No. 16-15179-FF

In the

United States Court Of Appeals

for the

Eleventh Circuit

JOAN JARA, et al.,

Plaintiffs/Appellants,

vs.

PEDRO PABLO BARRIENTOS NUNEZ,

Defendant/Appellee.

On Appeal from the United States District Court for the Middle District of Florida

BRIEF OF AMICUS CURIAE IN SUPPORT OF AFFIRMANCE OF ORDER ON APPEAL (CORRECTED)

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STATEMENT REGARDING ORAL ARGUMENT

The Court has already determined that Oral Argument will be necessary in this case. The undersigned amicus curiae seeks the Court's permission to participate in oral argument under FRAP 29(a)(8) to defend the district court's ruling because Defendant/Appellee is not participating in this appeal.

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STATEMENT OF AMICUS CURIAE

This Court appointed undersigned counsel as amicus curiae in this case to defend the district court's ruling on appeal. This appeal arises from a final judgment entered in the U.S. District Court for the Middle District of Florida against Defendant/Appellee. After entry of judgment, Appellants filed this appeal challenging a pre-trial ruling dismissing their claims under the Alien Tort Statute. Defendant/Appellee is not participating in this appeal and has not filed a brief in response to Appellants' brief.

No party or its counsel has had any involvement in writing this brief. No party or a party's counsel contributed money that was intended to fund preparing or submitting the brief. No person contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF THE ISSUES

1. Whether the district court properly dismissed Appellants' claims under the Alien Tort Statute, 28 U.S.C. § 1350, because the tortious conduct that gave rise to Appellants' ATS claim took place outside the territory of the United States and thus the claims did not "touch and concern" the United States with "sufficient force" to displace the presumption against extraterritorial application of U.S. law. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013); s*ee also Doe v. Drummond Co.*, 782 F.3d 576 (2015).

2. Whether Defendant/Appellee's failure to appeal the $28 Million verdict and judgment in this case under the Torture Victims Protection Act[1] moots this appeal because Appellants seek to recover damages in their Alien Tort Statute claims for the same injuries resulting from the same tortious conduct as their TVPA claims. There is no further relief for the district court to grant if this Court reverses the dismissal of Appellants' ATS claims.

[1]The TVPA is known more fully as the "Torture Victim Protection Act of 1991," Pub. L. No. 102-256, 106 Stat. 73, codified at note following 28 U.S.C. § 1350.

STATEMENT OF THE CASE

Nature of the Case

Appellants challenge a pre-trial ruling dismissing their claim under the Alien Tort Statute (the "ATS"). Their Complaint alleges that Defendant, Pedro Pablo Barrientos Nunez ("Barrientos"), was responsible for the unlawful detention, torture, and death of Victor Jara during the 1973 Chilean military coup d'état carried out by the forces of General Augusto Pinochet. Doc. 63 ¶ 62. Jara's family and his estate sued Barrientos under the ATS and the Torture Victim Protection Act (the "TVPA"), in federal district court in the Middle District of Florida, where Nunez now resides. All of the alleged conduct giving rise to Appellants' ATS claims—the arbitrary detainment, torture, and killing of a Chilean citizen in Chile by Chilean military personnel for protesting the overthrow of the Chilean government—occurred outside the territory of the United States.

The question in this appeal is whether the district court was bound by *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), and binding precedent from this Court interpreting *Kiobel*, to dismiss Appellants' ATS claims because they do not sufficiently touch and concern the territory of the United States. The district court properly found that the fact that Barrientos is a U.S. citizen and resident is not sufficient to overcome the presumption against exterritorial application of U.S. law. Thus, the district court did not err in dismissing the claims for lack of subject

matter jurisdiction.

Also, this case has the unusual posture that Appellants were the winners at trial. Appellants went to trial on their TVPA claims and obtained a $28 Million verdict. Barrientos did not appeal. All of Appellants' claims for relief incorporated the same allegations of tortious conduct, and Appellants' alleged injuries have been fully remedied by the verdict on their TVPA claims. When Barrientos chose not to appeal the jury's verdict against him, he effectively conceded to the $28 Million judgment against him, and Appellants' appeal of the dismissal of their ATS claims was rendered moot.

