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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 10-CV-21951-TORRES

JESUS CABRERA JARAMILLO,
in his individual capacity
and in his capacity as
the personal representative
of the estate of Alama Rosa
Jaramillo, et al.

Plaintiffs,

vs

MIAMI, FLORIDA
JANUARY 8, 2014

CARLOS MARIO JIMENEZ, NARANJO,
REG# 29346-016 FDC MIAMI
Federal Detention Center, P.O.
Box 019120 Miami, Florida, 33101
also known as Macaco,
also known El Agricultor
also known as Gonzalez Quinchia,
also known as Javier Montanez,

Defendant.

HEARING TRANSCRIPT ON DEFENDANT'S MOTION TO DISMISS THE
AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM & DEFENDANT'S
MOTION TO DISMISS FOR LACK OF JURISDICTION
BEFORE THE HONORABLE EDWIN G. TORRES,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:

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650 Page Mill Road
Palo Alto, California 94304
BY: LEO P. CUNNINGHAM, ESQ.

REPORTED BY:

JERALD M. MEYERS, RPR.

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1 (Call to order of the Court)

2 THE CLERK: All rise. Calling the case of Jesus
3 Cabrera Jaramillo, et al versus Carlos Mario Jimenez Naranjo,
4 case number 10-21951-Civil-Judge Torres.

5 Counsel, please state your appearances for the record.

6 MR. CUNNINGHAM: Leo Cunningham for the plaintiffs.

7 Good morning, Your Honor.

8 MS. ROBERTS: Kathleen Roberts for the plaintiffs.

9 Good morning.

10 THE COURT: Good morning.

11 MR. RODRIGUEZ: Good morning, Your Honor. Hugo
12 Rodriguez on behalf of the defendant Mr. Jimenez.

13 MR. TANOOS: Good morning, Judge. Jonathan Tanoos on
14 behalf of Mr. Jimenez. Good morning.

15 THE COURT: Good morning. This is a hearing at the
16 request of one of the parties for a hearing on the motion to
17 dismiss the amended complaint that the court ordered to be
18 filed following the issuance of the Kiobel decision and the
19 court lifting the stay or partial stay that we entered.

20 I have a series of questions for both sides. So let
21 me just start with counsel for the movant on your motion. The
22 part of the argument that I wanted to focus on is I understand
23 you have a personal jurisdiction issue, but if I move beyond
24 the personal jurisdiction issue, the question is whether or not
25 the response makes the point that I can sustain the claim even

1 under the Alien Tort Statute based upon the connection between
2 the alleged murders in Colombia with American interests in
3 Colombia and your response to that.

4 MR. RODRIGUEZ: Could you rephrase that again, because
5 I heard two distinct questions there, Your Honor, if you don't
6 mind.

7 THE COURT: In other words, the strongest part of it
8 as it relates to the Alien Tort Statute, on the face of it the
9 Kiobel decision would have mooted that claim, but the response
10 makes the argument that the exception in Kiobel applies here
11 where there is a substantial interest national, American
12 interests in the issues raised in the complaint such that the
13 presumption against extraterritoriality does not apply here.

14 So this is basically an exception to the Kiobel
15 decision is the way I read the response.

16 MR. RODRIGUEZ: Yes. I don't agree. Here is what we
17 have, Your Honor: We have in the complaint two Colombian
18 individuals that were killed by Colombian nationals, not
19 Mr. Jimenez in Colombia.

20 Nowhere in the complaint does it allege that
21 Mr. Jimenez was involved in anyone of these killings.

22 Quite to the contrary. They use very imaginative
23 wording in saying "For his role."

24 Their complaint is conclusions that since he was one
25 of the commanders of the AUC, and since he had partial control,

1 and since he had knowledge, he is inculcated really in what the
2 Colombians call Lina De Mano which means for us under the line
3 of command. Line of mondo. Command. Because, in essence, he
4 was one of the leaders of this AUC. Two individuals in this
5 7,000 person group committed two killings.

6 Hence, he is culpable. That's to cut to the chase is
7 what is being alleged, and it has nothing to do with
8 interaction, contacts or anything to do nod with the United
9 States.

10 I think that the plaintiff his understands the reasons
11 that he was involuntarily extradited here in for what he pled
12 to and are trying to bootstrap that into an argument of torture
13 and terrorism.

14 If I may, Your Honor, I mean I will cut to your point.
15 There are two indictments, one in Washington, D.C. and one in
16 this district.

17 The only one that could be relied upon is the one in
18 Washington, D.C., and that's case number 05-235-Criminal.

19 There he was indicted and pled guilty to engaging in a
20 drug conspiracy with the intent to finance a terrorism
21 organization.

22 The reason that he was indicted under this is because
23 in 2001 OFAC designated the AUC as a foreign terrorist
24 organization. As the head or one of the heads of the AUC, he
25 was indicted for the AUC or his drug activity which helped

1 finance a terrorist organization which had previously been
2 placed on the terrorism list.

3 There is a quantum leap, a grand leap by the
4 plaintiffs that because of that, okay, he should or that the
5 subject matter is here and that it has these extensive ties.

6 Nothing in his Washington, D.C. indictment has
7 anything to do with these plaintiffs. It doesn't come close to
8 these plaintiffs. It really has nothing to do with it.

9 What that indictment basically says is that his
10 organization, it was involved in a conspiracy to control
11 cocaine paste, because that's what they did, secure it and as a
12 result of that they were put on the OFAC list twice, one under
13 the financial aspects and one as a foreign terrorist
14 organization in 2001, and because of that, as the head of the
15 AUC, he pled guilty, sort of as a vicarious liability.

16 They can review the indictment. The court I am sure
17 has. There is nothing that suggests that he was involved in
18 nay activities, name, hurt, do anything to anyone, and it is a
19 quantum leap that two people involved in this 7,000 person
20 organization committed acts, and that he should be held liable
21 for what they did under this theory of he was the head of the
22 organization.

23 There aren't any ties. There isn't any significant
24 U.S. interest in that. I don't know if I answered the court's
25 question.

1 THE COURT: You partly did. With respect to, is it
2 true that there were proceedings initiated involving
3 Mr. Jimenez in Colombia prior to his extradition?

4 MR. RODRIGUEZ: Yes, and that was going to be part of
5 a very short background that I was going to give the court
6 because I think you need to have that background before I would
7 state to the court before it entertains our motion because I
8 think that is a significant aspect, and that is justica y paz.
9 Justice and peace.

10 THE COURT: Explain that.

11 MR. RODRIGUEZ: Do you want me to do it from here,
12 Your Honor? Do you mind if I sit down? My eyes are bad now.

13 THE COURT: Sure.

14 MR. RODRIGUEZ: Okay. Thank you. Okay. Your Honor,
15 in the late '90's Mr. Jimenez and others were drastically and
16 families were drastically impacted by the FARC, an
17 organization, an anti-Colombian Government organization in
18 Colombia.

19 As a result, this small group of men started fighting
20 back on behalf of their families. From there they developed
21 into a much larger group called the Altas DeFensas Unidas de
22 Colombia commonly known as the AUC.

23 He was one of the leaders of the AUC. Okay. The AUC,
24 to finance themselves, were involved in drug trafficking. From
25 the 90's through 2005 that organization grew to approximately

1 7,000 individuals both men and women. It was a paramilitary
2 organization.

3 THE COURT: What does that mean?

4 MR. RODRIGUEZ: That means that they had arms. They
5 dressed in Khakis or fatigues, and they operated in order to
6 protect their drug trafficking activities and to fight the
7 FARC.

8 THE COURT: Do you concede that they were operating
9 under color of law?

10 MR. RODRIGUEZ: Never. He has never been involved or
11 he is not an employee of the government. He is not a
12 functionary of the government. It is not before the court, but
13 I have spoken to the Attorney General of Colombia, they are
14 hands off.

15 He has never been involved with the government, except
16 as an employee, as a contractor under any of those issues.

17 This was a separate organization created for the
18 purposes of providing themselves security, and his area
19 controlled the majority of the coca paste, Your Honor, from
20 which originates all cocaine.

21 Now, they were not Robin Hood in their endeavors at
22 all, and the organization did do quite a few violent acts.
23 Thefts. Whatever. But he was one of several, numerous
24 individuals who controlled the AUC.

25 Now, his particular area, as it was distributed, was

1 an area primarily below Medellin and Pereira below that which
2 is the coco paste.

3 So it originates there with the indigenous indians.
4 Then it continues to go and go and go. Their involvement as
5 the initiators of it placed them directly in any conspiracy to
6 distribute cocaine.

7 His organization didn't farm it, didn't send it out by
8 airplanes, didn't send it out by boat, but defended, and their
9 original involvement was primarily the cocaine paste.

