RECORD NO. 14-1810
CROSS-APPEAL NO. 14-1934

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

FARHAN MOHAMOUD TANI WARFAA.,

Pl-Appellee/Cross-Appellant,

v.

YUSUF ABDI ALI,

Def-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.

RESPONSE/REPLY BRIEF OF APPELLANT/CROSS-APPELLEE YUSUF ABDI ALI

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ARGUMENT

I . THE DISTRICT COURT PROPERLY DISMISSED WARFAA'S ATS CLAIMS.

Warfaa asserts that the District Court improperly dismissed Warfaa's claims under the Alien Tort Statute, codified at 28 U.S.C., §1350 (hereinafter referenced *qua* "ATS") . Essentially, Warfaa argues that the District Court neglected to conduct an examination of whether, *vel non,* Warfaa's claims bore a sufficient nexus to the United States to overcome a presumption against the extraterritorial reach of the ATS, and that such an examination would have led to the conclusion that the ATS provided jurisdiction over Warfaa's claims. Warfaa is, respectfully, mistaken, and the District Court acted properly in dismissing Warfaa's ATS claims. Ali does, however, agree with Warfaa's statement of the appropriate standard of review on this point, *viz*., that whether, *vel non*, claims based upon extraterritorial conduct cannot be raised under the ATS is, indeed, a question of subject matter jurisdiction, citing *Al Shimari v. CACI, 758 F. 3d 516, 528 (4*th Cir. 2014), which are to be reviewed *de novo* by this Honorable Court, citing *AGI Associates, LLC v. City of Hickory, N. C*., – F. 3d – , 2014 WL 6981327, at 2 (December 11, 2014). *See*: Warfaa Br. at 11.

A. The District Court Did Not Need to Analyze the Operation of the Presumption Against the Extraterritorial Application of the ATS.

Warfaa contends that the Supreme Court decision in *Kiobel v. Royal Dutch Petroleum,* 133 S. Ct. 1659 (2013) requires a determination as to whether the

presumption of nonextraterritoriality is overcome whenever, as here, "the conduct giving rise to the claims is 'foreign'." Warfaa Br. at 13. Warfaa seriously misconstrues the scope of the *Kiobel* test in arguing that a presumption analysis is required in the case *sub judice*.

In *Kiobel*, the Supreme Court found that the ATS could not give federal subject matter jurisdiction to Nigerian nationals residing in the United States for an action grounded in alleged torts committed in Nigeria by certain foreign corporations with offices in the United States. *Kiobel*, 133 S. Ct. at 1669. The Court concluded the plaintiffs' claims were barred because they sought relief for "violations of the law of nations occurring outside the United States." *Id*.

The Supreme Court indicated that the canon of interpretation precluding extraterritorial application of a statute, in the absence of a contrary intent, could be overcome by a factual analysis of the extent to which the claims "touch and concern" the United States. *Id*. This analysis was not to be undertaken, however, every time a claim was "foreign" as Warfaa asserts. Rather, as the Supreme Court stated, the inquiry was only to be made when some part of "the relevant conduct" occurred in the United States. *Id.* The Supreme Court did add that the claims in *Kiobel* would not have touched and concerned the United States with "sufficient force" to overcome the presumption against extraterritorial application if any of the relevant conduct had taken place in the United States. The decisive finding for the Supreme Court in *Kiobel* was, however, that "all of

the relevant conduct took place outside the United States", and, therefore, no issue arose as to the forcefulness with which those claims might otherwise have touched and concerned the territory of the United States. *Id.*

Irrefragably, all of the "conduct" in the instant case, for purposes of applying the Supreme Court test, took place in Somalia. The only fact adduced by Warfaa that implicates the territory of the United States is Ali's residence in the United States. The Supreme Court in *Kiobel*, however, determined that a defendant's location in the United States was not pertinent to the issue of conduct for purposes of establishing ATS jurisdiction, finding that the defendant corporations in that case did not engage in ATS "conduct" in the United States despite what the Court found to be their "corporate presence" in the United States. *Id.*