Course of Proceedings

Appellants filed suit against Barrientos in 2013 asserting claims under both the ATS and the TVPA. Doc. 1; Doc. 63.[2] Specifically, Appellants alleged five claims for relief: (1) Torture under the TVPA and ATS, Doc. 63 ¶¶ 68-76; (2) Extrajudicial Killing under the ATS and TVPA, *id.* ¶¶ 77-83; (3) Cruel, Inhuman or Degrading Treatment or Punishment under the ATS, *id.* ¶¶ 84-89; (4) Arbitrary Detention under the ATS, *id.* ¶¶ 90-94; and (5) Crimes Against Humanity under the ATS, *id.* ¶¶ 95-100. Each of the five claims for relief incorporated the same background facts. *Id.* ¶¶ 68, 77, 84, 90, 95. And each of the claims alleged the

[2] The operative complaint for purposes of reviewing the order on Defendant's Motion to Dismiss is the Second Amended Complaint, Doc. 63.

same damages flowing from Barrientos's tortious conduct: "loss of spousal and parental companionship and loss of Victor Jara's support and services," "damages . . . for battery and other torts" that Victor Jara would have been able to collect, damages for "severe mental anguish and emotional distress," and punitive damages. *Id.* ¶¶ 63-66.

Barrientos filed a motion to dismiss Appellants' claims, asserting that the ATS and TVPA claims were time-barred under the statute of limitations, and that the district court lacked subject matter jurisdiction over the ATS claims. Doc. 82. The district court granted the motion in part. It dismissed Appellants' ATS claims with prejudice for lack of subject matter jurisdiction but denied the motion to dismiss the TVPA claims. Doc. 93. The District Court concluded that the Supreme Court decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), "forecloses all of Appellants' ATS claims because the tortious conduct took place entirely outside of the United States." Doc. 93 at 8. The District Court reasoned that the alleged conduct did not "touch and concern" the "United States . . . with sufficient force," to warrant displacing the presumption against extraterritorial application of U.S. law. *Id.* (quoting *Kiobel*, 133 S. Ct. at 1669).

The District Court recognized that "*Kiobel* provides for some possible extraterritorial application of the ATS," but it concluded, relying on *Doe v. Drummond Co.*, 782 F.3d 576, 596 (11th Cir. 2015) cert. denied 136 S. Ct. 1168

(2016), that citizenship is "insufficient to permit jurisdiction on its own." Doc. 93 at 9. The District Court also rejected Appellants' argument that Barrientos was using the United States as a safe harbor to evade justice "because foreclosing Plaintiffs' ATS claims does not leave them without remedy; torture and extrajudicial killing are cognizable under the TVPA, which was enacted in part to provide a remedy where the ATS cannot." *Id.*

The district court denied Barrientos's motion to dismiss the TVPA claims, and the parties proceeded to trial on the claims for torture and extrajudicial killing under the TVPA.[3] Indeed, the remedy available under the TVPA proved to have the teeth that the district court predicted. At the end of a nine-day trial, the jury returned a verdict totaling $28 Million: $6 Million in compensatory damages and $10 Million in punitive damages to the Estate of Victor Jara; and $2 Million in compensatory damages and $10 Million in punitive damages to his Jara's survivors, Joan Jara, Amanda Jara Turner, and Manuela Bunster. Doc. 186. The trial court entered a judgment on the verdict. Doc. 187.

Barrientos did not appeal the judgment entered against him. But, Appellants appealed the pre-trial dismissal of their claims under the ATS. Doc. 188. Barrientos has not participated in this appeal.

[3] After the district court dismissed Appellants' claims under the ATS, Appellants' filed a Third Amended Complaint without the claims for relief that were brought exclusively under the ATS, but with the same background facts. Doc. 111.

