

No. 09-3569

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

PEOPLE OF THE VIRGIN ISLANDS

Appellee

v.

WILLIAM G. CLARK

Appellant

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VIRGIN ISLANDS
No. 09-cr-00009 (HON. CURTIS V. GÓMEZ)**

**APPELLANT'S REPLY TO APPELLEE'S RESPONSE TO ORDER
REGARDING JURISDICTION**

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REPLY ARGUMENT

The Appellee, People of the Virgin Islands (hereinafter “government”), concedes that if the district court’s remand decision is not based on a finding that it either lacks subject matter jurisdiction or that there was a defect in removal, then the remand decision is reviewable by this Court. *See* Appellee Br. at p.5; 28 U.S.C. §§ 1447(c), (d); *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862, 1865-66 (2009); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345 (1976). Because the district court never reached the issue of subject matter jurisdiction, and there is no suggestion of a defect in removal, this Court has authority over the appeal. The government’s Response to the Court’s September 15, 2009 Order is not persuasive on the issue of this Court’s jurisdiction.

A. The District Court’s Ruling Cannot be Colorably Characterized as a Remand based on Lack of Subject Matter Jurisdiction.

The government mistakenly relies on *Powerex v. Reliant Energy Services, Inc. et al.*, 551 U.S. 224, 234 (2007) as purportedly supporting the government’s contention that the district court’s remand amounted to a dismissal based on subject matter jurisdiction. In asking this Court to draw an analogy with *Powerex*, the government glosses over important facts that distinguish *Powerex* from the case *sub judice*.

In *Powerex*, the district court’s determination that the petitioner was not a foreign state capable of removing a case under the Foreign Sovereign Immunities

Act (“FSIA”) was found to be a subject matter jurisdiction determination, and therefore incapable of review on appeal. *Id.* at 234. Based on the finding that the petitioner was not a foreign state, the *Powerex* district court concluded that it “lacked power” to adjudicate the claims. *Id.* at 233. It is this lack of power that the Supreme Court determined to be “colorably characterized” as a nonreviewable determination on the issue of subject matter jurisdiction. The *Powerex* district court’s analysis evaluated the one and only element of the FSIA removal requirement - whether the removing party is a foreign state. *Powerex*, 551 U.S. at 227. The determination that the removing petitioner was not a foreign state conclusively established that the district court lacked authority over the case. This finding was reinforced by the fact that the district court made it “quite clear [it] was purporting to remand on [the subject matter jurisdiction] ground.” *Id.* at 232. (Noting that “[t]he heading of the discussion section of the remand order is entitled “Subject matter Jurisdiction over the Removed Actions.””).

Such “colorable” indicators are completely absent from the district court’s memoranda. In Agent Clark’s case, the district court never reached the issue of whether or not it has “power” to adjudicate Agent Clark’s claims. Indeed, the district court does have power to adjudicate Agent Clark’s claims because Agent Clark has raised a federal defense. As set forth in detail in Appellant’s Response, the district court’s power to adjudicate comes directly from the federal defense:

“[R]aising of a federal defense in the officer’s removal petition ... constitutes the federal law under which the action against the federal officer arises for Art. III purposes.” *Mesa v. California*, 489 U.S. 121, 136 (1989). Here, the district court never even reached the issue of Agent Clark’s federal defense. (06/25/09 Mem. Op. 23 n.10.) Therefore, there was no finding by the district court that it lacked power to adjudicate the criminal case against Agent Clark.

Indeed, the only finding made by the district court is that the evidence presented was inconclusive on the issue of whether or not Agent Clark was or was not acting under color of federal office. (06/25/09 Mem. Op. at 23.) The district court opinion never mentions jurisdiction, or the lack thereof, as the basis for remand. The district court specifically declined to make a determination on the issue of Agent Clark’s federal defenses. Thus, the district court necessarily assumed it had discretion to remand based on an incomplete finding that Agent Clark might not have been acting under color of federal office.

