06-4216-cv

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 of 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

For Continuation of Caption See Inside Cover

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE JAMES W. ZIGLAR

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and Naturalization Services for New York District, and now Customs Enforcement, ROBERT MUELLER, Director of the Federal Bureau of Investigation, JOHN DOE 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.

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STATEMENT OF JURISDICTION

Appellee, defendant below, James W. Ziglar, former Commissioner of the former Immigration And Naturalization Service of the United States (hereinafter "INS"), adopts the Statement of Jurisdiction contained in the Brief For Official Capacity Defendants-Appellees And United States As Amicus Curiae.

STATEMENT OF THE ISSUES

1. Whether this Court should affirm the judgment dismissing all of plaintiff's claims against Mr. Ziglar in his personal capacity on the ground of lack of personal jurisdiction because the Complaint alleged no relationship on Mr. Ziglar's part with New York, other than his general supervisory authority as INS Commissioner over INS employees acting in New York.

2. Whether this Court should affirm the judgment dismissing all of plaintiff's claims against Mr. Ziglar in his personal capacity on the ground that the Complaint alleged no facts showing Mr. Ziglar's personal involvement in any of the violations of which plaintiff complains.

3. Whether this Court should affirm the judgment dismissing the personal capacity claims against Mr. Ziglar for failure to plead sufficient facts showing Mr. Ziglar's personal involvement and to support personal jurisdiction, and dismissing Count 4 for failing to plead facts sufficient to state a claim of a constitutional violation in connection with his detention in the United States.

4. Whether this Court should affirm the judgment dismissing Count 1 of plaintiff's Complaint under the Torture Victim's Protection Act, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note) (hereinafter "TVPA") on the ground that officials of the government of the United States cannot be sued under the TVPA for acts taken by those officials under color of federal law.

5. Whether this Court should affirm the judgment of the District Court dismissing all the claims against Mr. Ziglar in his personal capacity for all of the reasons stated by all of the other Defendants-Appellees in their individual briefs in this Court.

STATEMENT OF THE CASE AND FACTS

Mr. Ziglar adopts by reference the Statement Of The Case And Facts contained in the briefs filed by the other Defendants-Appellees in this appeal. Specifically, however, he wishes to address the dearth of allegations before the District Court regarding his own involvement in the acts of which plaintiff complains in this lawsuit.

I. ALLEGATIONS RELATING TO MR. ZIGLAR AND THE INS

Plaintiff, who claims to be a citizen and resident of Canada who was born in Syria, Joint Appendix (hereinafter "J.A.") 22, ¶ 11, alleged that he presented himself to federal immigration officials September 26, 2002, as he was

passing through New York on a trip from Switzerland to his home. *Id*. at 29, ¶ 26. (Plaintiff averred that he did not seek entry to the U.S. at that time, but only debarked to catch a connecting flight to Canada. *Ibid*.) Plaintiff claimed that federal officials detained and interrogated him until October 9, 2002, when they flew him to Jordan and transferred his custody to Jordanian officials. *Id*. at 33-34, ¶ 49. Plaintiff alleged that those Jordanians, after beating and questioning plaintiff, gave him to Syrians who took him to their country where they interrogated and tortured him for a nearly a year before releasing him in October 2003. *Id*. at 33-37, ¶¶ 49-67. Plaintiff pleaded that the United States government detained him without probable cause and subjected him to coercive interrogation and harsh conditions of confinement in the United States. *Id*. at 21, ¶ 4. He further pleaded that the U.S. officials handling his case had then purposely sent him to Syria, over his objection, because they knew and intended that he be tortured and otherwise mistreated by that nation. *Id*. at 35, ¶ 57.