Statement of Facts

This case concerns the events surrounding the September 1973 coup d'état that put General Augusto Pinochet in power in Chile. Doc. 63 ¶¶ 18–19. The Chilean military detained Víctor Jara during the early days of the coup because of his political beliefs and eventually transported him to Chile Stadium, where he was detained, tortured, and killed. *Id.* ¶¶ 24-25. Appellants' Complaint alleges, inter alia, that: (1) Barrientos, who was a lieutenant in the Chilean military, was one of the officers who participated in the establishment of a system of imprisonment, torture, and execution of suspected leftists and a scheme of human rights abuses of civilians at the stadium, *id*. ¶¶ 28, 59; (2) Barrientos "was in command of the mass detention of detainees at the stadium [and] took command and exercised direct control over" some of the soldiers, *id*. ¶¶ 29, 54; (3) Barrientos was "under a duty to investigate, prevent, and punish violations of international and Chilean law committed by soldiers under his command," which he failed to do, *id*. ¶ 56; and (4) Barrientos ordered his subordinates to torture Victor Jara and then "personally subjected [him] to the 'game' of Russian roulette, putting [him] in fear for his life" and ultimately killing him, *id*. ¶ 57–58. In summary, Appellants allege that Barrientos "directed, exercised command responsibility over, conspired with, or aided and abetted subordinates in the Chilean Army . . . to commit acts of arbitrary detention, torture, cruel inhuman or degrading treatment, extra judicial killing, and

crimes against humanity . . . in violation of international human rights laws." *Id.* ¶62. All of the alleged tortious conduct occurred in Chile in 1973. *See generally, id.* ¶¶ 17-67

Barrientos moved to the United States in 1989. *Id.* ¶ 11. Criminal proceedings have been brought against Barrientos in Chile, but his absence from Chile has prevented a prosecution. *Id.* ¶¶ 11, 39-47

Standard of Review

"A district court's decision to grant a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) is a question of law [this Court] review[s] de novo." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009); *Doe v. Drummond Co.*, 782 F.3d 576, 593 (11th Cir. 2015) ("We review de novo questions of subject matter jurisdiction.")

An appellate court must consider its jurisdiction, including whether an appeal is moot, at each stage of the case. *Seay Outdoor Adver., Inc. v. City of Mary Esther, Fla.*, 397 F.3d 943, 946 (11th Cir. 2005). "Dismissal of a moot case is required because mootness is jurisdictional." *Sierra Club v. EPA*, 315 F.3d 1295, 1299 (11th Cir. 2002).

SUMMARY OF THE ARGUMENT

The district court properly dismissed Appellants' ATS claims for lack of subject matter jurisdiction. The district court was bound by the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), and this court's decision in *Doe v. Drummond Co.*, 782 F.3d 576 (11th Cir. 2015), to find that Appellants' ATS claims do not sufficiently touch and concern the territory of the United States to displace the presumption against extraterritorial application of U.S. law.

In this case, because all of the alleged conduct supporting Appellants' ATS claims occurred in Chile, no relevant conduct occurred within the United States and Appellants' ATS claims do not have a U.S. focus. *Drummond Co.*, 782 F.3d at 592. The mere fact that Barrientos is a U.S. citizen is not alone sufficient to overcome the presumption against extraterritorial application. *Id.* at 596. Also, the fact that Barrientos is an individual defendant as opposed to a multi-national corporation makes no difference here. The geographic limitation imposed by *Kiobel* and *Drummond Co.* applies with equal force. The district court properly performed the inquiry required by binding precedent, and properly dismissed Appellants' ATS claims.

Also, Appellants' argument that Barrientos's residence and citizenship matters because the U.S. has an interest in preventing human rights abusers from

avoiding accountability rings hollow in this case. Barrientos does not have a "safe harbor" in the United States. After all, Appellants were permitted to take their claims under the TVPA to trial in order to seek redress for the very same conduct that supported their ATS claims. And the jury awarded a verdict of $28 Million against Barrientos.

Also, when Barrientos did not appeal the judgment on the $28 Million TVPA verdict, this case was rendered moot. The injuries that Appellants alleged in their Complaint were the same injuries for both their TVPA claims and their ATS claims. They have already obtained a damages award as a remedy for these injuries. There is no further relief for the district court to grant if this Court reverses the dismissal of Appellants' ATS claims. Accordingly, there is no longer a case or controversy in this case. A decision in this case would merely be an advisory opinion.

ARGUMENT AND CITATION TO AUTHORITY

A. The District Court was Bound by *Kiobel* and *Drummond Co.* to Find that Appellants' ATS Claims do not Sufficiently Touch and Concern the Territory of the United States Because All the Tortious Conduct that Supported Appellants' Claims Occurred in Chile

1. *Kiobel v. Royal Dutch Petroleum* altered the ATS landscape.

The Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.* forecloses Appellants' ATS claims because the alleged tortious conduct—torture of a Chilean citizen in Chile for protesting the overthrow of the Chilean government— took place entirely outside the United States. Though *Kiobel* provides for some possible extraterritorial application of the ATS, claims based on wholly foreign conduct simply do not "touch and concern" the United States with such force as to overcome the presumption against extraterritoriality. 133 S. Ct. at 1669.

In *Kiobel*, the Court considered "whether and under what circumstances courts may recognize a cause of action under the [ATS], for violations of the law of nations occurring within the territory of a sovereign other than the United States." 133 S. Ct. at 1662. The Supreme Court for the first time applied the presumption against extraterritoriality to claims under the ATS. *Id.* at 1664. Thus, under *Kiobel* the ATS does not generally have extraterritorial application and it

does not reach tortious conduct taking place entirely outside of the United States. *Kiobel* v. 133 S. Ct. at 1669.

Kiobel "answered the question before the Court in the negative, providing only 'under what circumstances' a court may *not* recognize a cause of action under the ATS—that is, when the claim involves a foreign plaintiff suing a foreign defendant where 'all relevant conduct' occurred on foreign soil." *Drummond Co.*, 782 F.3d at 585 (emphasis added). The *Kiobel* court left open the possibility that there may nevertheless be ATS claims that "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Kiobel*, 133 S. Ct. at 1669. But, the Supreme Court did not fully describe what "touch and concern" means, "nor did it define the operative terms pertinent to this inquiry, such as 'sufficient force,' 'relevant conduct,' or what more than 'mere corporate presence' would suffice to permit jurisdiction." *Drummond Co.*, 782 F.3d at 585 (quoting *Kiobel*, 133 S. Ct. at 1669 (majority opinion)).

Kiobel "significantly altered the landscape of ATS jurisprudence." *Drummond*, 782 F.3d at 584. Appellants argue that Kiobel did not expressly "overturn the established line of cases [starting with *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980),] allowing for subject matter jurisdiction over individual defendants who sought safe harbor in the United States following their

commission of human rights abuses, even when such conduct is wholly extraterritorial." Appellants' Br. at 18. But *Kiobel*'s application of the presumption against extraterritoriality to ATS claims is an altogether new development never considered in the cases that Appellants cite. And, as the Fourth Circuit notes, "recent Supreme Court decisions [namely, *Kiobel* and *Sosa v. Alvarez-Machain*,] have significantly limited, if not rejected, the applicability of the *Filártiga* rationale." *Warfaa v. Ali*, 811 F.3d 653, 658 (4th Cir. 2016) (citing *Kiobel*, 133 S. Ct. at 1664 (holding that ATS includes implicit geographic limits); and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (holding federal courts cannot recognize claims brought via the ATS unless plaintiffs premise those claims on "specific, universal, and obligatory" international norms)).

2. *Doe v. Drummond Co.* clarified the *Kiobel* standard.

In *Doe v. Drummond Co.*, 782 F.3d 576 (11th Cir. 2015), the Eleventh Circuit described its approach to interpreting and applying *Kiobel*'s language. *Drummond* relied on the "dispositive analysis" in *Baloco v. Drummond Co.*, 767 F.3d 1229 (11th Cir. 2014) ("*Baloco II*"), which considered whether "the claim" and "relevant conduct" are sufficiently "focused" in the United States to warrant displacement and permit jurisdiction.[4] *See Baloco II*, 767 F.3d at 1238-39. *Baloco*

[4] *Drummond* also noted that "the *Morrison* focus test refers to the focus of the *statute* (that is, the conduct regulated therein or purposes thereof), not the focus of the claim or that of the conduct." 782 F.3d at 590 n.20.

II "amalgamated" *Kiobel*'s "touch and concern" standard with the "focus" test from *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), a case cited by *Kiobel* in adopting the presumption against extraterritoriality. 133 S. Ct. at 1669. In *Morrison*, the Supreme Court concluded that the presumption against extraterritoriality barred a complaint that alleged both domestic and foreign conduct because of the fact that the domestic conduct at issue was not the "focus" of congressional concern. 561 U.S. at 266, 273.

