RECORD NO. 14-1810(L)
CROSS-APPEAL NO. 14-1934

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

FARHAN MOHAMOUD TANI WARFAA.,

Plaintiff-Appellee/Cross-Appellant,

v.

YUSUF ABDI ALI,

Defendant-Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Honorable Leonie M. Brinkema, U.S.D.J.

REPLY BRIEF OF PLAINTIFF-APPELLEE/CROSS-APPELLANT FARHAN MOHAMOUD TANI WARFAA

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Appellant Ali claims that the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), establishes a categorical bar to ATS claims based on "violations of the law of nations occurring outside the United States." Ali Response/Reply Brief, ("Ali Reply") at 2. Ali further argues that this Court's decision in *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014), complies with this categorical bar. Ali Reply Br. at 6. These conclusions are flawed. To reach them, Ali wrongly maintains that *Kiobel*'s "touch and concern" analysis is only triggered by conduct alleged to have taken place *inside* U.S. territory, and that Warfaa's suit does not "touch and concern" the United States in any event. *Id.* at 2, 4-5. He is wrong. Certainly, *Al Shimari* clarifies that the analysis is proper even where the conduct underlying the claim took place overseas. *Al Shimari*, 758 F.3d at 531 (finding jurisdiction over torture committed outside the United States). And, in the most elemental way, Warfaa's claims *do* touch and concern the United States. Ali, his torturer – in an apparent attempt to find safe harbor – moved to Virginia in 1996 and resides there to this day. By making this choice, Ali availed himself of the protections of the laws of the United States. In so doing, he also surrendered himself to the jurisdiction of the courts of the United States; such jurisdiction reasonably includes that granted to United States District Courts by the ATS. For these reasons, this Court should find the

Kiobel presumption is displaced consistent with Supreme Court and Fourth Circuit precedent, and that the district court erred in dismissing Warfaa's ATS claims.

I. The *Kiobel* Presumption is Triggered by Foreign Conduct and Displacement Requires a Fact-Intensive, Multi-Factored Analysis.

As an initial matter, if a tort is committed in U.S. territory, then the presumption against extraterritoriality simply does not apply. *See Blazevska v. Raytheon Aircraft Co.*, 522 F.3d 948, 954 (9th Cir. 2008) ("when a statute regulates conduct that occurs within the United States, the presumption [against extraterritoriality] does not apply."); *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993) (stating that the presumption against extraterritoriality is not triggered in the first place if U.S. law is being applied to domestic conduct). It is only when tortious conduct occurs outside the United States that a court must analyze whether there is still a sufficient nexus to ground jurisdiction. *Kiobel*, 133 S. Ct. 1669 (applying the touch and concern analysis to determine if the presumption against extraterritoriality is displaced only after determining that "all the relevant conduct took place outside the United States"). As a result, such analysis is naturally triggered when *foreign* conduct is alleged, not domestic conduct as Ali suggests. *Id.* (analyzing whether the defendants' status and presence was sufficient to recover jurisdiction after the presumption against extraterritoriality was triggered by foreign conduct).

Ali's argument that domestic tortious conduct is the sole material consideration in *Kiobel* presupposes a bright line rule against extraterritorial claims that is not grounded in precedent. In fact, a rule of this kind was considered and rejected by the majority of Justices in *Kiobel*, who chose instead to preserve those foreign claims that sufficiently "touch and concern" U.S. territory. 133 S. Ct. at 1669; *see also id*. at 1669–70 (Alito, J., concurring) (acknowledging that the majority opinion rejected a categorical bar against ATS claims for violations committed abroad). For this very reason, this Court has unequivocally and explicitly rejected the rule Ali proffers here: "We disagree with the defendants' argument [that the ATS does not reach overseas tortious conduct], which essentially advances the view expressed by Justices Alito and Thomas in their separate opinion in *Kiobel*." *Al-Shimari*, 758 F.3d at 528.

Instead, in this Circuit, courts must "consider[] a broader range of facts than the location where the plaintiffs actually sustained their injuries" and exercise caution against "mechanically applying the presumption" to bar ATS claims in ways that "would not advance the purposes of the presumption." *Al Shimari*, 758 F.3d at 529; *see also Doe v. Drummond Co.*, No. 13-15503, 2015 WL 1323122, at *6 (11th Cir. Mar. 25, 2015) ("[W]hen an ATS claim involves a U.S.-citizen defendant *or* where events underlying the claim occur both domestically and extraterritorially, the courts must engage in further analysis.") (emphasis added).