This Honorable Court's recent application of *Kiobel* in *Al Shimari, supra,* does not mandate a different conclusion. In *Al Shimari*, this Court found that the claims of victims of mistreatment at the Abu Ghraib prison in Iraq were subject to analysis as to the extent to which they "touched and concerned" the territory of the United States and, in view of the extent of those connections, were within the jurisdiction of the federal courts. The facts cited by this Court in *Al Shimari* were, however, ones that showed that much of the "conduct" underlaying the claims took place in the United States. These included the performance of the alleged tortious acts in furtherance of "the performance of a contract executed by a United States corporation with the United

States government," and allegations that "the acts of torture [were] committed by United States citizens who were employed by an American corporation,...the alleged torture occurred at a military facility operated by United States government personnel [,]...the employees who allegedly participated in the acts of torture were hired by CACI in the United States[,]...the corporation was authorized to collect payments by mailing invoices to government accounting offices in Colorado [,]...[the corporation's] interrogators were required to obtain security clearances from the United States Department of Defense[,]...and [the corporation's] managers located in the United States were aware of reports of misconduct abroad, attempted to 'cover up' the misconduct, and 'implicitly, if not expressly encouraged' it." *Al Shimari*, 758 F.3d at 528-29.

By contrast, none of actions in this case associated with the alleged tortious behavior, *id est,* the "relevant conduct" in the language of *Kiobel*, took place in the United States. As found by the District Court, "'[a]ll the relevant conduct" alleged in the Amended Complaint occurred in Somalia [citing *Kiobel* at 1669]..., carried out by a defendant who at the time was not a citizen or resident of the United States." J.A. at 78-79. The District Court consequently properly determined that the ATS presumption against extraterritorial application barred the adjudication of those claims that could only be heard through a grant of jurisdiction under the ATS.

B. The District Court Correctly Concluded that the Presumption against Extraterritorial Reach Barred Warfaa's ATS Claims.

Even if an analysis of the reach of the Warfaa claims into the United States were

required by *Kiobel*, the District Court conducted such an analysis and correctly concluded that the presumption against the extraterritorial reach of the ATS barred Warfaa's claims. Far from neglecting to conduct a "full factual analysis" of the extent to which Warfaa's ATS claims bore a nexus to the United States, as asserted by Warfaa (Warfaa Br. at 12), the District Court explicitly found, as noted above, that "'all the relevant conduct' alleged in the Amended Complaint occurred in Somalia," and that "[p]laintiff has alleged no facts showing that defendant's violations of international law otherwise 'touch[ed] and concern[ed] the territory of the United States.'" J.A. at 78-79 [internal quotes citing *Kiobel* at 1669].

Warfaa asserts that Ali's residence in the United States should have caused the District Court to conclude that ATS jurisdiction was available. Warfaa Br. at 15 ("[T]he District Court notably gave no weight to Ali's current residence."). The District Court properly determined, however, that, under *Kiobel*, ATS jurisdiction "appears to turn on the location of the relevant conduct, not the present location of the defendant." J.A. at 78-79. This has been the substantially uniform conclusion of all courts that have considered the matter since *Kiobel* was decided. *See e.g. Jara v. Nunez*, No. 6:13-CV-1426-ORL-37, 2014 WL 6608924, at *2 (M.D. Fla. Nov. 20, 2014) (denying ATS jurisdiction over a U.S. citizen defendant); *see, also, to similar effect, Mujica v. AirScan Inc.*, 771 F.3d 580, 594 (9th Cir. 2014) ("Our reading of *Kiobel* is in accord with that of other federal courts. So far as we can ascertain, since *Kiobel* was decided, only one court

has so much as suggested that an ATS claim is always viable when the defendant is a U.S. citizen or corporation. Every remaining federal court has dismissed ATS claims whose only connection to this country was the defendant's U.S. citizenship" [citing numerous authorities].).