Under the standard articulated by this Court in *Baloco II* and *Drummond Co.*, [5] the presumption against extraterritoriality is only displaced "if the claims have a U.S. focus and adequate relevant conduct occurs within the United States." *Drummond Co.*, 782 F.3d at 592. "Relevant conduct" is the conduct alleged "in support of those claims." *Id.* at 598. The conduct will be "adequate" to displace the presumption if "enough" of it occurs in the United States. *Id.* "[I]f *all* relevant conduct occurs entirely outside of the United States, the claim will be barred and no further jurisdictional inquiry will be required." *Id.* at 597-98.

[5] The Fifth Circuit has described the Eleventh Circuit's approach as a "hybrid approach" — "it 'amalgamate[d] *Kiobel*'s standards with *Morrison*'s focus test, considering whether 'the claim' and 'relevant conduct' are sufficiently 'focused' in the United States to warrant displacement and permit jurisdiction.'" *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 194-95 (5th Cir. 2017) (citing *Drummond* and *Baloco II*).

The standard in *Drummond Co.* "appears to require that there be specific, substantial allegations of conduct occurring in the United States that supports an ATS cause of action." *Doe v. Exxon Mobil Corp.*, No. 01 CV 1357, 2015 WL 5042118, 2015 U.S. Dist. LEXIS 91107, *20 (D.D.C. July 6, 2015) (describing and agreeing with the approach taken by the Eleventh Circuit in *Drummond Co.*). Thus, under *Drummond*, "the U.S.-based conduct need not allege a completed tort under the ATS, [but] the domestic conduct must indicate a U.S. focus to the claims and must be relevant to the claims, i.e. must support the claims." *Id.* "The site of the conduct alleged . . . carries significant weight, and . . . the domestic conduct alleged must meet a 'minimum factual predicate' to warrant the extraterritorial application of the ATS." *Drummond Co.*, 782 F.3d at 592-93 (citing *Baloco II*, 767 F.3d at 1236, and *Mujica v. AirScan Inc.*, 771 F.3d 580, 592. (9th Cir. 2014)).

In this case, all of the alleged conduct supporting Appellants' ATS claims occurred in Chile. Appellants' ATS claims do not have a U.S. focus and no relevant conduct occurred within the United States. *Drummond Co.*, 782 F.3d at 592.

Appellants argue that their claim touches and concerns the United States territory because Barrientos moved to the United States and became a citizen many years after the alleged tortious conduct occurred. But this conduct is merely incidental to Appellants' claims under the ATS. Appellants' Complaint makes only

passing reference to Barrientos's citizenship, but describes in great detail the circumstances and conduct that make up their ATS claims, all of which took place in Chile. *See generally*, Doc. 63.

"[A]lthough the U.S. citizenship of [a defendant] is relevant to [its] inquiry, this factor is insufficient to permit jurisdiction on its own." *Drummond Co.*, 782 F.3d at 596 (citing *Balaco II*, 767 F.3d at 1236 (concluding that a defendant's U.S. citizenship is not sufficient to displace the presumption against territoriality)). Citizenship alone does not carry the "significant weight" necessary to "warrant the extraterritorial application of the ATS to situations in which the alleged relevant conduct occurred abroad." *Id.* Here, there is nothing more that concerns the United States.

3. This case is not distinguishable from *Doe v. Drummond Co.*

Appellants attempt to distinguish this case from *Drummond* and *Baloco II*, arguing that this is the first "*Filartiga*-type" case presented to this court after *Kiobel* because Barrientos is an individual citizen and not a multi-national corporation. Appellants' Br. at 20. Whereas multinational corporations are presumably subject to suit in many countries, and therefore can't "seek safe harbor," Appellants argue that an individual such as the Defendant is only subject to suit where he resides and therefore may try avoid the long arm of the law. But nothing in the jurisdictional inquiry set out in *Kiobel* and *Drummond Co.* requires a

different result in this case where the defendant is an individual instead of a corporation. For purposes of this analysis, a corporate citizen is a person subject to jurisdiction in the same manner as an individual citizen. *Kiobel* and *Drummond* dealt with corporate defendants who were subject to the jurisdiction of U.S. Courts and those cases imposed a territoriality test. The presumption against extraterritoriality is not overcome simply because the defendant is an individual citizen where all of the alleged conduct supporting the ATS claim took place abroad. Appellants and their amici may disagree with the holdings in *Kiobel* and *Drummond*, but those cases control here.[6]

The trial court properly dismissed Appellants' ATS claims for lack of subject matter jurisdiction because all of the conduct supporting their claims took place in Chile. The mere fact that Barrientos is now a U.S. citizen is not enough of a domestic "focus" to overcome the presumption against extraterritoriality.