This Court's decision in *Al Shimari* governs the analysis of Warfaa's ATS claims. Addressing ATS claims for torture allegedly committed by U.S. government contractors at Iraq's Abu Ghraib prison, this Court first noted that the majority opinion in *Kiobel* intentionally and "broadly stated that the 'claims,' rather than the alleged tortious conduct, must touch and concern United States territory with sufficient force . . . ." *Al Shimari*, 758 F.3d at 527 (quoting *Kiobel*, 133 S. Ct. at 1669). Thus, the Court's operative language instructs lower courts to "apply a fact-based analysis" to determine whether ATS claims with a "close connection to United States territory" displace the presumption. *Id.* at 527–28 ("[I]t is not sufficient merely to say that because the actual injuries were inflicted abroad, the *claims* do not touch and concern United States territory."); *see Black's Law Dictionary* 281 (9th ed. 2009) (a "claim" is the "aggregate of operative facts giving rise to a right enforceable by a court"). Accordingly, courts must "consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action." *Al Shimari*, 758 F.3d at 527. Applying this analysis, the *Al Shimari* court unanimously held that the plaintiffs' claims touched and concerned the territory of the United States with sufficient force to displace the presumption against extraterritorial application of the ATS — even though the plaintiffs' injuries were entirely inflicted overseas. *Id.* at 531.

Defendant's reliance on authorities outside this Circuit offer him no help. First, the district court opinion in *Jara v. Nunez* was recently vacated and is no longer controlling in that case. *Jara v. Nunez,* No. 6:13-cv-1426-Orl-37GJK (M.D. Fla. filed Feb. 24, 2015).

Second, the Ninth Circuit opinion in *Mujica v. AirScan Inc.*, 771 F.3d 580, 594 (9th Cir. 2014), undermines Defendant's attempts to avoid factual analysis. There, as in *Al Shimari*, the court held that the "touch and concern" test is not limited to a claim's underlying conduct, and "'[i]t may well be, therefore, that a defendant's U.S. citizenship or corporate status is one factor that, in conjunction with other factors, can establish a sufficient connection between an ATS claim and the territory of the United States to satisfy *Kiobel*." 771 F.3d at 594. Indeed, in applying factual analysis to overseas conduct, the Southern District of Ohio held in *Ahmed v. Magan,* 2013 WL 4479077, at *1 (S.D. Ohio Aug. 20, 2013), that the presumption against extraterritoriality was rebutted *solely* by the defendant's status as a permanent resident of the United States. *See also Kiobel,* 133 S. Ct. at 1671 (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., concurring in the judgment) (indicating that jurisdiction under the ATS exists based solely on the fact that "the defendant is an American national."). As discussed below, the same result follows here.

II. The Claims against Ali Touch and Concern the United States because Defendant Ali is a U.S. National, Who Personally Committed Atrocity Crimes, and Now Seeks Safe Harbor on U.S. Soil to Escape the Consequences.

A. As an Individual Torturer and Commander, Ali's Physical Presence Touches and Concerns the United States.

A key factor distinguishes this case from *Kiobel* and *Mujica*: Warfaa brings claims against an individual torturer who sought safe harbor in the U.S., not against a multinational corporation that supported foreign human rights abusers through an indirect chain of transactions. As commander of the Fifth Brigade of the Somali National Army, Ali personally tortured Warfaa and commanded soldiers to arbitrarily detain, interrogate, and torture him. J.A. 36-37 at ¶¶ 20- 26. Later, after the fall of the regime that protected him, Ali sought safe haven from accountability in Canada. J.A. 34 at ¶ 8. He was then deported from Canada – for the very same human rights abuses at the heart of this case – and was sent to the United States, where he has resided continuously since 1996. *Id.* Ali's presence is thus unlike the "mere corporate presence" of the multinational corporations in *Kiobel*, who vicariously contributed to abuse in another country. Ali lives here on U.S. soil and he played a direct role in atrocity crimes. These ties bear far greater connection to the United States for two reasons.

First, both the Supreme Court and the Executive Branch have approved ATS claims against individual violators of international law who shelter on U.S. soil.

Warfaa's claims against an individual torturer are exactly the type of ATS claims upheld by *Filártiga v. Peña-Irala,* 630 F.2d 876 (2d Cir. 1980). Such claims were later recognized as valid by the Supreme Court in *Sosa v. Alvarez Machain,* 542 U.S. 692, 731-33 (citing *Filartiga* with approval). And they were endorsed by the Executive Branch in *Kiobel*. *See* Supp. Br. of the United States as Amicus Curiae in Partial Support of Affirmance, *Kiobel v. Royal Dutch Petroleum, Inc.* (No. 10-1491), 2012 WL 2161290, at *4-5 (June 11, 2012) ("[A]llowing [ATS] suits based on conduct occurring in a foreign country in the circumstances presented in *Filartiga* is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights.").

Second, this Court has affirmed that the physical presence of a torturer deeply touches and concerns the territory of the U.S. As this Court recognized, when Congress enacted the Torture Victim Protection Act, embraced *Filartiga*, and criminalized torture committed abroad under 18 U.S.C. § 2340A(b)(2), it demonstrated a "'distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind."' *Al-Shimari,* 758 F. 3d at 530 (quoting *Kiobel,* 133 S. Ct at 1671 (Breyer, J. concurring in the judgment)).