10 Now, this was vicious, and I mean there were wars back
11 and forth like if I could use this term.

12 In approximately 2004, the then president of the
13 Colombia was an individual by the name of Uribe.

14 A special law was passed in the Congress at the
15 request of this president, and it is called, for our terms,
16 justice and peace. Justicia y paz, and it is really more of an
17 administrative, but it has some criminal consequences, and
18 basically the thrust of this was, "Mr. Jimenez, I would like
19 you or we would like you and your other leaders to throw down
20 your arms, voluntarily surrender yourselves, and all of your
21 people."

22 For our purposes, I will use the word forfeit,
23 forfeit, a different term used in Colombia, properties "And for
24 that you will be detained for a period of no greater than 8
25 years."

1 Mr. Jimenez was one of the principal negotiators and
2 of the 10 was able to negotiate, including himself, 9 to the
3 table which did that, and they commenced a process within
4 Justica y paz demobilized commenced the process of turning over
5 considerable assets, well over on Mr. Jimenez' part in Colombia
6 every asset, the equivalent of \$25,000,000 and was
7 incarcerated.

8 The reason I don't use the word "arrested," he
9 voluntarily surrendered, and it is sort of our like our
10 immigration. You know, you are arrested and you are detained,
11 but it is not a criminal violation. It is basically what
12 justica y paz is.

13 Since that time, the initial creation of it, there
14 have been many changes and amendments to it, and now more
15 amendments and changes because we have a new president. A new
16 regime.

17 As part of that, prior to being extradited to the
18 United States, he gave no less than a dozen public
19 declarations. Things in Colombia are a little bit different,
20 Your Honor, and there this hearing would be simulcast.

21 This hearing would be placed on national television
22 right now if we were in Colombia, and these declarations
23 include Mr. Jimenez accepting vicarious liability for the
24 actions of his organization.

25 As a matter of fact, they have continued since he has

1 been in the United States, but, in essence, what occurs is that
2 he is provided a list by the special prosecutors of justica y
3 paz, and I will give the court an example, and I don't have the
4 specifics, "but isn't it true that in 2003 the AUC entered the
5 province of such and such and did X why and Z, and as a result
6 such and such was hurt."

7 They commandeered this property, and whatever, and his
8 answer is "Yes." Okay. So lino, line of command is what is
9 used in Colombia. So he accepted responsibility on behalf of
10 the AUC.

11 At no time during any of those public declarations,
12 nor any of the declarations that he has given here has he ever
13 been charged with or has there ever been any allegation that he
14 himself committed any act.

15 We could give a lot of examples, you know, whether it
16 be the president is responsible for everything that happens in
17 Afghanistan. I know it is large, or whatever, but he wasn't
18 even the general on the white horse on top.

19 He was at a completely different place, okay, and if
20 he had knowledge, knowledge was acquired, and especially in
21 this way after anything had ever been done, but it wasn't
22 committed by himself.

23 It was one or more of the 7,000 individuals in this
24 organization. In this particular case, the two individuals who
25 did the actual killing have admitted during the justica y paz

1 declaration process.

2 I have yet to see anything that says that Mr. Jimenez
3 was involved or had knowledge of it before it happened,
4 commanded it, ordered it, or did any of those things.

5 Some have said he had knowledge, but, yes, the
6 knowledge was acquired way after it had occurred.

7 He did those things and had to admit the actions of
8 the AUC, and I think it is important for the court to
9 understand that.

10 In contrast to an agreement with the prosecutors in
11 Colombia, he was involuntary extradited to the United States
12 while in custody in Colombia.

13 I say that involuntarily because of a Hawk helicopter
14 landing and putting a black hood over your head does not seem
15 to be very voluntary to me.

16 There is no extradition treaty with the Country of
17 Colombia. It is done under a memorandum of understanding.

18 Their justice is a little bit different. He was
19 brought, not into the State of Florida of Florida, but taken
20 directly to Virginia because the initial indictment was brought
21 in Washington, D.C., the case I referred the court to.

22 There, and the court can review the indictment, it is
23 very general. Starting on about December of 1997 and until a
24 date unknown to the grand jury, you as the head of,
25 participated, conspired confederated with others to distribute

1 drugs and import them into the United States.

2 THE COURT: And you referred to the second indictment.

3 There was a second indictment?

4 MR. RODRIGUEZ: The second indictment was Judge Lenard
5 indictment which is here in this district. That is strictly
6 drugs.

7 Again, a different act. Different actions. It is one
8 act or two they say that he pled to.

9 Let me go back. When he demobilized and admitted the
10 actions of the AUC and admitted that their activities were
11 financed through drug activity, he could not come to the United
12 States and not admit that he was one of the leaders of the AUC;
13 that they were involved in drug activity, and the monies that
14 they acquired or assets they acquired they used to support the
15 AUC.

16 In essence, he had already admitted that publicly and
17 I mean publicly where it goes out and victims can ask him
18 questions in Colombia.

19 He got here. He has yet to be given one page of
20 discovery in either case. He has never seen anything.

21 He pled guilty under advice of, not my advice. I was
22 not his counsel at the time, and I represent him now in the
23 criminal cases, but pled guilty and I am not saying that that
24 was wrong to do, but to challenge and do anything otherwise
25 would have negated his admissions in Colombia.

1 I don't know if the court understands what I am
2 saying. They are ambiguous. They are just brought in in 1997
3 to the present. "You and others conspired for drugs."

4 So he is charged there. He signs a mirror image plea
5 agreement with the District of Columbia, and then he was
6 subsequently indicted here, and that mirror image agreement, in
7 essence, says, "You will plead to both cases."

8 We cannot ask for the death penalty. We are going to
9 ask the court for 35 years."

10 The proffer, which basically says, "You, as the head
11 of, were involved in these activities for drugs to support
12 engaging in conduct in violation of 21 U.S.C. 841 drugs,
13 knowing or intending to pecuniary to an organization engaged in
14 terrorism or terrorist activity."

15 That is what the allegation is. He pled in
16 Washington, D.C. Sentencing was stayed and brought to Miami '9
17 or '10, and that's when I commenced my representation of him.

18 The cases were then consolidated and put before Judge
19 Lenard I think a year ago, or maybe even more than a year ago
20 and sentenced him to 33 years on both cases.

21 To focus in on the first question the court asked and
22 in reading the plaintiff's introduction and later background,
23 there was nothing voluntary about his being here.

24 As a matter of fact, we have tried to obtain an I.N.S.
25 opinion because as the court is well aware, when you are

1 extradited from another country, you don't have a passport.

2 You have no status.

3 The U.S. Consulate must provide a special parole
4 document, and that parole document, pursuant to the memorandum
5 of understanding with the Colombians is that you are being sent
6 to the United States to be prosecuted under two specific cases,
7 and those criminal cases are highlighted in that extradition
8 request.

9 So he was brought involuntarily to the United States.
10 Under immigration nomenclature, he is an in enigma. He really
11 doesn't exist because he is only temporarily here for the
12 purposes of being prosecuted in two criminal cases.

13 Under the tag theory, he was tagged when he was given
14 their documents by an official of the Bureau of Prisons while
15 next door.

16 He has never lived here. He never traveled to the
17 United States, in contrast to their suggestions and never owned
18 any assets in the United States, and that's according to the
19 United States Government.

20 He has never gone to Disney World and never traveled
21 here and has never been here. The nexus is, the nexus is that
22 the United States Government relies upon that 96 percent of all
23 of the world's cocaine generates in Colombia.

24 If it is in the United States, that's the nexus. I
25 don't know if I answered the court's question.

1 There are some other things that impact, but that's
2 why he is here. He is under a writ here. It is no one's
3 surprise that he is here under a writ for a Rule 35 that will
4 be subsequently dealt with later on this year.

5 After that, he will be designated after he receives a
6 subsequent reduction. He has no existence legally in the
7 United States, and he will be deported back to Colombia.

8 To cut it to the chase, Your Honor, the actions
9 alleged in the complaint accepting them as they are stated were
10 the unfortunate killing of two individuals by two other
11 Colombian nationals in Colombia, period.

12 This isn't a U.S. corporation, Chiquita Banana or any
13 of the others that have financial interests there and are
14 corporations here.

15 Mr. Jimenez is a Colombian national. He never, other
16 than being, having a hood put on him, being put into a DEA Hawk
17 helicopter and involuntary transferred to the United States
18 would he be here.

19 He doesn't reside here voluntarily. Quite to the
20 contrary. Involuntary. He didn't come here on his own as have
21 all other defendants that plaintiffs have brought these actions
22 against throughout the United States.

23 I think I was winded, but there is a similar process
24 in Colombia. One of the plaintiffs in this case, both
25 plaintiffs have been accepted as victim under *justicia y paz*.

1 The purpose of justica y paz is the possible or
2 attempt to provide them some compensation for losses. The same
3 allegations that are before this court are before the court in
4 justica paz. Both have been accepted as victims I have been
5 advised by the Attorney General's Office in Colombia.

6 THE COURT: And what does that mean?

7 MR. RODRIGUEZ: What it means is that later on in a
8 different hearing, we are going to be suggesting that their
9 only remedy is in Columbia where a specific law and remedy has
10 been provided.

