



United States District Court Southern District of Florida

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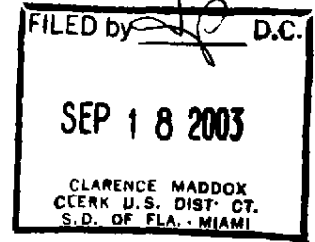
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 99-0528-CIV-LENARD/SIMONTON



ZITA CABELLO BARRUETO, in her capacity as personal representative of the Estate of Winston Cabello, and in her individual capacity, ELSA CABELLO, KAREN CABELLO MORIARTY, and ALDO CABELLO,

Plaintiffs,

vs.

ARMANDO FERNÁNDEZ LARIOS,

Defendant.

OMNIBUS ORDER ON MOTIONS IN LIMINE

THIS CAUSE is before the Court on the following Motions in Limine: Plaintiffs' Motion in Limine #1 for a Pretrial Order Permitting Plaintiffs to Present evidence of the Existence of and Facts Underlying Defendant's 1987 Conviction as an Accessory After the Fact to the Murder of an Internationally Protected Person (D.E. 191); Plaintiffs' Motion in Limine #2 for a Pretrial Order Permitting Plaintiffs to Offer Evidence Concerning Defendant's Role in the Disappearance of David Silberman Gurovich (D.E. 193); Defendant's Motion in Limine to Preclude Introduction of Defendant's Previous Conviction (D.E. 198); and Defendant's Motion in Limine to Restrict Evidence to Events Relating to

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Treatment of Winston Cabello (D.E. 199).¹ Both parties filed Responses. (D.E. 205, 206, 209, 210.) As of the deadline for filing replies, none had been filed. Upon review of the Motions and the Responses, the Court directed the parties to file supplemental response and reply memoranda. Defendant filed a Supplemental Response to Plaintiffs' Motion in Limine #2 on June 30, 2003. (D.E. 228.) Plaintiffs filed a Supplemental Opposition to Defendant's Motion to Restrict Evidence to Treatment of Winston Cabello on June 30, 2003. (D.E. 231.) Both sides filed Replies on July 11, 2003. (D.E. 233, 234.) Having considered the Motions, the Responses, the supplemental materials, the Replies and the record, the Court finds as follows.

I. Introduction

This case involves allegations that Defendant participated in extrajudicial killing, torture, and crimes against humanity in Chile after President Salvador Allende was removed from power and replaced by a military junta in a *coup d'etat* headed by General Agosto Pinochet on September 11, 1973.² Plaintiffs are the family members of Winston Cabello, an economist under the Allende government, who was allegedly killed in Copiapó, Chile, on October 16, 1973, by agents of the Pinochet regime, as part of a series of killings and disappearances in a two-month period that became known as the "Caravan of Death."

¹ Defendant also filed a Motion in Limine to Preclude Expert Testimony (D.E. 200), which the Court will address in a separate written order.

² A thorough summary of Plaintiff's allegations is set forth in the Court's Order Denying Defendant's Second Amended Complaint, dated June 5, 2002 (D.E. 168).

Plaintiffs filed the initial Complaint in this case on February 19, 1999, and an Amended Complaint on April 7, 1999. Defendant filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and a Motion for Summary Judgment, or in the Alternative, Motion to Dismiss, on May 24, 1999. The Court granted in part and denied in part the Motion to Dismiss for Lack of Subject Matter Jurisdiction, and denied the Motion for Summary Judgment and/or to Dismiss, on August 10, 2001.

Plaintiffs filed a Second Amended Complaint on September 17, 2001. The Second Amended Complaint alleges the following causes of action against Defendant: (1) extrajudicial killing (first through third claims); (2) torture (fourth claim); (3) crimes against humanity (fifth and sixth claims); and (4) cruel, inhuman or degrading treatment or punishment (seventh and eighth claims). Defendant filed a Motion to Dismiss the Second Amended Complaint on November 2, 2001. The Court denied the Motion to Dismiss on June 5, 2002. The parties engaged in extensive discovery, however, neither Defendant nor Plaintiff filed motions for summary judgment. As trial approached, the parties filed these Motions in Limine, which essentially require the Court to determine the scope of the issues for trial.