As this Court observed, "[t]he Supreme Court certainly was aware of these civil and criminal statutes when it articulated its 'touch and concern' language in

Kiobel." *Id.* As a result, the United States' deep interest in holding perpetrators of torture accountable, and denying them safe haven, supports ATS jurisdiction over Warfaa's claims. *See Al Shimari*, 758 F.3d at 531.

B. Ali's U.S. Nationality and Residence Forcefully Touch and Concern the United States.

Ali contends that his U.S. nationality is irrelevant to ATS jurisdiction. Resp. Br. At 5–6. He is mistaken. This Court, like the Ninth Circuit, has ruled that U.S. nationality and residence must be weighed in the touch and concern test. *Al Shimari*, 758 F.3d at 530–31 (noting nationality is one factor among many); *Mujica*, 771 F.3d at 594 (noting U.S. nationality, in conjunction with other factors, may overcome the presumption); *cf. Ahmed v. Magan*, 2013 WL 4479077, at *1 (S.D. Ohio Aug. 20, 2013) (holding that permanent residence of individual torturer overcame presumption against extraterritorial ATS claims in and of itself).

Although the *Kiobel* touch and concern test provided limited guidance on the applicable factors in the analysis, and was "careful to leave open" for "further elaboration and explanation" a "number of significant questions," *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring), the Court's limited guidance was clear on this point. Given that the *Kiobel* defendants were foreign multinational corporations, based in Europe, whose presence consisted of an office in New York operated by a separate, but affiliate company, the Court determined that the nexus to the U.S. was far too attenuated to displace the presumption. *See Kiobel*, 133 S.

Ct at 1669; *see also id. at* 1677 (Breyer, J., concurring) (describing the minimum presence of Defendant). Far from being irrelevant, as Defendant suggests, the status and location of the defendant, and availability of alternative fora for dispute played a critical role in the Court's conclusion. *Id.* Accordingly, these factors played a critical role in this Court's analysis in *Al-Shimari* and are thus applicable here. *Al Shimari*, 758 F.3d at 531.

Unlike the mere corporate presence of the *Kiobel* defendants, Ali is a lawful permanent resident and hence a U.S. national. Similar to *Al-Shimari* and *Magan*, which considered the nationality and location of the defendants, this case does not "present any potential problems associated with bringing foreign nationals into United States courts to answer for conduct committed abroad." *Al Shimari*, 758 F.3d at 530-31. Certainly, Ali cannot complain that permitting Warfaa's ATS claims to proceed would unfairly apply United States *law* to his foreign conduct. The ATS is merely a "jurisdictional vehicle," by which Warfaa "seeks to enforce the customary law of nations," rather than "a federal statute that itself details conduct to be regulated or enforced." *Al Shimari*, 758 F.3d at 530. Therefore, in bringing these claims, Warfaa seeks only to employ the ATS to enforce against his torturer here in the United States substantive norms that are "necessarily [] recognized by other nations." *Id.* Indeed, by choosing to reside in the United

States, Ali left Warfaa no choice in this matter.[1] To disallow Warfaa from employing the ATS jurisdictional vehicle in this instance would leave him unable even to attempt to hold Ali accountable for his brutal, torturous conduct.

All of these factors carry significant weight in the touch and concern test, as interpreted by this Court in *Al-Shimari*, and the district court erred in omitting the multi-factor analysis required by *Kiobel* to Warfaa's ATS claims. Accordingly, this Court should reject the district court's dismissal and find instead that Warfaa's ATS claims are sufficiently connected to the territory of the United States to overcome the *Kiobel* presumption.

CONCLUSION

For the reasons discussed above, Plaintiff-Appellee/Cross-Appellant Farhan Mohamoud Tani Warfaa respectfully requests that this Court reverse the district court's ruling on the application of *Kiobel* and reinstate Warfaa's ATS claims, or, in the alternative, remand the case with directions that the district court conduct the full factual inquiry that *Kiobel* requires.

[1] And, to be sure, this is not a case where a foreign national is being hailed into an unfamiliar court to defend himself. *Al Shimari*, 758 F.3d at 530 ("this case does not present any potential problems associated with bringing foreign nationals into United States courts to answer for conduct committed abroad, given that the defendants are United States citizens.").

Date: April 7, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,486 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

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CERTIFICATE OF FILING AND SERVICE

I certify that on this 7th day of April 2015, I caused to be electronically filed the foregoing Reply Brief of Plaintiff-Appellee/Cross-Appellant Farhan Mohamoud Tani Warfaa with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit on all parties or their counsel of record through the CM/ECF system to:

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I further certify that on this 7th day of April 2015, I caused the required copies of the Reply Brief of Plaintiff-Appellee/Cross-Appellant to be hand filed with the Clerk of the Court.

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