11 The first plaintiff for sure I can speak to, yes. The
12 Jaramillo, for example, petitioned, anyone that any "alleged
13 victim" who suffered a loss as a result of the actions of the
14 AUC fall under the ambient of their special legislation which
15 is justica y paz. When you petition, I assume you file
16 documents. You make your allegations. It goes through an
17 administrative process, and counsel may know more, and they
18 either accept or deny you as a victim.

19 Supposedly, and there is a lot of controversy there,
20 they then collect assets which would be similar to our
21 restitution. Okay. Documented over \$25,000,000 worth of
22 property and whatever assets to Mr. Jimenez personally, not of
23 AUC. Personally.

24 They then are supposed to equitably proportionately or
25 however distribute that restitution to the recognized victims

1 accepted by justica y paz.

2 For sure Ms. Jaramillo is one of them, and I will be
3 candid with the court, and I will tell the parties I have had
4 conversations with the attorney general himself and herself up
5 until about 6 months ago about the mere fact that should they
6 be allowed to come to the United States where they have never
7 been, never traveled to and don't have any idea of what is even
8 here and bring an action like this under the statute for acts
9 that were committed against them in Colombia by Colombian
10 nationals.

11 I have discussed that with them. I think when we get
12 further, and possibly if we don't prevail at this stage at a
13 summary judgment, that may be an issue because I think their
14 remedy, and they have chosen to use that remedy well before
15 they brought this action here in the United States, and it is
16 pending there, and that's for a different day for us to
17 address, but, in essence, justica y paz continues. Justica y
18 paz with changes will continue for a long time.

19 Is it a perfect implemented and administered program?
20 Probably not, but it is similar, and the best analogy I can
21 give is a law created to make restitution to those that were
22 victimized. These plaintiffs are part of that justica y paz
23 program in Colombia.

24 THE COURT: All right. Let me turn to counsel for the
25 plaintiffs in response to that issue specifically as well.

1 Is there, in fact, a proceeding that the plaintiffs
2 are participating in in Colombia? And if so, I am not sure I
3 know what legal doctrine would necessarily apply, but wouldn't
4 that be the best method by which we would obtain remedy for
5 their grievances?

6 MR. CUNNINGHAM: Your Honor, thank you for starting
7 with the part of the case I know the least about.

8 Let me tell you my understanding is that as a result
9 of the extradition, the justice and peace process that
10 Mr. Rodriguez has described was, and I am going to hedge,
11 effectively stopped with respect to this defendant, and it is
12 my understanding that my clients in Colombia can no longer get
13 redress through the justice and peace process.

14 That's my understanding, but it is superficial, but
15 that is absolutely my understanding, and that is what we have
16 alleged in our complaint, which is that the only remedies can
17 be obtained here.

18 THE COURT: But as a practical matter, are there any
19 assets that the defendant would have here?

20 In other words, if we go forward with the litigation,
21 and regardless of how we end up getting there, if we end up
22 getting a judgment to the plaintiffs, would there be any assets
23 here that, for example, has the federal government seized
24 assets in connection with the indictment that would then be
25 executable in response to our judgment?

1 MR. CUNNINGHAM: Again, take this with a grain of
2 salt. I apologize for that. I believe there have been
3 forfeitures or at least forfeiture attempts in connection with
4 the criminal case. I don't know my clients' ability to pursue
5 those assets in connection with the judgment we would hope to
6 obtain here.

7 THE COURT: Okay.

8 MR. RODRIGUEZ: Judge, I don't want to interfere with
9 Mr. Cunningham, but I have got the answers if I can be allowed,
10 Your Honor.

11 THE COURT: Well, let me finish with Mr. Cunningham.

12 Before I make you make your overall point, and I will
13 certainly let you do that, one of the things that sticks out to
14 me in reading your amended complaint in response to our order
15 and the cases that you are relying upon is the focus seems to
16 be -- and correct me if I am wrong -- the focus seems to be to
17 convince the court that this is an exception to Kiobel and so,
18 therefore, an ATS claim is viable.

19 If the court were to disagree with you on that, is
20 there really anything left to the case?

21 MR. CUNNINGHAM: Yes, Your Honor, absolutely, and
22 adamantly. So in our complaint there are only two claims that
23 are based exclusively on Alien Tort Statute, and they are also
24 based on Colombian law, but that's the crime against humanity
25 allegation and the war crimes allegations.

1 So we have the Tortured Victim Protection Act claims
2 that are completely and totally unaffected by the Kiobel
3 analysis.

4 So it is absolutely the case that even if Your Honor
5 were to conclude that the Kiobel presumption applies here, and
6 we have not overcome it, and I would like to speak to why we
7 have, then all that is at issue, I am sorry, and just to be
8 clear, we have claims for extra-judicial killing, torture,
9 cruel inhuman and degrading treatment, war crimes and crimes
10 against humanity.

11 Our extra-judicial killing and our torture claims are
12 plainly well-pled under the Torture Victim Protection Act
13 completely unaffected by Kiobel, and we will persist,
14 regardless of how the court rules on Kiobel.

15 So the case is absolutely going forward, leaving aside
16 the other arguments, regardless of how Your Honor rules on
17 Kiobel. Kiobel addresses the Alien Tort Statute which, you
18 know, the litigation about the Alien Tort Statute now is
19 becoming ethic and interesting and complicated.

20 It is a jurisdictional statute pursuant to which
21 courts have developed under federal common law principles
22 various causes of action or bases for claims, including war
23 crimes, crimes against humanity and cruel and inhuman and
24 degrading treatment, and those are the claims that we have
25 brought.

1 So the issue in Kiobel was whether or not a court can
2 entertain one of those claims when it is extraterritorial, and
3 as the case made clear, there is a presumption against the
4 application of the extraterritorial application of the statute,
5 but the court in Kiobel allowed that if the claims touch and
6 concern the United States with sufficient force, then that
7 presumption can be overcome with respect to those particular
8 claims.

9 Your Honor's initial question reflected that you are
10 on what our position is about why this case touches and
11 concerns the United States.

12 It is not the case that the individuals involved or
13 the conduct involved had nothing to do with the United States.

14 Witness the fact that this defendant was investigated
15 by seemingly every criminal investigatory agency the federal
16 government has.

17 He was then indicted in two different federal
18 districts. He was extradited to face those charges, and he is
19 here now serving a sentence on those charges.

20 That demonstrates that our federal government believes
21 that this defendant's conduct matters to the United States, and
22 our federal government is right about that because what this
23 man did, did affect the United States.

24 Mr. Rodriguez is focused on the indictment.
25 Respectfully, I think Your Honor needs to focus on our

1 complaint because what we have alleged and what we are
2 confident we will be able to prove is that the killings of the
3 relatives of our clients, Ms. Jaramillo and Mr. Estrada, they
4 were killed because they were part of an organization that is
5 called the PDP, and as our complaint asserts and is the case,
6 the PDP was a grass roots organization that did a number of
7 things, but one of the things it did is it offered alternatives
8 to growing coca, and Mr. Rodriguez has acknowledged that what
9 this defendant was really responsible for in connection with
10 the AUC was being in charge of the region of Colombia where the
11 coca paste was developed. That is what he did.

12 The PDP stood in opposition to that, and as we have
13 alleged, what this defendant did was command and conspire and
14 aid and abet the killing of people who were significant in the
15 PDP.

16 Our complaint alleges that there were 27 PDP leaders
17 killed. We represent the relatives of two of them.

18 The conduct here, as we have alleged it, and is the
19 case is that these killings were part and parcel of the narco
20 terrorism that our government is critically interested in, and
21 the game of disaggregating the conduct can be played and, you
22 know, it can be like a law school hypothetical where we draw
23 these kinds of lines, but the reality is our clients relatives
24 got killed because they were opposed to the cocaine development
25 and trafficking that has this defendant in the United States in

1 two different courthouses, and we think, therefore, this case,
2 leaving aside others, plainly touches and concerns the United
3 States, even though our clients relatives were killed in
4 Colombia and were Colombians. So that is our response on the
5 Kiobel argument.

6 I know Your Honor had question, so I am prepared to
7 answer your questions.

8 I could also pick up on some of the treads that
9 Mr. Rodriguez suggested, if you prefer.

10 THE COURT: And I guess let me ask you this question:
11 If the issue of the strength of the claims outside of the ATS
12 were, in fact, materially strong, what difference would it make
13 if these two claims that are ATS dependent would fall?

14 MR. CUNNINGHAM: So the 3 claims.

15 THE COURT: Because ultimately this is a case about an
16 extrajudicial killing is the theory of the complaint.

17 MR. CUNNINGHAM: Absolutely.

18 THE COURT: And that is an underlying point on all of
19 the different claims, and so to some extent my first question
20 is what difference does it make if, in fact, and obviously we
21 have yet to get to this part, but if, in fact, you are right
22 that under the TVPA there is both independent federal
23 jurisdiction and a cause of action that applies here, what
24 difference does it make? Why even worry about it?