The Complaint made numerous specific allegations of actions taken by both named and anonymous officials of the United States Immigration And Naturalization Service, the INS, of which Mr. Ziglar at that time served as Commissioner. Plaintiff claimed that unnamed INS officers detained him when he presented himself at the airport, *id*. at 29, ¶ 26, then turned him over to "uniformed men" who searched plaintiff's luggage "without his consent" and refused his

request to telephone his home. *Ibid*., ¶ 27. After several hours of interrogation, allegedly by unnamed agents of the Federal Bureau of Investigation and other unidentified men, *id*. at 29-30, ¶¶ 28-30, plaintiff averred that an immigration officer questioned him for three (3) hours about his membership in terrorist organizations, *id*. at 30, ¶ 31, after which he was chained, shackled, placed in solitary confinement, denied food, and kept awake all night by the conditions. *Ibid*. at 30, ¶¶ 32, 34.

Plaintiff further averred that on the evening of the next day, after the FBI had interrogated him again, an anonymous immigration officer came to his cell. *Id*. at 30-31, ¶¶ 33-35. That officer, plaintiff stated, asked plaintiff voluntarily to accept deportation to Syria and forced him to sign a form, but did not permit plaintiff to read the form. *Ibid.*, ¶ 35. The Complaint alleged that plaintiff was then transferred to the Metropolitan Detention Center in Manhattan, *id*. at 31, ¶ 36, where, on October 1, 2002, an MDC employee gave him a document "stating that the INS had found him inadmissible" to the United States because he belonged to Al Qaeda, "an organization designated by the" United States Secretary of State as a "Foreign Terrorist Organization." *Ibid*., ¶ 38. Plaintiff alleged that the INS gave him no "meaningful opportunity to contest this finding." *Ibid*., ¶ 38.

Plaintiff pleaded that the INS gave him an opportunity to designate the country to which he wished to be deported. *Id*. at 31-32, ¶ 41. But when he designated Canada, plaintiff alleged, seven (7) anonymous INS officers questioned him about why he resisted deportation to Syria. *Id*. at 32, ¶ 43. Plaintiff alleged that he had no prior notice of this interrogation and that he only agreed to talk after the INS officers falsely told him that a lawyer retained by his family had chosen not to attend the session. *Ibid.*, ¶¶ 43-44. Plaintiff stated that during his interrogation, he made the INS officers aware of his fear of being tortured if they returned him to Syria and the basis for his fears. *Ibid*., ¶ 44. Plaintiff averred that the next day, October 7, 2002, the INS kept his lawyer from communicating with him by falsely telling her that it had transferred plaintiff to New Jersey, when in fact plaintiff remained in the MDC. *Id*. at 33, ¶ 46. Plaintiff pleaded that on October 8, 2002, unidentified INS officers told him that, based on plaintiff's acquaintance with certain persons and on classified information, the Regional Director for the Eastern Region of INS, defendant Scott Blackman, had decided to remove plaintiff to Syria. *Ibid*., ¶ 47. The Complaint went on from there to allege how plaintiff was deported to Jordan and then moved to Syria, where Syrian government agents allegedly tortured him and confined him under inhumane conditions. *Id*. at 33-37, ¶¶ 48-67.

Plaintiff attached as Exhibit D to his Complaint a redacted photocopy of the Decision Of The Regional Director in his case. That Decision, signed by INS Regional Director J. Scott Blackman, found plaintiff to be "clearly and unequivocally inadmissible" based on evidence of plaintiff's membership in Al Qaeda. *Id*. at 86, Complaint Exhibit D, at 5.

Plaintiff's Complaint attributed none of these actions by INS employees to Mr. Ziglar. The only INS employee to whom plaintiff tied any actions by name was defendant Blackman. At no point did plaintiff allege that Mr. Ziglar personally committed or participated in any of the actions on which plaintiff based his claims for relief. Nor did plaintiff allege facts from which it could be reasonably inferred that Mr. Ziglar had anything to do with his original detention, with the conditions of his confinement in the United States, with the nature of his interrogation while in the U.S., or the decision to deport him to Syria. Nor did plaintiff allege that any of the anonymous or named INS agents specified in his Complaint were in any way acting as the personal agents of Mr. Ziglar or for Mr. Ziglar's personal benefit. Insofar as concerns Mr. Ziglar, the Complaint alleged no more than a *respondeat superior* basis for imposing liability.

The Complaint contained no allegations whatsoever that Mr. Ziglar—who was head of a government agency located in Washington, D.C.—was present or took any actions in the State of New York.

