No. 02-14427-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JUAN ROMAGOZA ARCE,
NERIS GONZALEZ,
and CARLOS MAURICIO,

Plaintiffs-Appellees,

vs.

JOSE GUILLERMO GARCIA and
CARLOS EUGENIO VIDES-CASANOVA,

Defendants-Appellants.

On Appeal from the United States District Court,
Southern District of Florida

U.S.D.C. Case No. 99-8364 Civ-Hurley/Lynch
The Honorable Daniel T.K. Hurley, Judge Presiding

PETITION FOR REHEARING OR REHEARING EN BANC

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Docket No. 02-14427-FF
Romagoza Arce v. Garcia

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 26.1 and 11th Circuit Rule 26.1-1, plaintiffs certify that the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal.

Juan Romagoza Arce

Rebecca Aviel

Carolyn Patty Blum

Center for Justice & Accountability

Jose Guillermo Garcia

Neris Gonzalez

David L. Gorman

James K. Green

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CERTIFICATION OF COUNSEL

I express a belief, based on reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and this Circuit and that consideration by the full court is necessary to secure and maintain the uniformity of decisions in this Court:

Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004)

Browning v. AT&T Paradyne, 120 F. 3d 222 (11th Cir. 1997)

Cabello v. Fernandez-Larios, No. 04-10030 (11th Cir. March 14, 2005)

I further express a belief, based on reasoned and studied professional judgment, that this appeal involves questions of exceptional importance:

1. Whether the panel violated the clear legislative mandate of the Torture Victim Protection Act (28 U.S.C. § 1350 note) ("TVPA") to toll the statute of limitations until defendants entered the United States.

2. Whether the panel misapplied the standard of review and improperly substituted its factual determinations for those of the district court.

3. Whether the panel's opinion conflicts with Circuit precedent by requiring plaintiffs to show defendant misconduct in order to equitably toll the statute of limitations.

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2. Whether the panel misapplied the standard of review and improperly substituted its factual determinations for those of the district court.

3. Whether the panel's opinion conflicts with Circuit precedent by requiring plaintiffs to show defendant misconduct in order to equitably toll the statute of limitations.

COURSE OF PROCEEDINGS

Plaintiffs Romagoza Arce, Gonzalez, and Mauricio suffered brutal torture at the hands of Salvadoran military forces commanded by El Salvador's former Ministers of Defense, General Jose Guillermo Garcia and General Carlos Eugenio Vides-Casanova. Plaintiffs sued Garcia and Vides-Casanova under the Alien Tort Statute (28 U.S.C. § 1350) ("ATCA") and the TVPA and, after a four-week trial ending on July 23, 2002, obtained a jury verdict of $54.4 million.

In pre-trial motions and at trial, Judge Daniel T.K. Hurley of the Southern District of Florida rejected defendants' assertion that the statute of limitations barred plaintiffs' claims. Judge Hurley ruled that equitable tolling was merited in light of the "extraordinary circumstances" surrounding plaintiffs' torture, including the defendants' roles as Ministers of Defense from 1979-1989, the military's

decade-long repressive campaign, the nature and cohesiveness of the military, the threat of reprisals to plaintiffs and their families, and plaintiffs' inability to gather evidence during El Salvador's civil war.

In a panel decision dated February 28, 2005 (the "Opinion," or "Slip Op."), Judges Tjoflat, Carnes, and Florida Middle District Court Judge Conway reversed Judge Hurley's ruling on equitable tolling and dismissed plaintiffs' claims.

STATEMENT OF FACTS

A reading of the Opinion leads one to believe that this case involves plaintiffs who suffered ordinary personal injuries, while living in a democratic society, governed by the rule of law, with a transparent government, who enjoyed rights to free speech, compulsory process, and access to courts, but who simply waited too long to sue private defendants who maintained stable residences in the venue where the wrongs occurred. In fact, plaintiffs suffered extraordinary injury while living in a viciously repressive society where human rights abusers — such as defendants' military subordinates — acted with complete impunity, and where plaintiffs and their families knew they faced reprisals if they sued defendants while the military remained in power.

Plaintiff Romagoza Arce was tortured with electric shocks and shot in the left arm to disable him from continuing his practice as a surgeon. The torture occurred in the National Guard Headquarters where defendant Vides-Casanova, then-National Guard Director, saw him on two occasions. R9-115, 120-121, 124-

26, 128, 140-148. Plaintiff Gonzalez, seven months pregnant on arrest, was tortured in a National Guard garrison where she was raped repeatedly, tortured with pins, razor blades, cigarettes and shocks, and forced to witness the horrific torture of a young man. R17-1572-78, 1580-81. Plaintiff Mauricio, held in the National Police Headquarters under the command of Minister of Defense Vides-Casanova, was suspended from the ceiling and viciously beaten. R12-591-96, 604.