In *Jamison v. Wiley*, 14 F.3d 222, 232 (4th Cir. 1990), a federal employee was sued civilly for sexual assault and battery of a coworker. The federal employee removed the case pursuant to the federal officer removal statute, 28 U.S.C. § 1442(a)(1), as well as the Westfall Act, 28 U.S.C. §§ 2679(b). The district court remanded, finding that the defendant was not entitled to have the United States substituted for him because the acts in question were not within the

scope of his federal employment. *Jamison*, 14 F.3d at 232. In determining whether it had authority over the appeal of the remand decision, the Fourth Circuit noted that the district court never mentioned jurisdiction or lack thereof in its remand decision. The appellee argued “the court’s inquiry into the scope-of-employment issue was ‘a fundamental inquiry into its own jurisdiction.’” *Id.* This argument was rejected by the Fourth Circuit, and should similarly be rejected in this case. The *Jamison* district court never indicated that it lacked jurisdiction to hear the case, but rather, that it should decline to exercise that jurisdiction once it made a determination that the defendant was not acting within the scope of his federal employment. “Such a discretionary remand of state-law claims that are properly within the federal removal jurisdiction is not a remand on a § 1447(c) ground that is insulated from appellate review by § 1447(d).” *Jamison*, 14 F.3d at 233.¹ Similarly, this Court should reject the government’s argument that appellate review is precluded based on the district court’s determination that it could make no finding on whether Agent Clark was acting under color of law.

Because the district court’s power and authority over Agent Clark’s prosecution arise from his federal defense, and the district court never addressed

¹ In *Jamison*, the district court found that the defendant was not acting within the scope of his employment, but made no express finding on whether the defendant was acting under color of federal office for purposes of § 1442(a)(1). In Agent Clark’s case, the district court made an inconclusive finding of the color of federal office issue. The inconclusive finding does not alter the fact a district court’s determination as to whether a federal agent was acting under color of federal office is not a subject matter jurisdiction determination for purpose of § 1447(c).

his federal defense, the remand here cannot reasonably be held to be a decision on the issue of subject matter jurisdiction. As such, the decision is reviewable by this Court.

B. The District Court failed to Fully Evaluate the § 1442(a)(1) Elements Required to Establish a Federal Defense and Causal Connection, Therefore This Case was Not Remanded Based Upon a Lack of Subject Matter Jurisdiction.

The government's reliance on *Feidt v. Owens Corning Fiberglass Corp.*, 153 F.3d 124 (3rd Cir. 1998) is likewise misplaced. In *Feidt*, the Court concluded that the district court "remanded the case because it found that a basic element of removal jurisdiction was lacking." *Feidt*, 153 F.3d at 127. The district court's determination that a basic element that was lacking, however, was only reached after an evaluation of each element required by 1442(a)(1). The court found that "removal was inappropriate because [the defendant] failed to establish the necessary causal connection between the conduct upon which [the plaintiff's] claim of state law liability was based . . . and the conduct [the defendant] allegedly performed under federal direction." Even after concluding that the causal connection element was lacking, the district court in *Feidt* continued in its analysis and noted that on the issue of federal defense, permitting the litigation "would not further the purposes underlying the federal officer removal statute, namely the threat to the enforcement of the implementation of a federal policy and the concern

for state court manipulation of federal defenses.” *Id.* (citing *Good v. Armstrong World Indus., Inc.*, 914 F.Supp. 1125, 1131 (E.D.Pa. 1996).

Unlike *Feidt*, the district court in the present matter did not reach a determination on each of the elements required by § 1442(a)(1). Instead, it stopped short of evaluating both the federal defense element and the causal connection element, which form the fundamental basis for this Court’s endorsement of the district court’s holding and refusal to review the remand in *Feidt*. Furthermore, unlike the defendant in *Feidt*, the right of removal to federal court in this case would directly further the purposes underlying the federal officer removal statute. As *Willingham v. Morgan*, 503 U.S. 329 (1992) makes clear, the purpose of the federal officer removal statute is to provide federal agents like Agent Clark a federal forum to hear their federal defenses in connection with state criminal proceedings. “[O]ne of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court.” *Id.* at 407. Particularly where, as here, the federal government conducted an investigation into the shooting and determined that Agent Clark’s actions were lawful and in full compliance with authority conferred by federal law enforcement policies, there is an overwhelming interest to have a federal forum determine his federal defense. Subjecting federal officers to state criminal sanctions for carrying out their federally appointed duties will have a chilling effect on the ability of federal

officers to function. “[T]he Federal Government ‘can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court ... and if the general government is powerless to interfere at once for their protection ... the operations of the general government may at any time be arrested at the will of one of its members.’” *Mesa v. California*, 489 U.S. at 126 (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1880)).

CONCLUSION

For the foregoing reasons, we submit that this Court has jurisdiction to review the district court’s remand order, and we request that the Court issue a briefing schedule regarding the same.

Respectfully submitted,

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Certificate of Service

The undersigned counsel for Appellant hereby certifies that on the 5th day of November, 2009, I caused to be filed and served via the Court's CM/ECF system a copy of the foregoing Defendant's Reply upon the following counsel for Appellee:

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