Warfaa's comments regarding the purported absence of another forum for suing Ali (although Ali is acknowledged to be only a legal permanent resident and not a citizen of the United States) and the risk that the United States might become a haven for foreign violators of international norms (Warfaa Br. 17) may be appropriately addressed to the executive and legislative branches. But, as the Court in *Kiobel* stated, "[i]f Congress were to determine otherwise [*id est,* that jurisdiction was available over conduct occurring wholly outside the United States], a statute more specific that the ATS would be required." *Kiobel*, 133 S.Ct. At 1669.

II. THIS HONORABLE COURT CAN AND SHOULD REVERSE ITS 2012 ABROGATION OF COMMON LAW IMMUNITY FROM SUIT FOR OFFICIAL ACTS BY FORMER GOVERNMENT OFFICIALS WHERE *JUS COGENS* VIOLATIONS ARE ALLEGED

In 2012, a panel of this Honorable Court held in the case of *Yousuf v. Samantar*, 699 F. 3d 763, 775-77, (4th Cir. 2012), *cert. den*., 134 S.Ct. 897 (2014), disregarding precedent, held that a former government official, Mohamed Ali Samantar, could not assert common law immunity from suit for alleged actions in office where *jus cogens* violations were *alleged,* and, in following such *stare decisis*, the District Court struck Ali's common law immunity claim in the

case *sub judice*. (J.A. At 88 – 90); Ali has appealed from that ruling, inviting this Honorable Court, *inter alia,* to reverse Samantar. Ali will not restate here the grounds for taking such an extraordinary measure, as he has already done so in his Opening Brief, filed with this Honorable Court on 15 December 2014, except to state that, since the filing of that Opening Brief, and the filing on 23 January 2015 of Warfaa's Opening Brief, there have been two noteworthy developments, *viz.*, the filing with the Supreme Court by the Solicitor General on 30 January 2015 of an Amicus Curiae Brief, notably, criticizing this Honorable Court's 2012 holding in *Samantar*, yet also recommending against the granting of certiorari based upon a supposed withdrawal of the claim for immunity for Samantar which arguably abnegated the certworthiness of the case, whereas, in an earlier certiorari petition from an interlocutory order in the same case the Solicitor General had recommended that the Supreme Court grant certiorari, vacate this Honorable Court's aforesaid 2012 Samantar decision, and remand the case back to the District Court for further determinations on Samantar's immunity claims. *Samantar v. Yousuf*, No. 13-1361 (Jan. 30, 2015), 2015 U.S. S. Ct. Briefs LEXIS 267, at *passim,* which brief apparently contributed to the Supreme Court's denial of certiorari from the latterly filed cert petition. *Samantar v. Yousuf*, 2015 WL 998667 (March 9, 2015).

To be sure, the Solicitor General's above-referenced 30 January 2015 amicus brief did contain, at Appendix "B", a oddly phrased diplomatic letter from the United States to the Government of Somalia, layered with a letter of transmittal dated 23 December 2014, which diplomatic letter is ingravidated with a peculiarly fashioned negative notice position as regards the respective claims for immunity as regards Samantar, and for Ali as well, in which the State Department deigned to state, essentially, the respective immunity claims of Samantar and Ali would be deemed to have been withdrawn unless formally reasserted by 23 January 2015, and, where no such reassertion was reportedly communicated, the State Department, per a 28 January 2015 letter from Mary E. McLeod, Acting Legal Advisor to the Secretary of State, addressed to the Solicitor General, included as Appendix "A" to the Solicitor General's Amicus Brief aforesaid, took the position that its novel negative notice protocol, heretofore, upon information and belief, unknown as a diplomatic practice between friendly nations in such matters, at least constituted a withdrawal of an immunity claim for Samantar, and that the State Department ". . . has not altered its prior determination that Mr. Samantar does not enjoy immunity in [the] litigation." *Id*. Tellingly, the said letter was silent as to Ali, and, anywise, unlike Samantar, the State Department has yet to take a formal position as to Ali's immunity claims, despite having been requested to do so on multiple occasions by the District Court. *See*: J.A. at 17 – 20; 22 – 27,

the oblique, negative notice exercise referenced above notwithstanding.