The Fourth Circuit reached the same conclusion as the district court in a similar case, *Warfaa v. Ali*, 811 F.3d. 653, 660-61 (4th Cir. 2016). In that case, the plaintiff alleged that the defendant, an individual, committed crimes against humanity in Somalia, and later moved to the United States.

[6] Amicus Curiae Legal historians argue that under international law "sovereigns are responsible for, and are expected to provide redress for, conduct of their subjects abroad." Amicus Brief of Legal Historians at 13-14. Notably, similar arguments were made by amici in *Drummond Co.* *See Doe v. Drummond Co.*, No. No. 13-15503, Brief of Amici Curiae Legal Historians.

> Nothing in this case involved U.S. citizens, the U.S. government, U.S. entities, or events in the United States. . . . The only purported "touch" in this case is the happenstance of Ali's after-acquired residence in the United States long after the alleged events of abuse. Mere happenstance of residency, lacking any connection to the relevant conduct, is not a cognizable consideration in the ATS context. See *Kiobel*, 133 S. Ct. at 1669 (indicating the defendant's "mere . . . presence" in the United States does not afford jurisdiction). "Kiobel's resort to the presumption against extraterritoriality extinguishes . . . ATS cases [with foreign parties and conduct], at least where all of the relevant conduct occurs outside the United States, even when the perpetrator later moves to the United States." [Cit.]

811 F.3d. at 660-61.

4. The district court engaged in the required "fact-intensive" inquiry.

Appellants argue that the district court did not engage in the "fact-intensive inquiry" required under *Kiobel* and *Drummond*. Appellants' Br. at 25. However they do not point to a single fact that the district court failed to consider. Instead, they argue that the district court did not properly consider the facts related to Barrientos's U.S. residence and citizenship "in the aggregate." Appellants' Br. at 27.

On the contrary, the district court did consider the specific facts of this case and rejected Appellants' argument that "Defendant's U.S. citizenship and Florida residency sufficiently 'touch and concern' the United States because they make him unamenable to suit in any other forum, allowing him to 'evade justice' and curtailing the United States' 'strong interest in not providing a safe haven for

human rights abusers[.]'" Doc. 93, p. 9. The court found this argument unpersuasive in part because a human rights abuser such as Barrientos is subject to liability under the TVPA. *Id.* ("Defendant is not evading justice and the United States is not providing a safe haven to human rights abusers because foreclosing Appellants' ATS claims does not leave them without remedy . . . .")

5. Barrientos does not have a safe harbor in the U.S.

This is not a case where the defendant has a safe harbor in the United States. After all, "torture and extrajudicial killing are cognizable under the TVPA, which was enacted in part to provide a remedy where the ATS cannot." Doc. 93, p. 9 (citing *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring)). The very remedy that Appellants sought under ATS—monetary damages—is the same remedy they sought under the TVPA. And if the monetary damages available under the ATS are aimed at keeping the United States from becoming a safe haven for human rights violators, an award of damages under the TVPA would have the same effect.

Here, Plaintiffs were awarded a verdict of $28 Million against Barrientos. The United States is not a jurisdiction where Barrientos can avoid accountability for his criminal conduct. The argument that Barrientos has a safe harbor in the United States rings hollow in light of the TVPA verdict.

B. Appellants' ATS Claims are Moot Because Appellants Have Already Been Awarded Damages for the Injuries Alleged in their Complaint. Appellants Seek an Advisory Opinion.

This case no longer presents a live controversy for the Court to decide. Because the damages sought by Appellants under the TVPA were the same that they sought under their ATS claims, because the alleged conduct supported both sets of claims, and because Barrientos chose not to appeal the verdict against him and in favor of Appellants, this appeal is moot. Relief has already been granted for the injuries caused by Barrientos's tortious conduct.