II. Standard of Review

All evidence is subject to certain basic principles of admissibility under the Federal Rules of Evidence. Rule 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action

more probable or less probable than it would be without the evidence.” FED. R. EVID. 401. Rule 402 provides that all relevant evidence is admissible, except as otherwise provided by federal law or rule, and evidence which is not relevant is not admissible. FED. R. EVID. 402. Thus, the Court must determine, first, whether the evidence that Plaintiffs seek to introduce and/or Defendant seeks to exclude is relevant to any fact of consequence to the determination of this case. If the evidence is relevant, the Court must then consider Rule 403, which provides that, “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403.

III. Defendant’s Motion to Restrict Evidence to Treatment of Winston Cabello

In Defendant’s Motion in Limine to Restrict Evidence to Treatment of Winston Cabello, Defendant seeks to narrow the scope of Plaintiffs’ case to the events that occurred in Copiapó, Chile on the evening of October 16, 1973, and particularly any interaction between Defendant and Plaintiffs’ decedent, Winston Cabello, who was killed that night outside of Copiapó. Defendant asserts that any other evidence would only serve to inflame the jury against the Pinochet regime and unfairly prejudice Defendant.

In response, Plaintiffs argue that evidence concerning what happened in each of the cities that the Caravan visited is relevant to this action, particularly for Plaintiffs to prove that Defendant committed crimes against humanity, as alleged in the Second Amended

Complaint. Plaintiffs contend that the killing of thirteen prisoners, including Cabello, as a group in Copiapó is clearly relevant. In addition, Plaintiffs assert that the killings at Copiapó cannot be separated, legally or factually, from those that occurred in other cities during the Caravan's visits, and that the killings in the various cities are intertwined due to the nature of the Caravan's mission – to destroy the perceived opponents of the junta, to eliminate opposition to its regime, and to instill fear in the Chilean population. Alternatively, Plaintiffs argue that the evidence is admissible under Federal Rules of Evidence 404(b) and 608-609, because Defendant has placed his knowledge and intent at issue, and his credibility will be at issue because he denies having seen or interacted with the prisoners, including at Copiapó. In their Supplemental Opposition to Defendant's Motion to Restrict Evidence to Treatment of Winston Cabello, Plaintiffs list nineteen facts which they assert to be material, and the evidence establishing them relevant, to the claims against and defenses of Defendant. The Court will consider each of these alleged facts and the evidence cited in support to determine the scope of the evidence that will be admitted at trial, to the extent that such determination can be made prior to the actual trial.

Plaintiffs' "Fact No. 1" is that Defendant was one of the first officers to enter the presidential palace on the day of the *coup d'etat*, where he found the body of President Salvador Allende. According to Plaintiffs, a local garrison commander testified that Defendant was famous as the "hero of La Moneda," for giving his own handkerchief to General Palacios Rhuman, who had injured himself. Plaintiffs claim this evidence is relevant

to establishing Defendant's motive, intent, and knowledge. In response, Defendant argues that Plaintiffs have not established a sufficient connection between Defendant and Winston Cabello, and that this evidence is irrelevant. The Court finds that evidence of Defendant's participation in the coup that brought Pinochet to power is not probative of any material issue and is irrelevant to the primary issue at hand, i.e., Defendant's role in the Caravan of Death. This evidence would unnecessarily confuse the jury and waste time on issues outside the scope of the disputed issues in this case. Therefore, evidence concerning Fact No. 1 will not be admissible at trial.

Plaintiffs' Fact No. 2 is that General Sergio Victor Arellano Stark assumed control over the local Army commanders shortly after the coup. Plaintiffs seek to introduce Arellano's letter rogatory response acknowledging that Pinochet designated him as the junta's "official delegate," and the testimony of local Army commanders, who indicated that Arellano had control over them.³ Defendant points out, correctly, that Arellano actually testified that General Pinochet ordered him to travel to northern Chile in 1973, not that he was Pinochet's "official delegate." Defendant also argues that the deposition testimony of the local garrison commanders, Rivera and Lapostol, is inadmissible because it does not connect Defendant with the killing of Winston Cabello or anyone else. Upon review of the

³ Ariosta Lapostol Orrego, commander of the Arica Regiment in La Serena, testified that Arellano indicated that he was representing General Pinochet and that he was "delegated by Pinochet." (A. Lapostol Dep. at 13.) Rivera, the garrison commander at Calama, testified that Arellano showed him an official document proving that Arellano had been authorized by the Commander in Chief of the Army and the President of the military junta, Augusto Pinochet Ugarte. (Rivera Dep. at 31.)

letter rogatory responses and the deposition testimony, the Court finds the evidence relevant to show that Arellano, as Defendant's superior officer, was acting directly under the orders of the Chilean leader, General Augusto Pinochet, and, thus, any actions taken at his command were taken "under color of law."