Plaintiffs all testified not only to their own terror upon release from captivity, but to their fear that relatives in El Salvador could be subject to reprisals if a lawsuit was filed against defendants so long as military rule persisted. R9-134; R12-635, 650; R18-1596-97. The 1993 U.N. Truth Commission Report on the Salvadoran conflict stated that such fears were "not unreasonable," given that those who formerly wielded power "have not been required to account for their actions." Plfs. Ex. 32 at 23. Defendants' own expert admitted that the Salvadoran military tortured civilians, that a "code of silence" prevented the military from publicly redressing such wrongs, and that it was virtually impossible to prosecute military officers. R19-1949; Plfs. Ex. 557 at R 3823; R19-1967-68.

As military commanders, defendants were not ordinary citizens who could evade responsibility by blithely denying the wrongs of their subordinates. They had an affirmative duty to be aware of abuses carried out by subordinates and to take corrective action to investigate and punish the perpetrators. Ex. 557 at R 3817, 3823; R16-1321-22.

In addition to failing to recognize the foregoing facts, the Opinion contains two significant errors of fact which are central to the plaintiffs' contentions on appeal. First, the Opinion states that ". . . the defendants were in the United States in the 1980s." Slip Op. at 14. This is inaccurate: defendant Vides-Casanova became Minister of Defense of El Salvador in 1983 and held that post until his retirement in May 1989; in August 1989 he moved to the United States. R20-2178, 2188-91; R21-2247; R17-1654-55. Defendant Garcia also entered the United States in October 1989. R17-1656-57. Second, the Opinion incorrectly states that plaintiffs did not bring their action until February 22, 2000. In fact, plaintiffs Romagoza Arce and Gonzalez filed suit on May 11, 1999.[1] R1-1.

STATEMENT OF IMPORTANCE

The Supreme Court recently affirmed that the TVPA expresses a "clear mandate" that "establish[es] an unambiguous and modern basis for federal claims of torture and extrajudicial killing." *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2763 (2004). The panel's Opinion threatens to undermine — indeed, to nullify — this legislative mandate. For this reason, rehearing and/or en banc review are of exceptional importance.

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[1] Fearing retaliation against her family members remaining in El Salvador, plaintiff Gonzalez filed this initial Complaint as "Jane Doe." She was later referenced by name in a Second Amended Complaint, filed on February 18, 2001. R1-39. *Citibank v. Data Lease Finance Corp.*, 828 F.2d 686, 698 (11th Cir. 1987) (amended pleading relates back to the original complaint where the complaints share a "common core of operative facts" or the same "course of conduct").

Like other claims filed under the TVPA and related statutes, this case advances a potent national interest recognized by Congress — that human rights abusers, like the Salvadoran Ministers of Defense, must not have safe haven in this country and must be held legally responsible for their acts of torture, wherever the acts occurred. Congress acknowledged the unique impediments to this type of litigation by providing for a generous statute of limitations and equitable tolling. Congress recognized not only that those responsible for torture would seek to block investigation of abuses, but also that litigation was dependent on regime change in the plaintiffs' countries of origin which would allow unfettered investigation, without fear of reprisals against plaintiffs, their families or witnesses.

The Opinion concedes that the legislative history of the TVPA dictates that equitable tolling must be available for claims brought under that statute. Slip Op. at 10-11. However, by holding that the limitations period is not tolled while human rights defendants remain outside the United States, the panel deprives plaintiffs of the remedy that Congress intended for them to have and flouts the legislative goal of deterring torturers from entering the United States.

The court manifests its dramatic deviation from a clear legislative mandate in three ways. First, it fails to accord controlling weight to Congress' express statement that the TVPA's statute of limitations should be tolled until the arrival of the defendant in the United States. Second, the Opinion fails to show proper deference to the detailed factual findings of the district court. Motivated,

apparently, by an exaggerated concern for "the dangerous precedent" that affirming plaintiffs' jury verdict would create (Slip. Op. at 22), the panel substitutes its *ipse dixit* judgment for the lower court's careful findings on many issues, including the pattern and practice of military abuses in El Salvador and the inability of plaintiffs to gather facts necessary to support their claims while the military government maintained power. Third, the Opinion too rigidly interprets the "extraordinary circumstances" necessary for equitable tolling, newly imposes a requirement that the defendant must have engaged in affirmative misconduct *as to this particular lawsuit* and, unlike the panel in *Cabello v. Fernandez-Larios*, No. 04-10030 (11th Cir. March 14, 2005), ignores the misconduct of the military government *as a whole*.