II. MR. ZIGLAR'S MOTION

Mr. Ziglar moved to dismiss the claims against him pursuant to FED. RULES CIV. PRO. 12(b)(1), (2), & (6). *Id.* at 112-115. In his Memorandum Of Points And Authorities In Support Of Motion Of Defendant James Ziglar To Dismiss Complaint (Dkt. No. 28), at 21, Mr. Ziglar expressly stated as follows: "Mr. Ziglar adopts the arguments made by the other defendants in this case in support of their various motions to dismiss." Several of those other defendants, including Attorney General Ashcroft and FBI Director Mueller, had moved to dismiss all the claims against them on the grounds of lack of personal jurisdiction. Memorandum In Support Of Motion To Dismissing [*sic*] The Claims Against Attorney General John Ashcroft In His Individual Capacity (Dkt. No. 56), at 8-10; Memorandum Of Law In Support Of Motion To Dismiss Plaintiff's Claims Against Defendant Robert S. Mueller III In His Personal Capacity (Dkt. No. 59), at 29-32. Despite Mr. Ziglar's clear adoption of those motions, plaintiff argued in his opposition papers that Mr. Ziglar had waived the personal jurisdiction point, Plaintiff Maher Arar's Memorandum Of Law In Opposition To Defendants' Motions To Dismiss (Dkt. No. 60), at 74 n. 29; an argument Mr. Ziglar rebutted in his reply memorandum. Reply Memorandum In Support Of Motion Of Defendant James Ziglar To Dismiss Complaint (Dkt. No. 65), at 5-6.

In its opinion, the District Court rejected plaintiff's contention and included Mr. Ziglar as among the defendants who had moved to dismiss on the grounds of lack of personal jurisdiction, stating that "[d]efendants note, however, that the complaint lacks the requisite amount of personal involvement needed to ... establish personal jurisdiction." Special Appendix (hereinafter "S.A.") at 84. At the conclusion of that section of its opinion headed "Personal Involvement and Personal Jurisdiction," *ibid*., the District Court dismissed "all claims against the individual defendants" without excepting Mr. Ziglar. *Id*. at 85.

III. THE DISTRICT COURT'S RULING

In the portion of its opinion headed "Personal Involvement and Personal Jurisdiction" the District Court noted that the individual capacity defendants had all raised two arguments: first, "that the complaint lacks the requisite amount of personal involvement needed to bring a claim against them in their individual capacities," *id.* at 84; and second, that the Complaint failed to allege sufficient facts "even to establish personal jurisdiction." *Ibid.* The District Court then found that "at this point, the allegations against the individually named defendants [thus including Mr. Ziglar] do not adequately detail which defendants directed, ordered and/or supervised the alleged violations of Arar's due process rights" or even "whether any of the defendants were otherwise aware, but failed to

take action, while Arar was in custody." *Id.* at 84-85. Though the defendants' personal jurisdiction argument, if accepted by the District Court, would have required a dismissal of all of plaintiff's claims against the individual capacity defendants, the District Court did not specifically address that issue. Instead, the District Court, in an ambiguous statement, ruled as follows: "Accordingly, all claims against the individual defendants are dismissed without prejudice with leave for plaintiff to replead Count 4." *Id.* at 85. That ruling was ambiguous, first, because the District Court had already dismissed Counts 1, 2, and 3 with prejudice, and Count 4 without prejudice, making it unclear whether the words "without prejudice" applied to "all claims against the individual defendants" or only to "Count 4;" and second, because it did not distinguish between the two arguments raised by the individual capacity defendants which the Court addressed in this section of its opinion.

The District Court compounded the ambiguity in the section of its opinion entitled "Conclusion." *Id.* at 87-88. In that portion of its opinion, the District Court did not address the personal jurisdiction argument or the lack of personal involvement argument with regard to Counts 1, 2, or 3. *Id.* at 87. With regard to Count 4, the District Court dismissed it without prejudice, giving plaintiff leave to "replead those claims without regard to any rendition claim and naming those defendants that [*sic*] were personally involved in the alleged

unconstitutional treatment." *Id.* at 88. Presumably, such a repleading would have had to allege sufficient facts to establish personal jurisdiction as well as personal involvement on the part of the individual capacity defendants in the wrong alleged in Count 4.