Third, Plaintiffs seek to introduce Defendant's admission that he was aware that his squad was connected with the deaths of four prisoners in Cauquenes, a city in southern Chile which the squad visited before returning to Santiago and moving on to northern Chile, including Copiapó, where Cabello was killed. Plaintiffs argue that the fact that Defendant did not report the deaths at Cauquenes when the squad returned to Santiago is probative on a number of issues, including: Defendant's knowledge of the objective of his squad and their role in killing political prisoners; to establish the existence of a conspiracy, its objectives, and Defendant's membership in it; his knowledge that he performed acts that assisted in human rights abuses and that the killings were extrajudicial; the torture was for a discriminatory purpose; and the misconduct was widespread and systematic. Defendant argues that he actually testified that he did not know when he learned that people were killed in Cauquenes. A review of Defendant's deposition testimony indicates that Defendant stated repeatedly that he did not know when he learned that four people were killed in Cauquenes, but, ultimately, he testified that he thought he was aware of the Cauquenes killings when he was in Santiago and that he did not talk to his superior officer about it. (Def.'s Dep. Vol. I at 112-13.) The Court finds that this evidence is relevant to the issue of whether Defendant participated in

a widespread or systematic attack directed against any civilian population, and may be considered as circumstantial evidence of Defendant's knowledge of these events.⁴ Of course, this evidence is relevant only if Plaintiffs can connect Defendant to the killing of Cabello, either directly or as an aider, abettor or conspirator, but that will remain to be determined at trial.

In Fact Nos. 4 and 5, Plaintiffs seek to introduce evidence related to La Serena, a city in northern Chile which the Caravan visited before Copiapó, to show that the objective in La Serena, as in other cities visited by the squad, included killing prisoners held by the military, and that Defendant killed prisoners in La Serena. In particular, Plaintiffs seek to introduce the letter rogatory responses of General Sergio Arredondo Gonzalez, who states that the mission was to verify the presence of prisoners and eliminate them, and that he saw Defendant participate in the killing of prisoners at La Serena. (Arredondo Letter Rogatory Resp. 18, 19, 21(l)-(n).) Defendant argues that this evidence is irrelevant because it pertains to events outside Copiapó. The Court finds that this evidence is relevant to the determination of whether Defendant knowingly participated in widespread or systematic crimes against humanity, whether the killings that occurred in Copiapó were part of a deliberate plan, and whether Defendant participated in a conspiracy which included the killing of Winston

⁴ In Claims V and VI, Plaintiffs allege that Defendant participated in crimes against humanity. The Rome Statute of the International Criminal Court defines a "crime against humanity" as any of certain enumerated acts prohibited by international law, including murder and torture, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Rome Statute, art. 7; see Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1353 (N.D. Ga. 2002).

Cabello.

Plaintiffs' Fact Nos. 6 through 12 concern the events in Copiapó on the night Winston Cabello was killed, including (as listed by Plaintiffs): (Fact No. 6) Defendant was armed with a variety of weapons, including some designed to inflict severe injuries, when he debarked from the helicopter in Copiapó; (7) Defendant sought information about, and threatened, prisoners in Copiapó; (8) Defendant crushed a Copiapó prisoner's face, likely causing fatalities; (9) Defendant assisted in selecting and extracting prisoners to be killed in Copiapó; (10) the prisoners were killed late at night along the road south of Copiapó; (11) the bodies of Winston Cabello and the other prisoners in Copiapó showed signs of violence that were likely inflicted by the weapons Defendant carried; and (12) Defendant was present at the burial of the thirteen prisoners in Copiapó. Defendant argues that the evidence cited by Plaintiffs should not be admitted because none of it ties Defendant directly to the killing of Cabello. As this Court has already ruled, however, Defendant may be held liable if he aided and abetted or conspired to commit the violations alleged in the Second Amended Complaint, and, of course, Plaintiffs are entitled to build a case based on circumstantial evidence. Thus, the Court finds that any evidence related to the helicopter's stop at Copiapó on October 16, 1973 and the killing and burial of the prisoners, including Cabello, goes to the very heart of this case. Specific evidentiary rulings may become necessary at trial, but at the present stage the Court finds all of the evidence related to the events at Copiapó admissible.