ARGUMENT

I. THE PANEL VIOLATED THE TVPA'S CLEAR LEGISLATIVE MANDATE TO TOLL THE STATUTE OF LIMITATIONS UNTIL DEFENDANTS ENTERED THE UNITED STATES

The legislative history of the TVPA states explicitly: "The statute of limitations *should be tolled* during the time the defendant was absent from the United States." S. Rep. No. 102-249, at 11 (1991) (emphasis added). Notwithstanding this mandate, the panel declined to toll the statute of limitations for the period prior to defendants' entry into the United States in 1989. In so doing, the panel nullified both the remedies the TVPA offers victims of torture and the TVPA's goal of denying safe haven to human rights abusers.

The TVPA was enacted to ensure that both U.S. citizens and aliens can bring claims for torture and extrajudicial killing carried out under color of law of a foreign nation.[2] *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104 (2d Cir. 2000). The entire thrust of the TVPA, moreover, is to extend legal remedies to victims of human rights abuse where both the victim and the abuser enter the U.S. from abroad.[3] Recognizing that "torture victims bring suits in the United States against their torturers only as a last resort," S. Rep. No. 102-249, at 9, Congress adopted a 10-year statute of limitations. 28 U.S.C. § 1350 note, Sec. 2(c); *see Papa v. United States*, 281 F.3d 1004, 1012 (9th Cir. 2002) (noting that TVPA cases "will tend to preclude filings in United States courts within a short time").

Further, the intent of the TVPA was to "mak[e] sure that torturers and death squads will no longer have a safe haven in the United States." S. Rep. No. 102-249, at 3. Senator Arlen Specter, the key sponsor of the legislation, emphasized that "There is no question that torture is one of the most heinous acts imaginable, and its practitioners should be punished and deterred from entering the United

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[2] As the TVPA's legislative history states, "judicial protection against flagrant human rights violations is often least effective in those countries where the abuses are most prevalent." S. Rep. No. 102-249, at 3.

[3] The panel suggests that plaintiffs could have filed their claims prior to 1989 "even if the defendants could not have been served." Slip Op. at 21. This conflicts with the clear legislative mandate that "only defendants over which a court in the United States has personal jurisdiction may be sued. In order for a Federal Court to obtain personal jurisdiction over a defendant, the individual must have 'minimum contacts' with the forum state, for example through residence here or current travel." S. Rep. No. 102-249, at 7.

States." 138 Cong. Rec. S4176, at 4176 (daily ed. Mar. 3, 1992). These findings form the backdrop to the statement in the TVPA's legislative history that the statute of limitations "should be tolled during the time the defendant was absent from the United States." S. Rep. No. 102-249, at 11.

Even a cursory reading of the TVPA shows why tolling during defendants' absence from the United States is necessary to effectuate Congress' purpose for the statute. *See Branch v. G. Bernd Co.*, 955 F.2d 1574, 1582 (11th Cir. 1992) ("Only by tolling the period . . . can we ensure that beneficiaries receive the full . . . period that Congress has required" and "effectuate Congress' purpose"). The deterrent purpose of the TVPA makes sense only if the statute's ten-year limitations period begins to run when a human rights defendant enters the U.S. — not before.

Because the "basic inquiry" in an equitable tolling analysis is "whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances," *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 707 (11th Cir. 1998) (quotation omitted), the statute of limitations for plaintiffs' claims should be tolled until at least August 1989, when the first defendant entered the United States. R17-1660. And since plaintiffs Romagoza Arce and Gonzalez filed suit in May 1999, their claims are timely.

The panel's Opinion cites no evidence of congressional intent that could conceivably justify a denial of tolling for the period up to August 1989. Although a determination on equitable tolling requires that a court "examine the purposes

and policies underlying" a statute, and the statute's "remedial scheme," *Ellis*, 160 F.3d at 707, the panel dismisses the TVPA's legislative history as mere "guidance," even though the Supreme Court — and, indeed, the panel itself in an earlier portion of the Opinion (at 10) — have relied on this history to illuminate the statute. *See Sosa*, 124 S. Ct. at 2763.