In light of the evident disquietude in communications between the United States and Somalia, Ali suggests that this Honorable Court may invite the State Department to weigh in with a clarifying Statement of Interest. *See, e.g.: United States v. Golitschek*, 808 F.2d 195, 204 (2d Cir. 1986) ("Thereafter, if advised that the Government intends to retry the defendant, we will invite the views of the State Department on the issues that implicate foreign relations and, with the benefit of those views, proceed to determine the remaining issues of the appeal.")

Warfaa, per his Opening Brief, contends that the panel of this Honorable Court that hears the instant appeal is somehow bereft of authority to reconsider the decision in *Samantar*. Warfaa Br. 29. This is not correct. The panel in the case *sub judice* will have, as Warfaa, himself acknowledges, "the statutory and constitutional power to overrule the decision of another three-judge panel." *McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004) (deciding that, in the event of a conflict in panel rulings, the first in time should be deemed precedential).

Considerations of discretion may militate against any holding here at variance with the holding in *Samantar*. *McMellon*, 387 F.3d at 332 ("[A]s a matter of prudence, a three-judge panel of this court should not exercise [the] power [to overrule the decision of another panel].") A contrary holding may, however, be reached under conditions of "special justification." *United States v. Smoot*, 690 F.3d 215, 223 (4th Cir. 2012)

(quoting *Dickerson v. United States*, 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000), while indicating that it would entertain such an argument only in a "highly unlikely circumstance"). As the Supreme Court indicated in *Dickerson* in elaborating when special justification may be found to exist, "We have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings." *Dickerson*, 530 U.S. at 443.

This Honorable Court may well indeed determine that the doctrinal underpinnings of Samantar have been undermined, and, therefore, may use the case, *sub judice*, to revisit and reconsider its earlier holding in *Samantar*. We respectfully submit that such exceptional circumstances exist here to reverse the earlier holding.

CONCLUSION

For the foregoing reasons, the decision in the case *sub judice* striking Ali's common law immunity should be vacated and reversed, with the end result that the subject, long pending action be dismissed with prejudice; concomitantly, for the foregoing reasons, the dismissal with prejudice of Warfaa's ATS should be affirmed. In addition, Ali, requests that, again, for the foregoing reasons, this Honorable Court suggests that the decision-making process of this Honorable Court would be aided by a request by this Honorable Court to the Executive Branch for a clarification of the Somali Government's formal request for immunity for Ali communicated by the 30

November 2013 diplomatic letter from H.E. Abdi Farah Shirdon, Prime Minister of the Federal Republic of Somalia to the Honorable John Forbes Kerry, Secretary of State of the United States [Document 78, filed with the District Court on 4 December 2013], as well as with the assistance of oral argument from the undersigned.

Dated: 17 March 2015

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Upon information and belief, as adverted to above, your Appellee, *viz.*, Yusuf Abdi Ali, respectfully submits that this Honorable Court's decisional process may be aided significantly by oral argument. Accordingly, Ali hereby requests to be heard at oral argument.

Dated: 17 March 2015

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CERTIFICATE OF COMPLIANCE

In re: Fourth Circuit Record No. 14-1810;

FARHAN MOHAMOUD TANI WARFAA versus YUSUF ABDI ALI.

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electronic version of the instant Brief and/or a word-count printout of same.

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FILING CERTIFICATE AND CERTIFICATE OF SERVICE

I, Joseph Peter Drennan, undersigned, hereby and herewith certify that, on this 17th day of the month of March 2015, I caused to be filed, electronically, with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, utilizing this Honorable Court's CM/ECF System, the Response/Reply Brief of the Appellant, and that I caused to be dispatched by carriage of First Class Post, through the United States Postal Service, enshrouded in suitable wrappers, the required number of copies of the Response/Reply Brief of the Appellant unto the following, *viz.*:

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