In Fact Nos. 13 and 14, Plaintiffs cite to evidence that Defendant killed prisoners in Antofagasta and Calama, two cities visited by the Caravan a few days after Copiapó. Defendant argues that such evidence is inadmissible as it does not constitute circumstantial evidence that Defendant participated in the wrongful acts committed against Cabello in Copiapó, and because extrinsic acts may not be introduced to show propensity. The Court finds that this evidence is relevant and admissible in Plaintiffs' presentation of the evidence, to prove that the killing of Cabello was part of a widespread and systematic attack carried out against Allende supporters after the coup, and to prove that Defendant was part of a conspiracy whose foreseeable consequences included the killing of Cabello.

Plaintiffs' Fact No. 15 is that Defendant was a member of Arellano's squad when they participated in killing prisoners in southern Chilean cities and later, northern Chilean cities. As the scope of the alleged "crimes against humanity" encompasses the Caravan of Death, the Court finds that the Caravan's two-month trip throughout Chile is directly relevant to the issues in this case.

Plaintiffs' Fact No. 16 is that at the time of the killings in September-October 1973, Defendant was aware of the connection between the Caravan and the deaths of prisoners. In particular, Plaintiffs seek to introduce Defendant's admission that he knew about the deaths of prisoners in Cauquenes, La Sercna, Copiapó, Antofagasta, and Calama, and that he knew of the connection between Arellano's squad to the deaths of the prisoners in each of those cities at the time. Defendant argues that this evidence is irrelevant because Plaintiffs

are attempting to impose a negligence standard where it does not exist, when the Eleventh Circuit requires a “knew or should have known” standard, and that Plaintiffs have not alleged that Defendant maintained effective command control in those cities. It appears that Defendant is referring to Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002), in which the Eleventh Circuit discusses the “effective command and control” theory of liability. Plaintiffs in this case are not attempting to impose the command-and-control theory of liability, however. As the Court ruled in the Order Denying Defendant’s Motion to Dismiss the Second Amended Complaint, Defendant may be held liable if he aided and abetted and/or conspired to commit the alleged violations against Winston Cabello. Thus, this evidence is relevant and admissible.

In Fact No. 17, Plaintiffs seek to introduce Defendant’s admission that he joined the DINA (“Dirección de Inteligencia Nacional” – the Chilean secret police organization) in October or November 1973. Plaintiffs assert that evidence of Defendant’s membership in the DINA, “a notoriously secretive and brutal state security instrument under Pinochet’s control, during or just after the killings of over 72 civilian prisoners by Fernández’s squad, is relevant to establishing that, regardless of rank, Defendant was a trusted Pinochet operative, which is relevant to his motive, intent and knowledge.” In response, Defendant argues that evidence of his membership in the DINA is irrelevant, and that Plaintiffs are merely using it to show propensity. The Court finds that Defendant’s membership in DINA is not probative of any fact to be determined, since he did not join the DINA until after

Cabello was killed in Copiapó. Given that Defendant has admitted he was on the helicopter tour that later became known as the Caravan of Death, the Court finds that evidence relating to Defendant's subsequent activities in the Chilean military and/or secret police is irrelevant and, even if slightly probative, would be repetitious, cumulative and overly prejudicial.

In Facts No. 18 and 19, Plaintiffs seek to introduce evidence related to the 1974 disappearance of David Silberman Gurovich and Defendant's 1987 conviction as an accessory-after-the-fact to murder of an internationally protected person, both of which are the subject of separate Motions in Limine, which the Court will discuss below.

IV. Defendant's Alleged Role in the Disappearance of David Silberman

In their Motion in Limine #2, Plaintiffs seek to introduce two pieces of evidence related to the disappearance of David Silberman Gurovich in October, 1974, and Defendant's alleged role therein. Silberman was the general manager of the Cobre-Chuqui copper mine during the Popular Unity government of Salvador Allende. Plaintiffs seek to introduce the deposition testimony of Jorge Ortiz Aedo ("Ortiz deposition"), who was the acting warden of the Santiago penitentiary in October, 1974, when Silberman was removed from the jail by a member of the military and/or DINA, who allegedly used false identification papers. Ortiz testified that he later identified Defendant Fernández Larios from a photograph as the man who removed Silberman from the Santiago prison in October, 1974. In addition, Plaintiffs seek to introduce the factual findings and conclusions of the Rettig Commission ("Rettig

Commission Report”), with respect to the Silberman disappearance.⁵ In relevant part, the Rettig Commission concluded that “it is possible to come to the conviction that the DINA was responsible for abducting David Silberman, and that he disappeared in its hands in violation of his human rights.” (Rettig Comm’n Rep. at 563.) Plaintiffs claim that both pieces of evidence are relevant and admissible because Silberman’s disappearance and presumed murder are “inextricably intertwined” with the events surrounding the Caravan of Death. Plaintiffs’ argument rests on their contention that the Silberman disappearance and the Caravan of Death are just two examples of Defendant’s participation in a number of crimes against civilians on behalf of the regime.