Plaintiff removed any ambiguity by refusing to replead, deciding to take his stand on his original Complaint. *Id.* at 92. The District Court then entered a final judgment that, among other things, dismissed all of plaintiff's claims against Mr. Ziglar in Mr. Ziglar's individual capacity with prejudice. *Id.* at 92-93. Plaintiff appealed.

SUMMARY OF ARGUMENT

1. Plaintiff's Complaint alleges no facts whatsoever that establish any connection between Mr. Ziglar personally and the State of New York. There exists no basis for the exercise of long-arm jurisdiction over Mr. Ziglar, and on that basis alone, the judgment of the District Court dismissing with prejudice all the personal capacity claims against Mr. Ziglar should be affirmed, the more so in light of the fact that by not addressing this point in his opening brief, plaintiff has conceded this point on appeal.

2. Plaintiff's Complaint alleges no facts demonstrating any personal involvement by Mr. Ziglar in any of the alleged misconduct for which

plaintiff seeks recovery in this case. Plaintiff's claims against Mr. Ziglar in his personal capacity rest entirely on vague, conclusional allegations that all the personal capacity defendants conspired with each other, without identifying who did what when; or else on Mr. Ziglar's supervisory position *per se*, without specifying any personal involvement by Mr. Ziglar. None of these allegations suffice to establish liability and plaintiff's failure in this regard justifies affirmance of the dismissal with prejudice of all of the personal capacity claims against Mr. Ziglar. By ignoring this issue in his opening brief, plaintiff has conceded this point on appeal.

3. Under the decision of the Supreme Court in *Crawford-El v. Britton*, 523 U.S. 574, 597-598 (1998), the District Court did not abuse its discretion by requiring plaintiff to replead Count 4 to state with more specificity how his treatment while in detention in the United States violated plaintiff's constitutional rights and the role each personal capacity defendant played in those violations. Nor would the District Court have abused its discretion had it required such additional pleading with regard to Counts 1, 2, and 3, had it not otherwise dismissed those Counts with prejudice.

4. The District Court correctly held that liability under the TVPA cannot be imposed on officials of the United States for actions taken by officials of foreign governments, in circumstances where the U.S. officials were acting under

color of U.S. law. This holding is consistent with the understanding of the law expressed by the Executive at the time of its enactment.

STANDARD OF REVIEW

This Court reviews the District Court's dismissal of the plaintiff's claims pursuant to FED. RULE CIV. PRO. 12(b) *de novo*. *Triestman v. Federal Bureau of Prisons,* 470 F.3d 471, 474 (C.A.2 2006). And while in doing so, this Court must assume the truth of the factual averments of plaintiff's Complaint, *ibid*., and any inferences reasonably to be drawn therefrom, it need not accept conclusional statements that have no basis in allegations of fact. *Furlong v. Long Island College Hospital,* 710 F.2d 922, 927 (C.A.2 1983). Plaintiff will be held to have waived any grounds in support of his claims that he did not present to the District Court, *Mycak v. Honeywell, Inc.*, 953 F.2d 798, 803 (C.A.2 1992), and any grounds he omitted from his opening brief in this Court. *JP Morgan Chase Bank v. Alto Hornos de Mexico, S.A. de C.V.,* 412 F.3d 418, 428 (C.A.2 2005). On the other hand, this Court may affirm the judgment of the District Court on any ground having a foundation in the record, whether or not the District Court rested its holding on that ground, and even if the District Court expressly rejected that ground in reaching its judgment. *MFS Securities Corporation v. New York Stock Exchange, Inc.*, 277 F.3d 613, 617 (C.A.2 2002).