This Circuit should not let stand a decision that fails to implement — that, in fact, repudiates — the will of Congress. By refusing to toll the statute of limitations until the time defendants entered the jurisdiction, the Opinion frustrates legitimate claims under the TVPA and permits the very human rights abusers that Congress sought to bar from our country to find haven here, safe in the knowledge that having remained outside the U.S. for ten years, they will remain forever beyond the reach of our laws.

II. THE PANEL MISAPPLIED THE STANDARD OF REVIEW AND IMPROPERLY SUBSTITUTED ITS FACTUAL DETERMINATIONS FOR THOSE OF THE DISTRICT COURT

In its review of the district court's determination that equitable tolling was merited on the facts of this case, the panel reviewed *de novo* both the pure legal question of whether equitable tolling applied and the underlying factual predicate of an equitable tolling finding. That the panel decision erred in its approach is highlighted by the recent decision of this court in *Cabello v. Fernandez-Larios*, No. 04-10030 (11th Cir. March 14, 2005), a case which directly addressed the

applicability of equitable tolling in the ATS/TVPA context. *Cabello* correctly states the law of this Circuit:

> The question of whether equitable tolling applies is a legal one subject to *de novo* review . . . . We are, however, bound by the trial court's findings of fact unless they are clearly erroneous.

Cabello, Slip Op. at 6 (citations omitted). *See Drew v. Dep't of Corrections*, 297 F.3d 1278, 1283 (11th Cir. 2002) ("a district court's determinations of the relevant facts [on equitable tolling] will be reversed only if clearly erroneous") (citations omitted); *Knight v. Schofield*, 292 F.3d 709, 711 (11th Cir. 2002) (noting that each case of tolling "turns on its own facts").

The facts by which the panel was bound, unless it found them clearly erroneous, were that plaintiffs were prevented from suing defendants until 1992 because (1) plaintiffs, as victims of government-sponsored torture, were targeted for repression by the military government *headed by defendants* until 1989; (2) even after 1989 (not 1983), when Generals Vides-Casanova and Garcia left El Salvador for the United States, the Salvadoran military remained in power for three more years, during which time plaintiffs, or their friends and families remained subject to military reprisals; and (3) until 1992, plaintiffs had no ability to gather evidence in El Salvador.[4]

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[4] "[Bearing] in mind the testimony regarding the nature of the military in El Salvador, [its] cohesiveness, the fact that from the Plaintiffs' point of view, what was happening in San Salvador was being directed by the military [it is] unrealistic to suggest that the mere presence of General Vides here, while the military remained in power, where people either associated with, or related to or close to

The Opinion rejects these factual findings, yet fails to explain why they are clearly erroneous. The panel found that the "situation in El Salvador" was "irrelevant" because "most of the plaintiffs and all of the defendants were in the United States in the 1980s." Slip Op. at 14. This conclusion ignores the fact that defendant Vides-Casanova served as El Salvador's Minister of Defense until 1989, and as the district court found, the repressive nature of the Salvadoran military itself — *irrespective of whether the defendants remained in El Salvador* — prevented plaintiffs from pursuing their human rights claims in El Salvador or the United States.

The panel notes, with gross understatement, that prior to 1992, "people or entities" in El Salvador "may have hindered" plaintiffs, and that the Salvadoran government showed a "lack of cooperation" toward them. Slip Op. at 15. Such statements are far more than mere mischaracterizations of the evidence. They are, rather, *de novo* factual findings that reject the district court's determination that, prior to 1992, plaintiffs would have jeopardized their own lives and the lives of their families had they sued defendants, and that plaintiffs lacked the ability to gather evidence in El Salvador.

In contrast, the *Cabello* panel correctly recognized that the determination of "extraordinary circumstances" for equitable tolling purposes is "fact-specific," Slip.

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the Plaintiffs would be subject to reprisals. We are talking about the ability to gather evidence and take other actions that would be appropriate to maintaining a lawsuit." R17-1662, -1664-65 (ruling of Judge Hurley).

Op. at 10, and that a clear error standard applies to the district court's fact-finding. The *Cabello* panel properly deferred to the lower court's factual finding that circumstances in Chile "prevented the Cabello family from pursuing any efforts to learn of the incidents surrounding [Winston] Cabello's murder." *Id.* at 12.