25 MR. CUNNINGHAM: Two reasons. One is why our clients

1 would worry about it, and the other reason is more lawyerly why
2 a lawyer would want those other claims in the case.

3 Our clients would worry about it because these cases
4 are a little bit different, and I was fortunate enough to try
5 before Judge Lenard back in 2004 a similar kind of case, and it
6 was really interesting to me because what I learned is that
7 these plaintiffs who have been victims of human rights abuses,
8 they don't bring these cases for the money, which is kind of
9 contrary to why we do most of what we do in America in civil
10 courtrooms.

11 They bring these cases to develop a record and to
12 cause there to be a judgment, not in a monetary sense, but a
13 judgment rendered that bad things happen to people they loved
14 and the man in the courtroom is responsible for it.

15 So the activity in Colombia here that we are focused
16 on is two extrajudicial killings. No question. But they were
17 part and parcel again of the systemic abuse that our clients
18 were subjected to, and others. So that is the first reason.

19 To get the right story on the record and out, it is
20 right to characterize this conduct as war crimes and crimes
21 against humanity because that is what it was, and the Alien
22 Tort Statute let's us bring that, say that and get a
23 determination on it the Torture Victim Protection Act does not.

24 Okay. Now, why would a lawyer want those claims in?
25 I know this will fly in the face of all judges management

1 instincts. It does enlarge the arguably scope of the conduct
2 at issue.

3 For example, with respect for crimes against humanity,
4 we would have to show this was part of systematic and
5 widespread conduct.

6 We have no doubt we could do that. For example, I
7 have told you that we have alleged that there were 27 other PDP
8 leaders who were killed.

9 I assure you now, Your Honor, I do not, even if my ATS
10 claims are to survive, I am not going to try to prove 27
11 different extrajudicial killings. I am not, but the reason a
12 lawyer would like those claims is it does allow for an
13 expansion so that the whole story can be told and, you know,
14 different courtrooms operate in different ways, and I have
15 never had the pleasure of trying a case in front of Your Honor,
16 so I don't know how restrictive or tight you might be about with
17 respect to what you might consider 404(b) or anything else, but
18 if I had those other two claims, then I may get a little bit
19 more latitude in certain countries in this country. So that is
20 the lawyerly reason why I would want them in.

21 THE COURT: And say again, say I concluded that the
22 case has no application post Kiobel, and we were strictly
23 applying the TVPA analysis, is it is a big problem with your
24 TVPA claim the color of law element?

25 MR. CUNNINGHAM: No, Your Honor. I don't think my

1 TVPA claims have any problem, much less the big ones.

2 I recognize that we would have to establish that there
3 was state action or action under color of law. I believe that
4 we have adequately alleged it, and I have no question that we
5 would sufficiently prove it, because as Mr. Rodriguez has
6 amplified, and as we have alleged, the AUC, the paramilitary
7 organization was in a symbiotic relationship with the Colombian
8 National Government.

9 THE COURT: But that does not seem to be from my
10 research of the TVPA, that doesn't seem to be sufficient,
11 right?

12 In other words, doesn't the fact that a terrorist
13 organization is aligned with a governmental organization, does
14 mean, though, that the actions of a terrorist organization are,
15 in fact, under color of law?

16 Isn't that by definition, by describing as you do in
17 the complaint, the AUC as a paramilitary terrorist
18 organization, isn't by definition they are acting outside the
19 color of law?

20 MR. CUNNINGHAM: No, Your Honor, and I believe that
21 the case law is pretty well developed that it can be the case
22 that an individual or an individual's organization can be
23 acting under color of law, and the test that has developed is
24 whether or not there is symbiotic relationship which I am
25 making air quotes around because that's the terminology in the

1 cases.

2 Whether or not there is a symbiotic relationship
3 between the government and the organization, there are
4 basically 3 different bases, if you will, for why this
5 defendant was acting under color of law.

6 The first is that there was this symbiotic
7 relationship with the national government who, in essence,
8 turned over this part of the country to the AUC, and the part
9 of the AUC that was headed by this defendant.

10 Second is that in connection with our, what we have
11 alleged that the AUC in this region had, in essence,
12 infiltrated the municipal governments, and that related to the
13 conduct here was the fact that the two decedents here were
14 involved in local politics and had offended local politicians
15 who were in the camp of or again symbiotically aligned with the
16 AUC in this region.

17 So there is a national level involvement. There is
18 a local level involvement, and then there is a third argument
19 for state action, and at a certain point the law recognizes
20 that these paramilitary organizations who exercise dominion and
21 control, as this one did in this part of Colombia, becomes a de
22 facto state and even without a formal constitutional
23 recognition that the de facto state is a law unto itself, and
24 when its actors act, they have acted under color of law.
25 So those are the 3 interrelated theories that I believe the law

1 clearly recognizes that would make made for a stay action here.

2 THE COURT: Now, this may not have been, in fairness
3 to you because what I am asking you may not necessarily have
4 been called for in your memorandum, given the argument that was
5 raised on the motion to dismiss, but just off the top of your
6 head, is there an 11th Circuit authority on this question of
7 the application of the TVPA in a circumstance like this?

8 MR. CUNNINGHAM: There is, and thank you for allowing
9 me off the top of my head because I may now get this wrong, and
10 so I would like the opportunity to supplement and speak to this
11 point.

12 THE COURT: Okay.

13 MR. CUNNINGHAM: Because it is an important one. I
14 mean, even though it may not have been briefed, at some point
15 we are going to have to wrestle to the ground the elements of
16 the TVPA which include this.

17 There is a rotten decision for us in the 11th Circuit
18 called Sinaltrainal. I am sure I have mispronounced it. The
19 decision, while good for us in terms of recognizing that
20 organizations like this can be acting under color of law and
21 individuals that are part of them can, it is Sinaltrainal
22 versus Coca Cola, I think.

23 The decision is terrible for us on the pleading, and
24 we, though, believe that we have pled our case better the
25 Sinaltrainal plaintiffs pled their case.

1 So there I am pointing out sort of the worse authority
2 on my position ultimately, but that is one of the cases that
3 would speak to the issue.

4 THE COURT: Now, I know that Sinaltrainal was
5 partially abrogated in Kiobel.

6 MR. CUNNINGHAM: Yes.

7 THE COURT: I haven't studied this to the level of the
8 degree that you may have, but, in other words, what part of
9 Sinaltrainal, is there a part of Sinaltrainal that is left
10 after the abrogation?

11 MR. CUNNINGHAM: Unfortunately, yes.

12 THE COURT: In other words, the pleading issue, the
13 pleading of a TVPA claim was not an issue in Kiobel?

14 MR. CUNNINGHAM: Yes. It was not on this issue. The
15 case does remain out there.

16 THE COURT: Well, let me ask the flip question. Maybe
17 you can answer the flip question.

18 What holding of Sinaltrainal, the Coca Cola case, what
19 was needed to be abrogated in Kiobel? Do you remember?

20 MR. CUNNINGHAM: I don't, but let me see if I can see.

21 THE COURT: Because obviously what happened then in
22 the Coca Cola had case was there was both an ATS and a TVPA
23 claim. Is that what was going on?

24 MR. CUNNINGHAM: You know, I apologize, Your Honor. I
25 am not remembering.

1 Now, it may have been the question of whether or not a
2 corporate defendant can be a defendant under the TVPA because
3 the case law has developed that it cannot, but I think that's
4 the part that ends up being abrogated, but I am not sure about
5 that.

6 THE COURT: Okay. Well, with respect to it, let me
7 find that, though. Well, let me ask you this question:

8 On the pleading in question, don't you also have a
9 problem, the Mamani case, doesn't the Mamani case present a
10 pleading problem in your situation because in Mamani, you know,
11 arguably assume you have a color of law question. You know,
12 you establish that issue.

13 MR. CUNNINGHAM: Right.

14 THE COURT: And you overcome that hurdle.

15 MR. CUNNINGHAM: Right.

16 THE COURT: One of the points in Mamani was that you
17 cannot just infer that because somebody was, in fact, the head
18 of an organization, in that case the Bolivian Government, that
19 that means that, therefore, that an extrajudicial killing, even
20 in connection with a governmental action, in that case it was
21 it was a blockade, or something, and the government was trying
22 to put down a blockade, or something, even that doesn't
23 necessarily mean that individuals other than the killers
24 themselves, i.e. the shooters was the way I think Mamani put
25 it, are liable just because of the positions that they held.

1 You have to specifically allege actual knowledge of
2 actual control. Isn't that what Mamani stands for?

3 MR. CUNNINGHAM: No, it doesn't. Quite.

4 THE COURT: All right.

5 MR. CUNNINGHAM: Right. Before I get to Mamani, as I
6 sat here, I heard two other people have admitted to those
7 killings.

