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Tenth Circuit Declines to Extend Collateral Order Doctrine to Encompass Interlocutory Orders on 'Bivens' Claims

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Along with the Third and the Sixth Circuits, the Tenth Circuit is the third circuit court to conclude that the collateral order doctrine does not provide for immediate review under similar circumstances.

In *Mohamed v. Jones*, No. 22-1453, __ F.4th __ (10th Cir. May 7, 2024), the U.S. Court of Appeals for the Tenth Circuit determined that it lacked jurisdiction to consider an interlocutory order concerning whether the *Bivens* doctrine provided a remedy for excessive force and failure to intervene claims under the Eighth Amendment. Along with the Third and the Sixth Circuits, the Tenth Circuit is the third circuit court to conclude that the collateral order doctrine does not provide for immediate review under similar circumstances.

The 'Bivens' Doctrine

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the U.S. Supreme Court recognized an implied private right of action for damages against federal officials who allegedly violated a citizen's constitutional rights. *Bivens* held that federal officials may be liable for using excessive force in conducting a warrantless search. Since 1971, the Supreme Court has recognized *Bivens* claims in two additional contexts. In *Davis v. Passman*, 442 U.S. 228 (1979), the court allowed a *Bivens* claim under the Fifth Amendment for gender discrimination against a congressional staffer; in *Carlson v. Green*, 446 U.S. 14 (1980), the court allowed a prisoner suit alleging inadequate medical care in violation of the Eighth Amendment.

Since this trifecta of cases, however, the court has continually limited *Bivens* to those three fact patterns. In today's jurisprudential landscape, federal courts are unlikely to expand *Bivens* beyond these three recognized factual and legal contexts. A federal court may also deny a remedy under *Bivens* if alternate remedies are available.

Relevant Allegations From the Complaint

Khalfan Khamis Mohamed, who is currently incarcerated at the “Super

Max" prison in Florence, Colorado, went on hunger strike. In response, BOP officials temporarily removed him from his cell. As they escorted him back, three officials beat him and three others stood by complicitly.

District Court Proceedings

Relying on *Bivens*, Mohamed sued the BOP personnel (BOP defendants) in their official and individual capacities. Relevant here, he brought an Eighth Amendment excessive force claim against the officers who allegedly beat him and an Eighth Amendment failure to intervene claim against those who allegedly stood by as he was beaten.

The BOP defendants and the United States moved to dismiss, arguing that the excessive force and failure to intervene claims were not cognizable under *Bivens* and that one BOP defendant was entitled to qualified immunity on the failure to intervene claim. A magistrate judge recommended denial of the motion, concluding that *Bivens* provided a remedy because the factual and legal context was analogous to *Carlson* and the single BOP defendant was not eligible for qualified immunity. The district court adopted the magistrate's recommendation in its entirety.

The BOP defendants and the United States moved for reconsideration, contending that the Supreme Court's decision in *Egbert v. Boule*, 142 S. Ct. 1793 (2022) and the Tenth Circuit's recent opinion in *Silva v. United States*, 45 F.4th 1134 (10th Cir. 2022) foreclosed any *Bivens* remedy. The district court denied the motion.

Tenth Circuit Determines It Lacks Jurisdiction Under the Collateral Order Doctrine

The BOP defendants appealed under the collateral order doctrine, asserting only that the excessive force and failure to intervene claims should be dismissed for lack of a *Bivens* remedy. They did not appeal the district court's qualified immunity determination.

In a split decision, the Tenth Circuit majority concluded that although the BOP defendants' arguments were "not meritless," they failed to meet their burden in establishing appellate jurisdiction under *Cohen v. Beneficial Industrial Loan*, 337 U.S. 541 (1949), which lays out three requirements for an order to be appealed before final judgment. The order must be conclusive; "resolve important questions separate from the merits"; and be "effectively unreviewable on appeal from … final judgment."

Emphasizing the narrow scope of *Cohen*—under which interlocutory jurisdiction has been extended only to orders denying constitutionally based immunities (i.e., qualified immunity) and orders that would be moot following judgment—the majority focused its analysis on Cohen's third factor, which requires the reviewing court to consider whether denying immediate review "would imperil a substantial public interest" or "some particular value of high order." See *Will v. Hallock*, 546 U.S. 345, 352-53 (2006). The Supreme Court in Will indicated that such values include "honoring the separation of powers" and "preserving the efficiency of

government and the initiative of its officials." The BOP defendants argued that allowing interlocutory appeals of *Bivens* extension orders would serve these values. The majority disagreed.