Alternatively, Plaintiffs contend that the Ortiz deposition and the Rettig Commission Report are admissible under Rule 404(b) to show Defendant’s knowledge and intent concerning the purpose of the Caravan’s travels, and its role in the death of prisoners like Winston Cabello. Plaintiffs assert that Defendant’s intent and knowledge at the time of the Caravan are at issue in this case based on Defendant’s denial that he had any contact with the prisoners killed by the Caravan and his insistence that as the lowest-ranking officer on the Caravan he cannot be held responsible for the killings. Plaintiffs argue that the Ortiz deposition and Rettig Commission Report “shed[] light on his knowledge about the

⁵ The Rettig Commission, formally the “Chilean National Commission on Truth and Reconciliation,” was commissioned by Chilean President Patricio Aylwin Azocar, who was elected to replace Pinochet in December, 1989, to examine the crimes and human rights abuses committed during the Pinochet regime. The Commission was not empowered to assign responsibility to particular individuals, but, rather, was to discover and report the truth of allegations made by victims and their families. The Commission issued its Report to President Aylwin on February 9, 1991.

Caravan's purpose and indicate[] that he was not merely along for the ride as he suggests.”
(Mot. in Limine No. 2 at 10.)

In response, Defendant reiterates his position that none of the evidence concerning events outside of Copiapó is relevant to the determination of this case, and that the evidence concerning Silberman's disappearance is irrelevant because Plaintiffs have shown no nexus between the alleged disappearance and the events that occurred in Copiapó. In addition, Defendant argues that the Rettig Commission Report is hearsay and inadmissible under Federal Rule of Evidence 803(8)(C), particularly because the evidence is untrustworthy. Furthermore, Defendant contends that the evidence concerning Silberman's disappearance is inadmissible under Rule 404(b), because such evidence of extrinsic acts is not offered for a proper purpose, but merely to establish bad character and suggest conforming behavior, and because the evidence has little probative value and is unfairly prejudicial.

In the Court's view, the evidence related to Silberman's disappearance and presumed murder is not “inextricably intertwined” with the events that occurred during the Caravan of Death, since the alleged disappearance of Silberman occurred approximately a year after the Caravan, with no direct evidence linking the two events. However, the Court agrees with Plaintiffs' alternate argument that the evidence is admissible under Rule 404(b) as evidence of “other bad acts” to show Defendant's knowledge about the true purpose of the Caravan and his intent as a participant in the Caravan.

Rule 404(b) of the Federal Rules of Evidence states in pertinent part: “Evidence of

other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident..." Fed. R. Evid.. 404(b). In United States v. Miller, 959 F.2d 1535 1538 (11th Cir. 1992) (en banc), the Eleventh Circuit outlined a three-part test to be used by courts in evaluating the admissibility of evidence under Rule 404(b), as follows.

First, the evidence must be relevant to an issue other than the defendant's character. Second, as part of the relevance analysis, there must be sufficient proof so that a jury could find that the defendant committed the extrinsic act. Third, the evidence must possess probative value that is not substantially outweighed by its undue prejudice, and the evidence must meet the other requirements of Rule 403.

Id. at 1538 (citing Huddleston v. United States, 485 U.S. 681, 689 (1988); United States v. Beechum, 582 F.2d 898, 912-13 (5th Cir. 1978)⁶).