8 THE COURT: Right.

9 MR. CUNNINGHAM: And, of course, that's the case. I
10 had a flashback sitting in Judge Lenard's courtroom ages ago
11 where the defendant I had who was a lieutenant, who was not
12 actually involved in the shooting of the decedents there, made
13 the same argument.

14 "I can't be guilty because I didn't do the shooting."

15 Well, there are 3 different secondary liability
16 theories or derivative liabilities or indirect liability
17 theories that are plainly extant in this area in the 11th
18 Circuit and has recognized them, including in my case, that
19 prior case Kiobel.

20 So you can be liable under a command responsibility
21 theory. You can be liable as a co-conspirator and you can be
22 liable for aiding and abetting.

23 Mamani sort of lumped things together, focused on or
24 alluded to command responsibility and then said that that case
25 was not well-pled.

1 The actual holding of the case is that the killings
2 were not shown to be deliberate. That is, the pleadings didn't
3 satisfactorily establish that these were not random killings,
4 but to focus on the court's question, because Mamani does
5 implicate the issue, Mamani had civilian leaders.

6 It was the president and the defense minister. That
7 implicated two big problems, aside from the practical problems.

8 I mean, the practical issue driving that case is that
9 Mamani looks a lot like Ikbali, whereas you have gone too far.
10 You can't win legitimate government actors are responding to
11 legitimate government issues, be it Attorney General Ashcroft
12 and Robert Mueller in the Ikbali case responding to 9/11, or be
13 it the Mamani situation where Bolivia is being shut down by
14 protests and people, they can't get food to the capital.

15 Then civilian leaders are allowed to do the things
16 they need to be done, and you cannot have these kind of
17 seemingly strict vicarious liability theories over everything
18 that happened.

19 The court actually uses the phrase making reference
20 to, "The long chain of command."

21 Well, what it doesn't say, but what it should have
22 noted is that the doctrine really is not applicable in that
23 case because these were not military leaders.

24 The doctrine that we are relying on is the
25 well-established Command Responsibility Doctrine, and for

1 command responsibility, and the 11th Circuit on this is Ford,
2 and I am sure we have a cite for it somewhere. I think it is
3 in our brief, it is that, let me back up.

4 The reason you want to have command responsibility,
5 obviously, is that you don't want troops running amuck and
6 committing war crimes and doing the like.

7 So it is has been well-established in this country,
8 based on World War II issues in a case called Yamashita, which
9 is a 1946 Supreme Court case, made clear that there is command
10 responsibility liability under international law and recognized
11 in U.S. courts.

12 Part and parcel of that is that the mens rea
13 requirement is new or should have known what was going on so.

14 We are this is not like the Ikbali case that Mamani
15 was parroting where it was not a sufficient mens rea under the
16 Bivins action theory in Ikbali that one should have known what
17 was going on. That was not part of the law there.

18 The Command Responsibility Doctrine has recognized,
19 including in the 11th Circuit, should have known is a
20 sufficient mens rea in order to hold someone responsible.

21 So Mamani reaches the result or reaches for judicial
22 reasons, and it does not end the discussion about the pleading
23 of command responsibility.

24 THE COURT: In the Caballo case which you cited, which
25 I believe you said was the Judge Lenard case, right?

1 MR. CUNNINGHAM: Yes.

2 THE COURT: It involved a lieutenant at the brigade
3 level?

4 MR. CUNNINGHAM: Yes, in essence. He was a member of
5 a squad called the Caravan of Death. It was in a helicopter,
6 and it went up and down Chile.

7 Local people at the brigade level working in
8 connection with the general and his lieutenant and others on
9 the helicopter picked out people who would then be killed in
10 the various parts of Chile.

11 THE COURT: And then the underlying cause of action in
12 that case was ATS, TVPA or both, or something else?

13 MR. CUNNINGHAM: Both. It was both.

14 THE COURT: In that case the lieutenant was operating
15 for a paramilitary group or, in fact, the Government of Chile?

16 MR. CUNNINGHAM: I think The government of Chile.

17 THE COURT: All right. So that TVPA color of law
18 issue would not be --

19 MR. CUNNINGHAM: It was not an issue in that case.

20 THE COURT: It was not problematic in that case.

21 MR. CUNNINGHAM: No, it was not.

22 THE COURT: In a paramilitary sense, what is your best
23 case on that question as far as you know?

24 MR. CUNNINGHAM: What is my best case on that? I
25 mean, in Chiquita, the District Court opinion, Your Honor, I

1 believe the District Court case in Chiquita found there to be
2 color of law in connection with the paramilitaries in Colombia.
3 I do believe that Chiquita is on appeal to the 11th Circuit.

4 THE COURT: Was that out of our district?

5 MR. RODRIGUEZ: I think it is a Judge Hurley case.

6 MR. CUNNINGHAM: I think that's right.

7 MR. RODRIGUEZ: It is a Judge Hurley case in Palm
8 Beach, Your Honor.

9 THE COURT: Did that involve the Guatemala case? Is
10 that the Guatemala case? I remember he had a Guatemala trial.

11 MR. CUNNINGHAM: Yes. It was Colombia.

12 THE COURT: Oh. Colombia as well?

13 MR. CUNNINGHAM: Yes. I am being reminded of Eldona
14 versus Del Monte Fresh as another case that may be the
15 Guatemalan case that deals with this issue.

16 Your Honor, we will be happy to provide cites on these
17 cases that I am really pulling out of my hat.

18 THE COURT: Right. No, and I appreciate the fact that
19 to some extent it is outside the scope of what the specific
20 issue that was raised, but I am kind of getting ahead of myself
21 a little bit.

22 Getting more to the point of what the specific issue
23 on the table is, I understand the argument on focusing on the
24 ATS issue, going back to that issue.

25 I understand the argument that you are making in terms

1 of where the national interest that Kiobel might be referring
2 to, but, of course, it is pretty new. We will figure out what
3 they are referring to later.

4 MR. CUNNINGHAM: We will stipulate to that, yes, Your
5 Honor.

6 THE COURT: Right. So your point is that because this
7 was a drug trafficking organization, identified as such by us,
8 by the United States --

9 MR. CUNNINGHAM: Yes.

10 THE COURT: -- and this was an extrajudicial killing
11 and allegedly committed by that organization and by the
12 defendants control or should have known control liability, that
13 would be sufficient even to establish the ATS application even
14 where the victims, the perpetrators and the geographical
15 location were outside of the United States?

16 MR. CUNNINGHAM: Yes. And, Your Honor, maybe I should
17 stop there, but the answer is effectively, yes. The point is
18 that although a couple of the judges, Alito and Thomas would
19 have liked the rule to have been brightlined, if it is
20 extraterritorial, we are done.

21 That's the end of the analysis. The fact of the
22 matter is that the Kiobel majority allowed that when the issue
23 touches and concerns the United States with sufficient force,
24 then the presumption can be displaced, and for the reasons that
25 Your Honor has summarized, we think that this case against this

1 defendant over these killings does touch and concern with
2 sufficient force.

3 THE COURT: I am just going back to the point you just
4 made. You said Justice Thomas and who now?

5 MR. CUNNINGHAM: Justice Alito.

6 THE COURT: Was this a plurality case?

7 MR. CUNNINGHAM: Ms. Roberts said he was 9 to 0.

8 MS. ROBERTS: On the outcome.

9 MR. CUNNINGHAM: On the outcome, right, but, then
10 there were these multiple concerns, so that, yes, there is a
11 little something for everyone in Kiobel.

12 THE COURT: Right. I see. I see I missed that. I
13 didn't read that one. I had read the dissent. So the Alito
14 Thomas position was a more strict position

15 MR. CUNNINGHAM: Yes. You are done.

16 THE COURT: There is no extraterritorial application,
17 period, under the current wording of the statute.

18 MR. CUNNINGHAM: Effectively, yes.

19 THE COURT: All right. And then the majority opinion
20 allowed for an exception which you are talking about?

21 MR. CUNNINGHAM: Right.

22 THE COURT: The touch and concern exception.

23 MR. CUNNINGHAM: Exactly.

24 THE COURT: Okay. Well, one of the confusions that I
25 think a lot of judges are having, putting aside this case, but

1 in general is when you read the dissenting opinion by Justice
2 Breyer who tried to come up with a different test, and I don't
3 understand his anymore then I understand the touch and concern,
4 was it seems to me that there is a conflict with what the
5 Supreme Court had done in Sosa and which was cited Kiobel and
6 what other lower courts have done, including the 2nd Circuit in
7 that case that was --

8 MR. CUNNINGHAM: In Filartiga

9 THE COURT: Correct.

10 MR. CUNNINGHAM: Yes, which is the fountain head, if
11 you will, of the modern jurisprudence in this area.

12 THE COURT: Correct.

13 MR. CUNNINGHAM: Yes.

14 THE COURT: And, in fact, which Breyer cites
15 repeatedly in his dissent is, "See what we have done or see how
16 this should be properly applied."