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DISMISSAL OF ALL THE PERSONAL CAPACITY CLAIMS AGAINST MR. ZIGLAR BECAUSE THE COMPLAINT DOES NOT ALLEGE SUFFICIENT FACTS TO ESTABLISH PERSONAL JURISDICTION OVER HIM

In the District Court, plaintiff bore "the burden of showing that the court has jurisdiction over" Mr. Ziglar by advancing "legally sufficient allegations of jurisdiction." *Metropolitan Life Insurance Company v. Robertson-Ceco Corporation*, 84 F.3d 560, 566 (C.A.2 1996). To meet this pleading burden, plaintiff was required to offer more than "conclusory non-fact-specific jurisdictional allegations." *Jazini by Jazini v. Nissan Motor Company, Ltd.*, 148 F.3d 181, 185 (C.A.2 1998). This plaintiff did not do.

The Complaint did not allege that Mr. Ziglar resided in New York. Under New York's long-arm statute, N.Y.C.P.L.R. § 302(a), the District Court had the power to reach Mr. Ziglar in his personal capacity only in the circumstances enumerated in that statute: that is, only if plaintiff alleged that Mr. Ziglar transacted business in New York, § 302(a)(1); committed torts in New York, personally or through his agent, § 302(a)(2); or committed a tortious act outside New York that caused injury within New York, but only if he also engaged in a "persistent course of conduct" in New York or regularly did or solicited business in New York or derived substantial revenue from goods used or services

performed in New York; or if Mr. Ziglar expected the act to have consequences in New York and he derived substantial revenue from interstate or international commerce. § 302(a)(3).

Plaintiff's Complaint met none of these tests with regard to Mr. Ziglar. As for §§ 302(a)(1) and (a)(2), plaintiff did not allege that Mr. Ziglar personally did anything in New York. Nor did plaintiff allege that any person in New York was acting as Mr. Ziglar's personal agent, as he must to satisfy § 302(a)(2). *E.g., Green v. McCall*, 710 F.2d 29, 33 (C.A.2 1983). And as for § 302(a)(3), plaintiff did not allege that Mr. Ziglar engaged in a persistent course of conduct in New York or that Mr. Ziglar obtained any commercial benefits whatsoever from his activities, whether in New York or elsewhere. The Complaint thus contained no allegations that met the requirements of New York's long-arm statute.

Mr. Ziglar's status as Commissioner of the INS is not sufficient to render him amenable to suit in New York for the acts of INS employees in New York. "New York law ... does not provide jurisdiction over a defendant in his individual capacity based on an agent's tortious act within the state unless the agent was representing the defendant in his individual capacity." *Green v. McCall*, *supra*, 710 F.2d at 33. Plaintiff nowhere alleges that any of the INS agents whose acts he set out in his Complaint were acting as Mr. Ziglar's personal agents or that

Mr. Ziglar somehow personally benefited from their acts. And no allegations exist in this case from which any such inferences could be drawn, reasonable or otherwise. *E.g.*, *Marsh v. Kitchen*, 480 F.2d 1270, 1273 (C.A.2 1973) (federal law enforcement agents are agents of common principal, *i.e.*, the United States, not of one another).

The Complaint failed, and failed utterly, to allege anything to establish that Mr. Ziglar had any personal involvement in any of the wrongdoing of which plaintiff complained in his pleading in the District Court. The District Court lacked personal jurisdiction over Mr. Ziglar, and the District Court so concluded. S.A. at 84-85. For this reason alone, the District Court's dismissal of the individual capacity claims against Mr. Ziglar should be dismissed. The more so, in light of the fact that plaintiff has failed to address this issue in his opening brief.

II. THIS COURT SHOULD AFFIRM THE DISMISSAL OF ALL THE PERSONAL CAPACITY CLAIMS AGAINST MR. ZIGLAR BECAUSE THE COMPLAINT DOES NOT ALLEGE SUFFICIENT FACTS TO ESTABLISH MR. ZIGLAR'S PERSONAL INVOLVEMENT IN THE WRONGS OF WHICH PLAINTIFF COMPLAINS

Dismissal of a claimed constitutional violation "is proper where, as here, the plaintiff 'does no more than allege that [defendant] was in charge'" of the agency committing the acts of which plaintiff complains. *Gill v. Mooney*, 824

