2231, they surely would have been arrested by at least one of the many federal agents at the scene of the raid. No court of law has determined that any Plaintiff violated this or any other statute in connection with the April 22, 2000 raid, a fact that further demonstrate that there is no affirmative defense of illegality for Defendant to assert.

In addition, in a footnote to its memorandum, Defendant cites several state statutes that are similar to 18 U.S.C. § 2231. Florida Statutes §§ 843.01 and 843.02 criminalize

resisting an officer with violence and without violence. Although Defendant does not specifically argue that these statutes were violated, there is a long line of Florida cases holding that a defendant cannot be found guilty of violating Florida Stat. §§ 843.01 and 843.02 unless the defendant knew: (1) the person he was resisting was a law enforcement officer; (2) the officers was opposed while conducting a lawful duty; and(3) after advising the defendant to cease or stop his or her behavior. *See, Singer v. State of Florida*, 647 So.2d 1021 (4th DCA 1994) (Defendant found guilty of resisting arrest when approached a uniformed officer, who was questioning a suspect, after being ordered by the officer to leave, with clenched fists and yelling); *D.G. v. State of Florida*, 661 So.2d 75 (2nd DCA 1995) (holding that protesting, refusing to answer questions, and refusing to stop yelling, without threatening anyone, after several warning from uniformed officer did not violate statute); *M.M. v. State of Florida*, 674 So.2d 883 (2nd DCA 1996) (Defendant guilty of violating statute when defendant, after several warnings from the officer to leave, continued to yell profanities at the officer and approach officer while the officer was attempting to apprehend a suspect and defendant later struggled with officer). Finally, in Florida ". . . a person 'may resist the use of excessive force in making the arrest.'" *Wright v. State of Florida*, 705 So.2d 102, 104 (4th DCA 1998) (*citing*, *State v. Holley*, 480 So.2d 94, 96 (Fla. 1985)). Thus, Plaintiffs could not have violated Florida Stat. §§ 843.01 and 843.02, since the agents were not in identifiable vehicles, did not wear identifiable uniforms, did not state their purpose, and did not warn any of the Plaintiffs to stop or leave before applying force on them.

C. <u>Plaintiffs did not Interfere with Execution of Search Warrant</u>.

Although Defendant claims Plaintiffs have made "admissions" about interfering with the raid, Defendant is misconstruing and taking out of context the allegations in Plaintiffs' Complaint. The Complaint specifically states that all of the Plaintiffs were peacefully assembled and had taken no action before the armed agents began attacking them. "At the time of the raid, approximately fifty (50) supporters, including many of the Plaintiffs, had **assembled peacefully behind the barricade**, in nearby yards, and elsewhere in the neighborhood..." *See* Compl. ¶ 163 (emphasis added). "When the convey of vehicles pulled up to the Gonzalez family's home, federal agents immediately began indiscriminately spraying gas to immobilize, restrain and suppress persons who had assembled peacefully behind the barricade, as well as neighbors, passers-by, and even members of the news media assembled along N.W. 2 nd Street. Federal agents sprayed gas directly behind the barricade and throughout the neighborhood, including many of the Plaintiffs." *See* Compl. ¶ 164.

The alleged "admissions" of Plaintiff Gregory Paul Allen demonstrate how Defendant is attempting to misconstrue and take out of context the actual allegations pled in Plaintiffs' Compliant. According to the Complaint:

> Plaintiff Gregory Paul Allen also was among the supporters assembled peacefully behind the barricade when federal agents doused him and other supporters with gas. When the raid began, Plaintiff was in the street behind the barricade. Plaintiff tried to move closer to the Gonzalez family's home, but federal agents shouted at him, threatened him with a battering ram, and threatened to spray him with more gas. Federal agents also seized Plaintiff, grabbing and pulling on him, and nearly forcing him to the ground.

See Compl. ¶ 186. Nowhere in this paragraph does Mr. Allen allege a single fact supporting a claim that he used any force whatsoever against the agents, much less

resisted or interfered with the execution of the search warrant that allegedly gave legal justification to the raid. An affirmative defense of illegality simply cannot be sustained on the basis of this paragraph.

A great many other Plaintiffs' whose claims Defendant seeks to dismiss on the grounds of illegality similarly alleged that they did nothing more than try to move closer to the Gonzalez family home, in many instances only to see what was happening. *See* Compl. at ¶ 191 (Leslie Alvarez); ¶ 193 (Guillermo Arce); ¶ 195 (Teresa Benitez); ¶ 209 (Eva Espinosa); ¶ 210 (Triburcio Estupinan); ¶ 214 (Lenia Fernandez); ¶ 217 (Jose Antonio Freijo); ¶ 217 (Jose Garcia); ¶ 220 (Ledia Betancourt Garcia); ¶ 221 (Rose Garcia); ¶ 224 (Carlos Gonzalez); ¶ 225 (Jose Gonzalez); ¶ 230 (Pablo Hernandez); ¶ 235 (Martha Lorenzo Lara); ¶ 245 (Troadio Mesa); ¶ 249 (Jorge Morales); ¶ 251 (Zaida Nunez); ¶ 252 (Francisco Ondarza); ¶ 255 (Anna Ortega); ¶ 269 (Otoniel Ramos); ¶ 272 (Pedro Riveron); ¶ 278 (Tomas A. Rodriguez); ¶ 290 (Miriam Zaldivar); and ¶ 291 (Carlos Zayas). These wholly unspectacular allegations cannot be fairly equated with forcibly assaulting, resisting, opposing, preventing, impeding, intimidating, or otherwise interfering with the execution of a search warrant.