17 MR. CUNNINGHAM: Right.

18 THE COURT: The problem is, of course, what happens to
19 Filartiga after the majority opinion?

20 MR. CUNNINGHAM: Right.

21 THE COURT: As a practical matter.

22 MR. CUNNINGHAM: Right. I mean, the easiest way to
23 not wrestle with that hard question is to say all that Kiobel
24 is about is corporate defendants because let's get real.

25 Everyone is troubled by the application of suing

1 American companies in American courtrooms for this stuff that
2 goes on in the other parts of the world.

3 That is not our case. I mean, our case is about
4 individuals being killed at the direction of, our theory is not
5 just command, you know, it is knew or should have known.

6 We actually allege that this defendant did direct
7 these killings, and we are comfortable we would prove that and
8 prove that he had knowledge beforehand, but these cases against
9 individuals are different.

10 So I mean you can argue that, let me now argue that
11 Kiobel does not apply at all because we have an individual
12 defendant.

13 The Kiobel concern is motivated by the fact that
14 corporations can be anywhere and everywhere and nowhere at one
15 time because it is a fictional entity.

16 We don't have a fictional entity. We have a real
17 human being, and this real human being is in the United States,
18 and he is in the United States based on the horrible despicable
19 narco terrorism he did, a part of which resulted in the death
20 of our client.

21 That's why it touches and concerns the United States,
22 if you get to that, but why even get there? Just say Kiobel
23 only applies to corporate defendants and we don't have a
24 corporate defendant. Filartiga and Sosa, we are all good then.

25 That's the most simplistic way to limit the confusion

1 caused by Kiobel.

2 THE COURT: Okay. Let me give you an opportunity to
3 reply.

4 MR. CUNNINGHAM: In Mr. Rodriguez' remarks there were
5 illusions to the personal jurisdiction issue.

6 Let me just make one point before I turn that over
7 because I think that in some ways our briefing, which I stand
8 by and I think is persuasive, there is again a simpler argument
9 for why there is jurisdiction.

10 The jurisprudence on jurisdiction has all developed
11 for dealing with cases where there is an absent defendant,
12 right, the so-called tag theory of jurisdiction or transient
13 jurisdiction.

14 It assumes a transience. There is no transience here.
15 The defendant was in Florida when he was served. He was in
16 Florida before he was served.

17 He is in Florida after he is received. We can writ
18 him over right now, if need be. So this I would submit that
19 the entire due process analysis, you don't even have to get
20 into it because the defendant was here and is here.

21 So dealing with the case law about absent defendants,
22 you don't even have to go that far, but in Mr. Rodriguez' his
23 argument has very cleverly done is it has taken the so-called
24 Doctrine of Speciality, a notion of extradition law that you
25 cannot convict someone for a crime on for they were not

1 extradited.

2 He has not brought that argument. Maybe he just has
3 not brought it yet, but he has not brought it I submit because
4 it wouldn't apply here. It doesn't apply to civil cases, and
5 we have provided a couple of cites in our brief where the court
6 has proceeded to exercise jurisdiction in civil cases against
7 defendants who were in the country by intent of extradition.

8 THE COURT: Well, I guess there is an undercurrent of
9 his argument is the extradition issue.

10 I mean, for example, he pointed out that technically
11 he is here under special parole conditions for adjudication of
12 the case following extradition, the conclusion of the case
13 which I assume includes the conclusion of the sentence, and
14 then at that conclusion of the sentence, his parole
15 extinguishes and he will be returned to Colombia because he has
16 no status here.

17 So, therefore, I think what I understood the argument
18 to be, what Mr. Rodriguez is saying is he is basically a man
19 without a home at this point and so, therefore, he is not here
20 because he certainly never agreed to be here.

21 He didn't waive extradition, for example, and so,
22 therefore, Burnam shouldn't apply because to some extent he is
23 not an intentional passer -hrough because he is not even here,
24 I guess is the way to explain it.

25 MR. CUNNINGHAM: Right.

1 THE COURT: He is in this unique position.

2 MR. CUNNINGHAM: Right.

3 THE COURT: So he cannot be served with process in a
4 civil case here because he is not here.

5 Does that basically some sum it up?

6 MR. RODRIGUEZ: If I may, Leo, with the caveat that he
7 is not here voluntarily. Let's put that first.

8 THE COURT: Yes.

9 MR. CUNNINGHAM: Right.

10 THE COURT: Let's put that first.

11 MR. RODRIGUEZ: Yes.

12 THE COURT: All right. It is not an unfair argument.

13 MR. CUNNINGHAM: No. It is a very, very lawyerly
14 argument, and it is like we lawyers, we have gotten so clever.
15 When you say he is, in essence, not here --

16 THE COURT: Right.

17 MR. CUNNINGHAM: -- I recognize that, you know, he is
18 an enigma under I.N.S. and all of that stuff, but Dear God, ask
19 the guy in the bunk next to him where he is, and he will tell
20 you, "He is right here. He is right here in Florida."

21 So let's forget about the metaphysics. The fact of
22 the matter is the man is here. He is not an absent defendant.
23 He is here. He is physically corporally in the United States,
24 in the State of Florida.

25 He could be sitting at that table in probably 48 hours

1 if we wanted him here. So he is here. Let's not make this
2 more complicated than it is.

3 What Mr. Rodriguez respectfully really is arguing
4 towards, there ought to be some sort of immunity against civil
5 against civil suits if you are here because you are extradited
6 and the law is to the contrary, or if you don't have an
7 immigration status that is different, and there is no support
8 for that, so it is just comes back down to fundamental
9 principles, which is by tradition and for good reason American
10 courts have always, always been willing to exercise
11 jurisdiction over people who are physically present.

12 Burnam is an extension is an extension to an absent
13 defendant who is only momentarily physically present, and that
14 is not this case.

15 THE COURT: Right.

16 MR. CUNNINGHAM: That is not this case, but even if it
17 were the case, the notion that it has to be voluntarily, if you
18 pull back and read Burnam, it talks about how various laws have
19 made various exceptions with respect to tricking someone into
20 the jurisdiction or forcing them into the jurisdiction.

21 It is an interesting aside that the Statement of
22 Conflicts deals with this issue now makes clear that if you are
23 there, albeit involuntarily, but lawfully, that is the
24 question, are you lawfully where you are, and the defendant in
25 this case is lawfully in the United States and lawfully in

1 Florida.

2 So there is nothing unfair about him standing and
3 facing our allegations. Said differently, there is no reason
4 to give a man like this an immunity from a civil suit because
5 he is here extradited for the atrocities he has engaged in.

6 THE COURT: All right. Yes. I tend to agree,
7 although the funny thing is you are talking to somebody who
8 since I first read that opinion in the first year of law school
9 do not understand why we have transient jurisdiction in this
10 day and age, when we have developed 100 years worth of due
11 process analysis that assumes a lot more than that, and that
12 this anomaly that as long as we tag you, you are it.

13 So, you know, I am very personally, what is the term,
14 amenable to Mr. Rodriguez' argument because I don't understand
15 transient jurisdiction to begin with.

16 MR. CUNNINGHAM: And there are justices on the court
17 who went with you.

18 THE COURT: Yes, but that's the law.

19 MR. CUNNINGHAM: It is the law.

20 THE COURT: I would be very interested if this case
21 does not otherwise go away for one reason or another, if one
22 wanted to make an argument, this is a good case to re-examine
23 Burnam because look what is happening here where you have
24 somebody who has been extradited who is sitting in jail against
25 his will and he gets served with legal process against his

1 will, and the court exercises jurisdiction over him.

2 That seems to me to quintessentially runs counter to
3 this whole body of law that has literally 10,000 cases under
4 it.

5 So, you know, I think it is good argument, but it
6 works only on me personally, but I agree with you that I don't
7 think that the jurisdictional based on existing law because I
8 think under existing law if you are lawfully tagged, being you
9 are lawfully within a jurisdiction, then you are tagged, that's
10 basically sufficient to confer personal jurisdiction.

11 MR. CUNNINGHAM: I agree, but the point that I am
12 making that I am making is it was not in our papers, but even
13 beyond that, he was here when he got tagged.

14 He remains here, so he does have continuous and
15 systematic contacts with Florida, I mean, really literally.

16 Every morning he wakes up and breaths Florida air. He
17 drinks Florida water. He gets food that came over Florida
18 roads. If there were going to be some sort of tour that
19 happens, he could come to Florida courts and do it.

20 He lives in Florida.

21 THE COURT: Well, I don't want to argue an issue of
22 which I am going to rule in your favor on, but just the problem
23 with transient jurisdiction is if that is the case, and it
24 gives rise to general jurisdiction because now he was here,
25 theoretically somebody who has a landlord dispute with him in

1 Colombia could come here and sue him here, right?

2 The court would have power over him, putting aside
3 other jurisprudential principles that runs counter to my view
4 of how the due the process clause should apply in
5 jurisdictional cases, but, again, you win on this, so don't
6 worry about it.