F.2d 192, 196 (C.A.2 1987) (quoting *Williams v. Vincent*, 508 F.2d 541, 546 (C.A.2 1974)). Plaintiff here seeks to impose liability on Mr. Ziglar under a theory of *respondeat superior*, for all the Complaint alleges as to Mr. Ziglar (apart from generalized allegations of conspiracy) is that he was the Commissioner of the INS during the period at issue with "responsibility for the implementation and enforcement of United States immigration laws." J.A. at 24-25, Complaint ¶ 17. But "*respondeat superior* generally does not apply in § 1983 and consequently in *Bivens*-type actions." *Ellis v. Blum*, 643 F.2d 68, 85 (C.A.2 1981). "Because personal involvement by a federal official is a prerequisite to liability under *Bivens*, federal officials who are not personally involved in an alleged constitutional deprivation may not be held vicariously liable under *Bivens* for the acts of subordinates." *Perez v. Hawk*, 302 F.Supp. 2d 9, 18-19 (E.D.N.Y. 2004). Accordingly, to state a claim against Mr. Ziglar under *Bivens* plaintiff must have pleaded that:

> "(1) [Mr. Ziglar] participated directly in the alleged infraction; (2) [Mr. Ziglar], with actual or constructive knowledge of the violation, failed to remedy the wrong; (3) [Mr. Ziglar] created or permitted the policy or custom under which the unconstitutional practices occurred; (4) [Mr. Ziglar] was grossly negligently [*sic*] in managing subordinates who caused the violations; or (5) [Mr. Ziglar] failed to act on information indicating that the constitutional deprivations were taking place." *Id*. at 19.

Because the Complaint alleged no facts to show any of these, the District Court concluded that all of the individual capacity claims failed to state claims against him. S.A. at 84-85. Plaintiff does not contest this finding on appeal, and this finding alone is sufficient to justify affirmance of the dismissal of Counts 1-4.

Besides which, the finding is clearly correct. The Complaint is devoid of any allegations that meet the *Perez* test, or that even come close, with regard to Mr. Ziglar. And while there was a bare bones allegation that Mr. Ziglar participated in a conspiracy to violate the TVPA and plaintiff's constitutional rights, the Complaint did not allege how he did so, when he did so, with whom he conspired, or what role he played in the conspiracy. Such "conclusory, vague, or general allegations" do not serve to plead a claim of conspiracy. *Leon v. Murphy*, 988 F.2d 303, 311 (C.A.2 1993).

Nor did plaintiff plead sufficient facts to support a claim of aiding and abetting. The Complaint contained no allegations that Mr. Ziglar had knowledge of any of the wrongdoing alleged, what assistance Mr. Ziglar provided the primary wrongdoers, or how he provided that assistance. Absent such allegations, plaintiff failed to state a claim of aiding and abetting. *Armstrong v. McAlpin*, 699 F.2d 79, 91 (C.A.2 1983); *Lesavoy v. Lane*, 304 F.Supp. 2d 520, 527 (S.D.N.Y. 2004).

For these reasons, and the reasons set forth by the other individual defendants in their briefs, plaintiff failed to plead claims against the individual capacity defendants, including Mr. Ziglar. This Court should affirm the judgment dismissing Counts 1-4 with prejudice as to those defendants.

III. THIS COURT SHOULD AFFIRM THE JUDGMENT OF THE DISTRICT COURT DISMISSING COUNT 4 FOR FAILURE TO PLEAD WITH SUFFICIENT SPECIFICITY HOW PLAINTIFF'S TREATMENT WHILE IN DETENTION IN THE UNITED STATES VIOLATED PLAINTIFF'S CONSTITUTIONAL RIGHTS AND THE ROLE EACH PERSONAL CAPACITY DEFENDANT PLAYED IN THOSE VIOLATIONS.