First, the majority decided that allowing interlocutory review of *Bivens* extension orders would *not* promote efficiency. In support, the majority invoked the efficiency rationale behind the final judgment rule, cautioned against cart-before-the-horse merits evaluation of *Bivens* extension orders, recommended alternative avenues for interlocutory review, and emphasized the Supreme Court's preference for rulemaking over judicial expansion of the collateral order doctrine. *Second*, the majority rejected the notion that orders extending Bivens to new contexts are analogous to those denying qualified immunity. *Bivens*, the majority posited, is more analogous to 42 U.S.C. Section 1983 than to qualified immunity. This is because "like Section 1983, *Bivens* gives plaintiffs a chance to vindicate their constitutional rights," whereas "qualified immunity's underlying rationale is to preserve officer initiative by protecting officials from liability and trial." *Finally*, distinguishing appeals involving *Bivens* extension orders from *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)—a case discussing the scope of presidential immunity—the majority held that *Bivens* extension orders do not impact separation of powers enough to warrant an expansion of *Cohen*. The majority concluded its analysis by noting that, ironically, the BOP Defendants' requested expansion of the collateral order doctrine raised its own separation of powers concern: "How far … should courts go in carving out exceptions to the congressionally enacted final judgment rule?"

Discussion of Supreme Court Precedent and the Law in Other Circuits

The Supreme Court has not yet ruled on whether *Bivens* extension orders are appealable as a matter of right. The Court has twice reviewed *Bivens* extension orders on interlocutory appeal in conjunction with qualified immunity issues. See *Hartman v. Moore*, 547 U.S. 250 (2006); *Wilkie v. Robbins*, 551 U.S. 537 (2007). Yet, in *Will*, the court mused in dicta that "if simply abbreviating litigation troublesome to government employees were important enough for Cohen treatment, collateral order appeal would be a matter of right whenever … a federal official lost [a motion to dismiss] on a *Bivens* action." 546 U.S. at 353-54. The court thus implied that *Bivens* extension orders are not immediately appealable.

The BOP defendants argued that *Hartman* and *Wilkie* recognized Bivens extension orders as a separate category of immediately appealable cases. After determining that it was bound by the *Will* dicta, Tenth Circuit majority rejected that argument. In the majority's view, jurisdiction in both *Hartman* and *Wilkie* was predicated on a denial of qualified immunity and "without such a predicate, review of a *Bivens* extension order is unavailable."

In 2021 and 2023, the Sixth and Third Circuits, respectively, declined to expand the collateral order doctrine to *Bivens* extension orders. See *Himmelreich v. Federal BOP*, 5 F.4th 653 (6th Cir.

2021); *Graber v. Doe II*, 59 F.4th 603 (3d Cir. 2023). In both *Himmelreich* and *Graber*, the court relied on the *Will* dicta and ruled that the defendant(s) had not established Cohen's third factor. Given the contextual background of *Himmelreich* and *Graber*, the *Mohamed* majority professed its “reluctance” to “go against the tide” and create a circuit split.

Chief Judge Tymkovich Dissents

In dissent, Chief Judge Timothy Tymkovich disagreed that the circuit court lacked appellate jurisdiction under *Cohen*. Judge Tymkovich relied heavily on *Egbert*, in which the court severely limited the reach of *Bivens*. Under *Egbert*, if a case is “meaningfully” different from the three recognized *Bivens* contexts, “a *Bivens* remedy is unavailable if there are 'special factors' indicating that the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'” 596 U.S. at 492. “Even a single reason to pause” before applying *Bivens* in a new context forecloses such application. The court rested its rationale for constraining creation of new *Bivens* contexts on separation of powers concerns. In the *Egbert* majority's view, Congress, not the courts, should be entrusted with the creation of new causes of action.

In light of *Egbert's* plainly restrictive (and, arguably, unworkable) analytical framework, Judge Tymkovich opined that the *Bivens* doctrine has been “defanged” so entirely that *Bivens* claims are “no longer cognizable.”

Judge Tymkovich then turned to the *Cohen* factors. Like the majority, he focused his analysis on the third factor: whether an order is effectively unreviewable on appeal by imperiling a substantial public interest. In Judge Tymkovich's view, the initial recognition and continuing “zombie existence” of *Bivens* puts “irreparable” strain on the separation of powers between every coordinate branch of government by disincentivizing legislation on the issue, impairing government functioning, and arrogating legislative power; thus, *Bivens* extension orders satisfy the criteria laid out by *Will* and warrant immediate interlocutory review.

Stephen Masciocchi and Aja Robbins are attorneys in Holland & Hart's Denver office. Masciocchi co-chairs the appellate group at Holland & Hart and assists clients with high-stakes federal and state appeals and class actions. Robbins helps clients navigate complex litigation at the trial and appellate level.