The "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate" *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990); *accord Horton v. City of St. Augustine*, 272 F.3d 1318, 1326 (11th Cir. 2001). "Dismissal of a moot case is required because mootness is jurisdictional." *Sierra Club*, 315 F.3d at 1299. "The 'case or controversy' constraint imposes a 'dual limitation' known as 'justiciability' on federal courts." *De La Teja v. United States*, 321 F.3d 1357, 1361 (11th Cir. 2003) (citations omitted). "'The doctrine of justiciability prevents courts from encroaching on the powers of the elected branches of government and guarantees that courts consider only matters presented in an actual adversarial context.'" *Id*. (citations omitted).

The Supreme Court has defined the doctrine of mootness: "'a case is moot when the issues presented are no longer 'live' or the parties lack a legally

cognizable interest in the outcome.'" *Id.* at 1362 (citing P*owell v. McCormack*, 395 U.S. 486, 496 (1969)). A case can become moot either "due to a change in [factual] circumstances, or . . . [due to] a change in the law." *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328 (11th Cir. 2004). "If a lawsuit is mooted by subsequent developments, any decision a federal court might render on the merits of [the] case would constitute an [impermissible] advisory opinion." *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329, 1332 (11th Cir. 2005), cert. denied; *see also Coral Springs*, 371 F.3d at 1328. "An appellate court simply does not have jurisdiction under Article III 'to decide questions which have become moot by reason of intervening events.'" *Brooks v. Ga. State Bd. of Elections*, 59 F.3d 1114, 1119 (11th Cir. 1995) (citations omitted). "The Article III 'case or controversy' requirement mandates that the case be viable at all stages of the litigation; 'it is not sufficient that the controversy was live only at its inception.'" *Id*. (citation omitted).

"To determine whether a case is moot, [the Court] determine[s] what relief [it] may grant if the district court erred." *Iacullo v. United States*, 463 F. App'x 896, 898 (11th Cir. 2012) (citing *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1287 (11th Cir. 1999).) "[I]f intervening events have made it impossible for this court to grant any effectual relief," the case is moot and must be dismissed. *Aquamar S.A.*, 179 F.3d at 1287 (quotation omitted).

Here, the circumstances have changed since the end of the trial of this case, and there is no longer a live controversy because, even if the dismissal of the ATS claims is reversed, there is no relief for the district court to grant. *Id.* It has already been granted. Thus, there is no longer an "adversarial context" for this Court's consideration of the issues presented. *De La Teja*, 321 F.3d at 1361. The trial of this case ended in a verdict and judgment in favor of Appellants that provides the same remedy that they would receive if they took their ATS claims to trial and prevailed.

There is only one set of injuries alleged in Appellants' Complaint. Doc. 63 ¶¶ 63-66. Damages have already been awarded to remedy these injuries. Doc. 187.

Though theoretically ATS claims may include claims for relief and tortious acts that are not covered under the TVPA, that is not an issue in this case. Here, the conduct that constituted ATS claim was the same conduct alleged in the TVPA claim. Indeed, Appellants acknowledge that "the same evidence that was presented at trial to prove Barrientos's liability for torture and extrajudicial killing under the TVPA largely overlaps with the evidence that would have been required to prove Plaintiffs' distinct ATS claims." Appellants' Br. at 42.

Appellants do not identify the relief that they will seek in the district court if their appeal is successful. Appellants' Brief asks this Court for reversal of the dismissal of their ATS claims, or, in the alternative, a remand for the district court

to conduct a fact intensive inquiry. Appellants' Br. at 43. Because damages have already been awarded, Appellants essentially seek an advisory opinion from this Court on what is admittedly an important legal question. But because there is no longer case or controversy, it does not matter how important the legal question is. There is simply no jurisdiction for this Court to decide such an appeal. Appellants' appeal is moot.

CONCLUSION

For the foregoing reasons, this Court should affirm the order of the district court dismissing Appellants' claims under the ATS, or the Court should dismiss this appeal as moot.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This brief, which contains 4,759 countable words, complies with Fed. R. App. P. 27(d)(2)(A) and Fed. R. App. P 32(a)(5), (6).

/s/ Leland H. Kynes
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CERTIFICATE OF SERVICE

I certify that on August 23, 2017, I filed a copy of the foregoing with the Clerk of Court using the Appellate CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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