7 MR. RODRIGUEZ: Can I even say anything? I lose.
8 Judge, let me just highlight a couple of things and I know what
9 the court has said, but --

10 THE COURT: Do you see my point, Mr. Rodriguez?

11 MR. RODRIGUEZ: I do, but --

12 THE COURT: If you lose on this issue, you might want
13 to consider actually making an argument that in your case,
14 assuming that I rule against you on the personal jurisdiction
15 question, and assuming I am not wrong on the merits of it, one
16 argument that one can make is that this case is an example of a
17 case where were Burnham should be reviewed, should be narrowed.
18 It should be reconsidered. It should be revisited, and because
19 it is an interesting situation --

20 MR. RODRIGUEZ: It is.

21 THE COURT: -- where basically you have an argument
22 that says he is right. He is here, and so he is not just
23 metaphysically here, he is blood and guts here and so,
24 therefore, under a theory of tag jurisdiction that should be
25 sufficient, and this might be a case where one could argue,

1 well, then, tag jurisdiction needs to be revisited, but under
2 the existing law, I am bound by existing law.

3 MR. RODRIGUEZ: Yes.

4 THE COURT: I cannot create law.

5 MR. RODRIGUEZ: I understand that.

6 THE COURT: Is there really anything left for me to do
7 with that?

8 MR. RODRIGUEZ: Yes. In Burnham the fact is he goes
9 to California voluntarily. While he is there he is served in
10 California with divorce papers.

11 He went to California on his own. Jimenez is not here
12 on his own. He voluntarily, I appreciate the clever tag, and I
13 will accept that, but anyone knows what voluntary means.

14 Burnham went on his own. Jimenez didn't come here on his own.

15 THE COURT: The problem is --

16 MR. RODRIGUEZ: And he was tagged because he is here
17 involuntarily. It is totally different, and I understand the
18 intellectual exercise, but the court asked him if there is any
19 other authority for this, and I didn't hear Mr. Cunningham
20 respond because there is none.

21 We haven't had a situation like this that they are
22 trying to bootstrap this Burnham argument to say, "You were
23 brought here involuntarily, forced, shackled, and now because
24 are here, now we can serve you with this process, and they
25 interpreted California law.

1 Florida law, which the court must apply, is a little
2 different. In a transient jurisdiction, Florida law says the
3 person must be here voluntarily, and that is what I want the
4 court to focus on.

5 If you want us to supplement it, we will, Your Honor,
6 because in the Florida cases the word is voluntarily here.

7 Mr. Jimenez did not come to the United States
8 voluntarily, and I don't think that Mr. Cunningham would argue
9 with that point.

10 It is different than Burnham and quite distinguishable
11 for Burnham for the purposes of jurisdiction.

12 THE COURT: But you don't dispute that he is here
13 lawfully for purposes of American law?

14 MR. RODRIGUEZ: Oh, I am not disputing that he is here
15 lawfully in the sense that, no, I am not disputing that. For
16 personal jurisdiction I am saying he is not here voluntarily.

17 THE COURT: Yes.

18 MR. RODRIGUEZ: Which is what Florida law requires
19 somebody to do. If he would have flown into MIA to take his
20 family to Disney World and he would have gotten tagged, I would
21 not be standing before the court, but above and beyond the
22 immigration arm, he is not here voluntarily, having said that.

23 The court and Mr. Cunningham focused in on several
24 things, but one thing that Mr. Cunningham did not address as we
25 talk about the TVPA, and the court asked Mr. Cunningham the

1 question, "Have these people, have these plaintiffs, are they
2 involved in justica y paz?"

3 I didn't hear a response, and I think the reason that
4 he didn't give you a response is the following, Your Honor:

5 The TVPS, 28 U.S.C. 1350(b) requires "A court shall
6 decline to hear a claim under this section if the claimant has
7 not exhausted adequate and available remedies in the place in
8 which the conduct giving rise to the claim occurred." Period
9 and simple.

10 They have already availed themselves to this same
11 action in Colombia. That process is still continuing, and I
12 thought that he was going there and I wanted to --

13 THE COURT: Do I have enough of a record on that
14 point?

15 MR. RODRIGUEZ: No, you don't because that was not an
16 issue that we were going to be dealing with.

17 THE COURT: Right.

18 MR. RODRIGUEZ: And when I stood up, I think that
19 Mr. Cunningham is incorrect when he said the process was
20 stopped.

21 The United States Attorney here in this district has
22 assigned an Assistant United States Attorney, E.J. Yera out of
23 Palm Beach.

24 Mr. Yera's sole function is to facilitate the justice
25 and peace continuing process throughout the United States.

1 To that extent, in the new Igloo over in the Ferguson
2 Building is special space that has been created by this United
3 States Attorney's Office at the behest of the Department of
4 Justice, the State Department with video and simulcast where
5 detainees from across the street are taken to continue their
6 declarations in justica y paz.

7 Unfortunately, I have participated in at least 7 to 10
8 on behalf of Mr. Jimenez who is continually in the process.

9 The first week of February I've been asked by the
10 Supreme Court of Colombia to give them a presentation on the
11 judicial process of Mr. Jimenez which is going on criminally
12 and in this case.

13 So he is still in the process with justica paz, and
14 has been continuing with that process.

15 I just wanted to highlight that these victims still
16 have redress. It may not be to their satisfaction, and it may
17 be the administrative process is not what it should be, but
18 that exists.

19 We will be addressing that issue later on under the
20 fact that they have not exhausted their administrative remedies
21 to satisfy that.

22 Something else. Mr. Jimenez has never had any assets
23 in the United States. That is well-documented by the United
24 States Government.

25 There have been no forfeiture of any assets of

1 Mr. Jimenez in the United States. As a matter of fact, the
2 United States is deferring to the justica y paz restitution
3 process as part of any claim. He does not have any assets and
4 never has had any assets.

5 Judge, we better carve out a couple of months for
6 trial because as I am listening to counsel under their color of
7 law theory, I am just wondering I am going to be standing up
8 just objecting to hearsay throughout this because I don't know
9 how, under their theory of aiding and abetting, they are going
10 to be able to present that evidence, but I leave that for
11 another day.

12 One other interesting factor is if counsel is prepared
13 to provide evidence that Mr. Jimenez "is the man in the
14 courtroom responsible for the killing," and that he did it
15 under "color of law on behalf of the Colombian Government,"
16 then the Country of Colombia is an indispensable party, and we
17 cannot go forward without them.

18 I mean, they are basically saying he was an
19 instrumentality and did it at their behest because that is what
20 color of law is, and with their permission or their sanction or
21 their authority or any of those things. And if that be the
22 case, they need to be a proper party.

23 They haven't pled it. We will deal with it on a
24 different issue. We have a law school studio here, Your Honor.

25 I finally figured out it is going to be more than one

1 semester because the issues presented in this case are very
2 interesting.

3 As to our motion to dismiss, we didn't hit on some of
4 the other factors, and I don't know if the court wants to
5 address them. Excuse me.

6 THE COURT: Well, touch on the primary issue that is
7 raised now in the motion to dismiss, I think, because,
8 obviously, there are other arguments that may have to be for
9 another day as you point out.

10 With respect to the issue on the motion to dismiss
11 having to do with Kiobel, let me rephrase the question that I
12 kind of started out with.

13 If, in fact, you have a killing, assuming they meet
14 the other elements, but if, in fact, you have a killing that
15 was the product of a drug trafficking organization's pursuit of
16 control of an area for purposes of drug trafficking, and drug
17 trafficking that ultimately had its goal to be the United
18 States, why isn't that a sufficient nexus for purposes of
19 looking at crimes against humanity were committed in pursuit of
20 that drug trafficking activity? If I put the question that
21 broadly, why wouldn't it?

22 MR. RODRIGUEZ: If I understand what the court is
23 saying is, assuming or the allegation at this stage --

24 THE COURT: Right.

25 MR. RODRIGUEZ: -- that these two killings, these two

1 plaintiffs were killed as a result of their activity, is it --

2 THE COURT: PDP.

3 MR. RODRIGUEZ: PDP, which for our purposes, in taking
4 the complaint I cannot argue about it, but that is a really
5 quantum leap, and whatever.

6 THE COURT: I understand.

7 MR. RODRIGUEZ: And that this organization, among its
8 multitude and facets of operation that the two individuals that
9 killed these two people did so to inhibit their activity which
10 was an alternative to cocaine --

11 THE COURT: Right.

12 MR. RODRIGUEZ: -- that that is sufficient touch and
13 concerns for the United States? I have a difficult time with
14 that, even on their bare allegation. That's I think what
15 Mr. Cunningham is saying.