The other Defendants-Appellees have addressed the reasons why the dismissal with prejudice of Count 4 should be affirmed, and Mr. Ziglar will not repeat those arguments here. In light of plaintiff's emphasis in his opening brief on what he believes to be the toothless requirements of "notice pleading," however, Mr. Ziglar did want to emphasize one point. In cases where the defendants have asserted qualified immunity or where the facts suggest qualified immunity might be available, the Supreme Court has stressed that the District Courts have a responsibility to "*insist* that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." *Crawford-El v. Britton*, *supra*, 523 U.S. at 598 (emphasis added) (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991)(Kennedy, J.,

concurring in the judgment)). The Court noted that this requirement comes into play "[w]hen a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive," *id*. at 598, which is the case, of course, when a plaintiff seeks to prove the malice that is required to overcome a qualified immunity defense. *Id*. at 591-594. In such cases, the Court said, "the trial court *must* exercise its discretion in a way that protects the substance of the qualified immunity defense." *Id*. at 597 (emphasis added). And "[i]t *must* exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings," *id.* at 597-598 (emphasis added), either by determining the validity of the defense before allowing discovery, or by requiring more detailed pleadings by the plaintiff. *Id.* at 598.

Crawford-El teaches in no uncertain terms that, whatever may be the rule in other cases, in qualified immunity cases where, perforce, "an official's state of mind is at issue," *id.* at 597, a requirement that the plaintiff replead with more specificity such as the District Court imposed here with regard to Count 4 lies well within the bounds of permissible discretion. For this reason alone, this Court should affirm the District Court's dismissal with prejudice of Count 4.

And for this reason also, the District Court's conclusion that Counts 1-3 failed to plead with sufficient specificity the role that each individual played in committing the wrongs alleged did not run afoul of the notice pleading rule. The

District Court's ruling in this regard also fell within the teaching of *Crawford-El*, and on that basis should be affirmed.

IV. THIS COURT SHOULD AFFIRM THE JUDGMENT OF THE DISTRICT COURT DISMISSING COUNT 1 ON THE GROUND THAT THE ACTIONS OF THE DEFENDANTS WERE NOT TAKEN UNDER COLOR OF FOREIGN LAW WITHIN THE MEANING OF THE TVPA

The other Defendants-Appellees have demonstrated in their briefs why this Court should affirm the judgment of the District Court dismissing Count 1. The only point Mr. Ziglar wishes to add is that, in signing the TVPA, President George H.W. Bush, the first President Bush, stated his understanding that the "under color of foreign law" requirement would not have the effect of reaching the operations of United States law enforcement personnel. He stated: "I do not believe it is the Congress' intent that H.R. 2092 should apply to the United States Armed Forces or law enforcement operations, which are always carried out under the authority of United States law." Statement By President George H.W. Bush Upon Signing H.R. 2092, 22 Weekly Comp. Pres. Docs. 465 (Mar. 16, 1992). This understanding is in line with that of the authorities cited in the briefs of the other Defendants-Appellees.

V. THIS COURT SHOULD AFFIRM THE JUDGMENT OF THE DISTRICT COURT DISMISSING WITH PREJUDICE ALL THE CLAIMS AGAINST THE INDIVIDUAL CAPACITY DEFENDANTS, INCLUDING DEFENDANT-APPELLEE, JAMES W. ZIGLAR, FOR THE REASONS STATED IN THE BRIEFS OF EACH OF THE OTHER DEFENDANTS-APPELLEES AND SUPPORTING AMICUS CURIAE

For the reasons stated in the briefs filed by all of the other Defendants-Appellees and the United States as amicus curiae, this Court should affirm the judgment of the United States District Court for the Eastern District of New York dismissing with prejudice all of plaintiff's claims against the individual capacity defendants, including Defendant-Appellee James W. Ziglar.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully Submitted,

_____

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to FED. RULE APP. PRO. 37(a)(7)(C), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 5,093 words (which does not exceed the applicable 14,000 word limit).

_____
William Alden McDaniel, Jr.

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT EXPRESS**
COUNTY OF NEW YORK)		**MAIL**

I, , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On February 22, 2007

deponent served the within**: Brief for Defendant-Appellee James W. Ziglar**

upon:

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the address(es) designated by said attorney(s) for that purpose by depositing **2** true copy(ies) of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Overnight Express Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York and via email.

Sworn to before me on February 22, 2007

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