Similarly, Plaintiff Leina Fernandez alleges that she "moved towards the Gonzalez family home in an effort to help people lying on the ground who had been beaten or overcome with gas." *See* Compl. at ¶ 214. Troadio Mesa alleges that he "tried to move closer to the Gonzalez family home in order to assist the women for 'Mothers Against Repression' who had been praying the Rosary in the front yard of the Gonzalez family home, but had been knocked to the ground by federal agents." *See* Compl. at ¶ 245.

Plaintiff Anna Ortega "tried to move closer to the Gonzales family's home in order to assist Ramon Saul Sanchez of the 'Democracy Movement,' who had been knocked to the ground by federal agents." *See* Compl. at ¶ 255. Certainly, the government cannot legitimately contend that trying to help the injured is the equivalent of forcibly resisting the execution of a search warrant.

Plaintiff Yusledis Ortiz was in the backyard of the Gonzelez family home when the raid began. *See* Complaint at ¶ 257. Her child was asleep in the Gonzalez family's living room. *Id.* Ms. Ortiz alleges that, when the raid began, she entered the Gonzalez family's home to get her sleeping child, then ran into a bedroom. *Id.* Again, the government cannot legitimately contend that a mother's seeking out her child during a paramilitary-style raid constitutes forcibly assaulting, resisting, opposing, preventing, impeding, intimidating, or otherwise interfering with the execution of a search warrant.

Plaintiff Mario Miranda was in the front yard of the Gonzalez family home, at the invitation of the Gonzalez family, when the raid began. *See* Compl. at ¶ 246. "Plaintiff moved towards the rear of the Gonzalez home, where three (3) federal agents grabbed him, threw him to the ground and spayed gas directly in his face." *Id.* "One of the federal agents held a machine gun to his fact and screamed, 'Don't move mother-fucker or we'll blow your fucking head off.'" *Id.* "Plaintiff was forced to remain on the ground, with a machine gun pointed at his head, for the duration of the raid." Nothing in these allegations warrant a finding that Mr. Miranda resisted the agents' efforts to execute the search

warrant, much less used any force to do so. In fact, they demonstrate the exact opposite.

Plaintiff Eduardo Rodriguez, awoken by the commotion of the raid, did nothing more than climb onto the roof of his own home to film the raid. *See* Compl. at ¶ 273. "Federal agents yelled at him and instructed him to get down from the roof." *Id.* "Plaintiff was overwhelmed by the gas and tried to get fresh air." *Id.* Taking pictures on a rooftop certainly cannot be equated with forcibly interfering with the execution of a search warrant. Nor is there any allegation that Mr. Rodriguez did not comply with the agents' instructions or make any use of force.

As these examples make clear, the "admissions" alleged by Defendant to defeat Plaintiffs' claims simply do not constitute forcible interfere with a search warrant or violations of 18 U.S.C. § 2231. Many of the Plaintiffs simply attempted to move closer to the barricade or the Gonzalez family's home in order to see what was happening, while others were attempting to aid and assist other plaintiffs who had been injured by the agents' actions. Defendant's argument takes Plaintiffs' allegations out of context and attempts to misconstrue them into something they are not. Moreover, Defendant's agents did not announce who they were and what they were doing, they were not dressed in their usual readily identifiable uniforms, they were not in marked law enforcement vehicles. Any confusion about what was occurring was more than understandable, and likely was intentional on the part of Defendant. Because the so-called "admissions" set forth in the Complaint do not constitute forcible interference or other violations of 18 U.S.C. §2231 by Plaintiffs -- especially if the Complaint is construed liberally in Plaintiffs' favor, as the Court must do in ruling on a motion to dismiss -- Defendant's affirmative defense of illegality must

fail. At a minimum, additional fact must be developed in discovery or at trial before the Court can consider such an affirmative defense.

III. Conclusion.

For the foregoing compelling reasons, Defendant's second motion to dismiss must be denied, and Plaintiffs must be allowed to proceed with their claims.

Respectfully submitted,

JUDICIAL WATCH, INC.

Larry Klayman, Esq.
Florida Bar No.: 0246220
Paul Orfanedes, Esq.
(Not a Member of the Florida Bar)
501 School Street, S.W., Suite 500
Washington, D.C. 20024
Tel.: (202) 646-5172
Fax.: (202) 646-5199

Edelberto Farrés, Esq.
Florida Bar No.: 0070793
100 SE 2 Street, Suite 3920
Miami, FL 33131
Tel.: (305) 349-2391
Fax: (305) 374-9054

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2003 a true and correct copy of the foregoing PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS was served, via facsimile and first class U.S. mail, postage prepaid, on the following:

Stephen E. Handler, Esq.
U.S. Department of Justice
Torts Branch, Civil Division
P. O. Box 888
Washington, D.C. 20044

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Edelberto Farrés