16 THE COURT: Because I guess the argument is, well, the
17 fact that Mr. Jimenez was indicted and pled guilty to a case
18 where the issue was his role and the management of the drug
19 trafficking organization --

20 MR. RODRIGUEZ: Judge --

21 THE COURT: -- why isn't that sufficient? I mean,
22 that's not normal. In other words, that is not a normal
23 situation, right? I mean, that is an unusual circumstance.

24 MR. RODRIGUEZ: These are particularly torturous acts,
25 and I believe that they must be more specific in what he did,

1 either before or to support that, not just he was of the heads
2 of the organization.

3 THE COURT: Well, that goes to how you plead the
4 claim.

5 MR. RODRIGUEZ: Yes.

6 THE COURT: Let's assume the pleading issues aside,
7 focusing on the substantive question, because you may be right
8 because obviously if you don't plead it, then you don't even
9 get to that, but assuming he pled it with a specificity that
10 Mamani and that Coca Cola case require, okay, the question is
11 just why shouldn't that be a sufficient nexus in the unusual
12 case where American jurisdiction would be interested and have
13 sufficient jurisprudential to adjudicate a case where the
14 fallout of which was, in fact, a killing that was proximately
15 related to the drug trafficking that the United States itself
16 indicted?

17 Why wouldn't that be a sufficient nexus as a general
18 matter?

19 MR. RODRIGUEZ: At this stage of the game?

20 THE COURT: Right.

21 MR. RODRIGUEZ: It would be sufficient.

22 THE COURT: Right.

23 MR. RODRIGUEZ: I would love to address this issue in
24 a summary judgment which we would do because then we get into
25 all kinds of other issues.

1 I mean, that is just for our purposes under the rules
2 of the game as we are playing now, the court is correct, but
3 those are just quantum conclusions, and I respect, Mr.
4 Cunningham, but I think they are going to be very difficult to
5 present.

6 THE COURT: All right.

7 MR. RODRIGUEZ: Yes.

8 THE COURT: Okay. All right.

9 Well, I appreciate everybody work in preparation for
10 the hearing, and at this point I think even though I have asked
11 a lot of questions that go beyond the scope of the actual
12 motion that is pending, in fairness what I am going to do is I
13 am just going to focus on what the issues are right now as
14 raised in the motion in the motion, and then we will take it
15 from there.

16 MR. RODRIGUEZ: Judge, can I have one moment to speak
17 to Mr. Cunningham?

18 THE COURT: Sure.

19 MR. RODRIGUEZ: Your Honor, the question I asked
20 Mr. Cunningham, I said, "Should we address with the court in
21 the future having some type of a scheduling conference?"

22 Judge, this case is complicated. I mean, from an
23 evidentiary standpoint how we will present it. Depositions,
24 foreign, and all of those types of thing.

25 THE COURT: I agree.

1 MR. RODRIGUEZ: And we both agree that we need to
2 have, if not to entertain it now, but if the court could give
3 us showing in the future, let's say 30 days out, 45 days out,
4 we can sort of meet and then have a discovery or a scheduling
5 conference at that time.

6 I think it will facilitate proceeding in this case.
7 If not, it is going to be piecemeal, piecemeal, and I know they
8 come from California.

9 THE COURT: Okay. That's fine with me.

10 MR. RODRIGUEZ: Yes.

11 THE COURT: We will see how the motion to dismiss
12 shakes out.

13 MR. RODRIGUEZ: Fine.

14 THE COURT: Then assuming it gets denied, in whole or
15 in part, then because, frankly, let's assume based upon the
16 issues that were raised, the only thing that I could
17 definitively strike, assuming that I find that the basic
18 pleadings have been sufficient, is the ATS claim. The TVPA
19 claim would remain.

20 MR. RODRIGUEZ: Correct.

21 THE COURT: And the TVPA claim has, you know, as you
22 point out you have various defenses that you are going to want
23 to present.

24 The record is going to have to be developed on that,
25 and so I would certainly give you sufficient time and

1 opportunity to do that given you uniqueness of the case.

2 So, if, in fact, we get to that point what I will do
3 is I will issue a ruling. I will set it. We can even do a
4 telephonic scheduling conference.

5 This is a consent case. So whatever the parties will
6 agree to, in terms of how they would like the schedule to be
7 conducted going forward, 95 percent of the time I will agree
8 to, and so if that means special accommodations given the
9 uniqueness of the case and the difficulties involved in
10 gathering evidence an all of that, that is perfectly fine with
11 me.

12 So what I will do is let me rule on the pending
13 motion. I will give you a little period of time to digest it.

14 We will set a scheduling conference for what we have
15 to do, depending upon what happens, and then at that point you
16 tell me.

17 You will have discussed your situation beforehand.
18 You will tell me what you want, and then I will probably adopt
19 it. Okay?

20 MR. CUNNINGHAM: That's perfect. Thank you, Your
21 Honor.

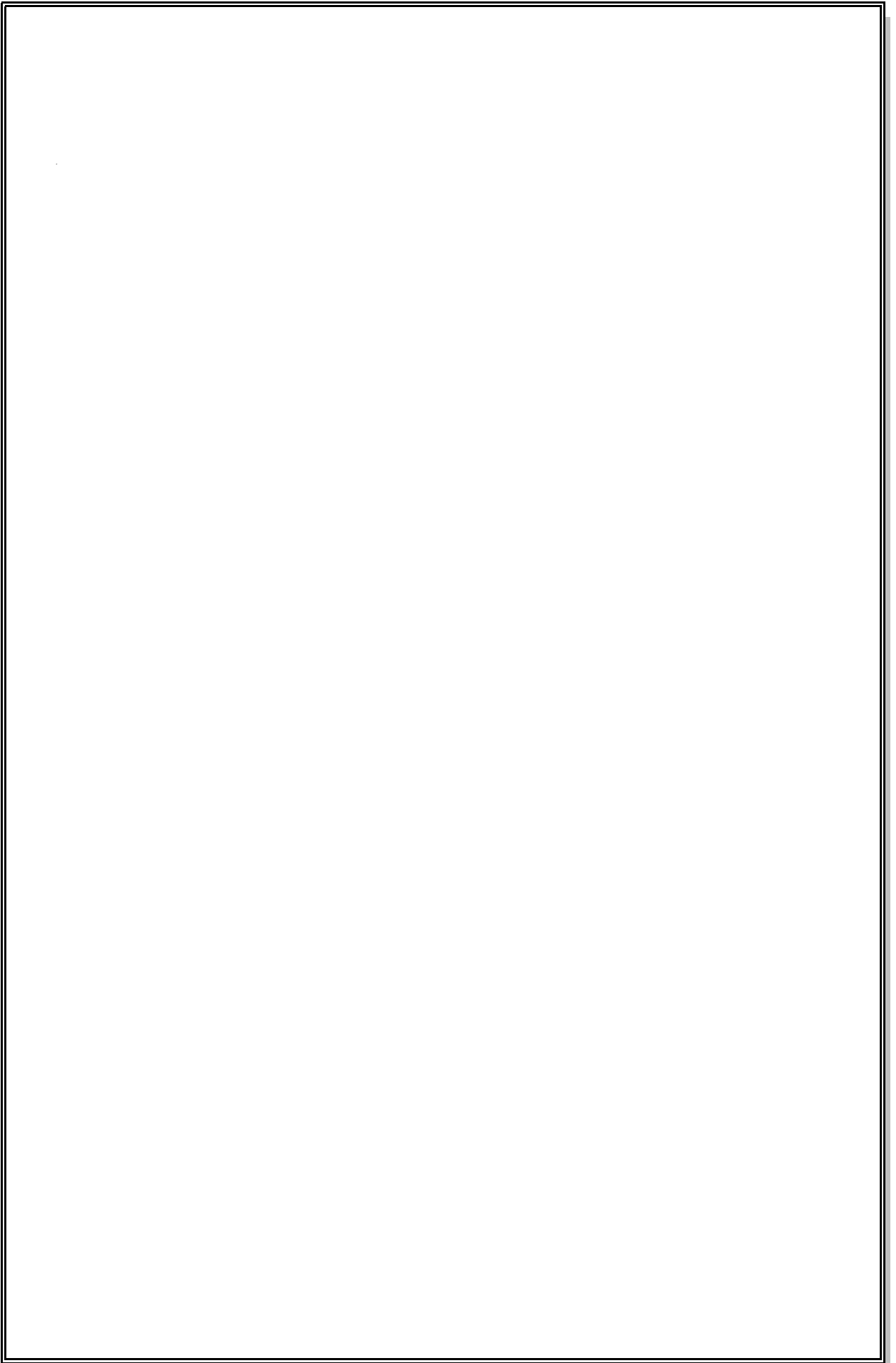
22 MR. RODRIGUEZ: Thank you very much, Your Honor.

23 THE COURT: Okay. Thank you all very much.

24 THE CLERK: All rise.

25 (Whereupon the proceedings were concluded)

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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

JANUARY 20, 2014

S/JERALD M. MEYERS

DATE

JERALD M. MEYERS, RPR-CM