Cabello underscores how the *Romagoza-Arce* panel improperly substituted its version of the facts for the detailed findings entered by the district court judge. *Cabello* and *Romagoza-Arce* feature similar facts, centering on defendants' actions in concert with others as part of repressive regimes that withheld critical information from human rights plaintiffs. *Compare Cabello* Slip. Op. at 11-12 and record evidence in *Romagoza-Arce* at R17-1662, 1664-65. The panel in *Romagoza-Arce* should have deferred to the underlying facts presented to the trial judge in support of his decision to equitably toll the statute of limitations until the end of the Salvadoran conflict and the restoration of civilian rule. The panel's failure to do so contravenes Eleventh Circuit law and requires rehearing or en banc review.[5]

III. THE PANEL'S OPINION CONFLICTS WITH CIRCUIT PRECEDENT THAT EQUITABLE TOLLING DOES NOT REQUIRE A SHOWING OF DEFENDANT MISCONDUCT

The panel's opinion "recognize[s] that defendant misconduct is not formally or always required for the application of equitable tolling." Slip Op. at 14, n.5.

[5] While the *Cabello* panel did attempt to distinguish its facts from the facts in this case (*Cabello*, Slip Op. at 10-12), its attempt relied upon the *Romagoza-Arce* panel's mistakes of fact and incomplete recitation of Judge Hurley's findings, and should not serve as a basis to distinguish the cases.

Indeed, it is well established that equitable tolling, unlike equitable estoppel, "does not require any misconduct on the part of the defendant." *Browning v. AT&T Paradyne*, 120 F.3d 222, 226 (11th Cir. 1997); *United States v. Beggerly*, 524 U.S. 38, 49 (1998) (Stevens, J., concurring) (doctrines of fraudulent concealment and equitable estoppel are "distinct" from equitable tolling).

Nonetheless, the panel repeatedly points to a supposed lack of defendant misconduct as a basis for rejecting equitable tolling in this case. *See* Slip Op. at 14 ("the plaintiffs fail to muster sufficient evidence of the *defendants'* involvement") (emphasis original), 16 ("denial does not rise to the level of misconduct usually required for equitable tolling"),[6] 18 ("nothing in the record suggests that anyone prevented Gonzalez from coming to the United States earlier"), 21 ("defendants' absence [from the U.S.] is not enough to toll the statute, especially given the lack

[6] The panel states that "it is common for people to deny wrongdoing, particularly when they are not under oath or when they have no duty to disclose. Indeed, to accept the plaintiffs' argument would be to impose upon litigants an affirmative duty to disclose information before litigation begins." Slip Op. at 17. While ordinary citizens normally have a duty to tell the truth only when under oath, these defendants were not ordinary citizens but were military commanders who had a duty to know, a duty to investigate, and a duty to punish and prevent. *Ford v. Garcia*, 289 F.3d 1283, 1288 (11th Cir. 2002). Even assuming *arguendo* that affirmative misconduct is required, for those with command responsibility, denying knowledge of torture and other atrocities when they had such knowledge and not acting to prevent the abuses or punish perpetrators is tantamount to affirmative misconduct. Moreover, even had the defendants merely been silent, they could still be liable because of their duties as military commanders. *Id.* Maintaining a code of silence, and protecting others who also maintained it, were not passive acts, but were rather part of a larger scheme to deceive. R19-1949; Plfs. Ex. 557 at R 3823; R19-1967-68.

of affirmative misconduct from the defendants"). Though the panel invokes a "totality of the circumstances" test for equitable tolling, the Opinion requires, as a practical matter, that a plaintiff establish defendant misconduct in order to obtain equitable tolling. That is not the law.

Not only does the panel's insistence on evidence of defendant misconduct conflict with the established law of this Circuit, it is particularly inappropriate in a command responsibility case such as this. The *Cabello* panel endorsed the district court's findings that the actions of the Chilean military government ***as a whole*** prevented the family from pursuing their claim. Slip Op. at 12. Similarly, the district court here relied on the misconduct of the Salvadoran military government ***as a whole***. It specifically noted the "nature of the military in El Salvador, [its] cohesiveness, the fact that from the Plaintiffs' point of view, what was happening was being directed by the military" to hold that plaintiffs would have been prevented from gathering evidence until, at least, the Salvadoran Peace Accords in 1992. R17-1660-65. Thus, the underlying factual predicates of both *Cabello* and *Romagoza-Arce*, are, in relevant part, directed to the same equitable concerns: that defendants should not be advantaged by their participation in a system which helped cover up their responsibility, be it direct or indirect, for participation in human rights atrocities. The panel seeks to justify its decision to deviate from this analysis by its cursory mention of the "ambient environment in El Salvador," Slip Op. at 14, and little else. Yet it is the military governments that created the climate

of repression responsible for plaintiffs' inability to pursue claims because the plaintiffs could not investigate or gain access to witnesses.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request rehearing by the panel or, in the alternative, rehearing by the full court sitting *en banc*.

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