A. Ortiz Deposition

In the instant case, the Court finds that the Ortiz deposition is admissible under the Miller three-part test. First, the Ortiz' testimony is relevant to the issue of Defendant's knowledge regarding the purpose of the Caravan and his intent to participate in the acts committed by the Caravan, and is not offered merely to establish bad character as Defendant suggests.⁷ In addition, there is sufficient proof to allow a jury to find that Defendant

⁶ The United States Court of Appeals for the Eleventh Circuit has adopted as binding precedent all decisions rendered by the former Fifth Circuit prior to October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

⁷ It should be noted that the Ortiz deposition is being admitted only for the purposes listed above. Any mention of DINA or Defendant's alleged relationship with that organization is excluded, based

committed the extrinsic act. In Huddleston, the Supreme Court held that the similar act evidence is relevant under Rule 404(b) where a jury could reasonably find that the act occurred and that the defendant was the actor by a preponderance of the evidence. 485 U.S. at 690. Furthermore, the Eleventh Circuit has held that the uncorroborated word of an accomplice is sufficient to satisfy the Huddleston standard. United States v. Bowe, 221 F.3d 1183, 1192 (11th Cir. 2000); see United States v. Trevino, 565 F.2d 1317, 1319 (5th Cir. 1978). In Bowe, the defendant was a Bahamian attorney whose representation of criminal defendants led to his indictment on charges of conspiracy to import cocaine. 221 F.3d at 1187. The Eleventh Circuit found that the testimony of a cooperating witness regarding the defendant's efforts to protect her drug smuggling operations was admissible to prove defendant's intent in his subsequent dealings with other clients, where the witness' testimony was detailed, specific and based on personal observations and where the witness admitted to gaps in her knowledge. Id. at 1192.

In the instant case, Defendant argues that Ortiz' statements are "questionable" because he identified Defendant as the officer who took Silberman out of the penitentiary from a photograph some twenty years after the fact.⁸ However, the Court finds that Ortiz' testimony is detailed and specific, relates his personal observations of events at the penitentiary, and is at least partially corroborated by the Rettig Commission Report . In addition, based on

on the Court's prior ruling that Defendant's membership in DINA is not probative of any fact to be determined in this case.

⁸ Ortiz testified that the officer in charge of the patrol identified himself as "Alejandro Quinteros."

Ortiz' testimony that as warden of the Santiago penitentiary he routinely turned over prisoners to military patrols, the Court concludes that Jorge Ortiz Aedo was an accomplice in the disappearance of prisoners like Silberman. Therefore, his uncorroborated testimony is admissible as 404(b) evidence consistent with the holding of the Eleventh Circuit in Bowe.

Finally, the Court finds that the probative value of the Ortiz deposition is not substantially outweighed by its prejudicial effect. In Beechum, 582 F.2d at 914-15, the Eleventh Circuit held that a court should consider the overall similarity of the extrinsic and charged offenses in order to measure the probative value of proffered 404(b) evidence. Although the disappearance of Silberman occurred one year after the Caravan of Death, both Silberman and the prisoners killed by the Caravan were allegedly taken from their prison cells by agents of the military junta and are believed to have been killed not long after their disappearances. In light of these facts and Defendant's repeated denials of culpability, the Court finds that Ortiz' testimony has substantial probative value on the issue of Defendant's knowledge and intent. Moreover, the Court will be able to mitigate any prejudice by instructing the jury that the extrinsic evidence is only to be considered for the limited purposes of demonstrating Defendant's intent and knowledge regarding the acts alleged in the Second Amended Complaint. See Beechum, 582 F.2d at 917.

B. The Rettig Commission Report

As for the Rettig Commission Report, the Court agrees with Plaintiffs that it falls within the public records exception to the hearsay rule and, therefore, is not excludable as hearsay. Fed. R. Evid. 803(8)(C). However, the Court finds the contents of the Report less

probative than the Ortiz deposition testimony, as the Report never specifically identifies Defendant as the military officer who took Silverman from the penitentiary in October 1974. Furthermore, in light of the Court's admission of the Ortiz deposition, the introduction of the Rettig Commission Report is unnecessary as it would be offered merely to repeat and confirm Ortiz' testimony. For this reason, the Court finds that Rettig Commission Report, although relevant and of some probative value, would be repetitious, cumulative and cause undue delay and waste of time. Thus, the Report is excluded under Rule 403, except as possible rebuttal evidence.

V. Defendant's 1987 Conviction

Both sides have filed motions in limine with respect to evidence of Defendant's 1987 conviction as an accessory-after-the-fact to murder of an internationally protected person, Chilean Foreign and Defense Minister Orlando Letelier, and his aide Ronni Moffitt, who were killed in a car bombing in Washington D.C. on September 21, 1976. The evidence indicates that Defendant pled guilty in 1987 in a Washington D.C. federal district court to being an accessory-after-the-fact to the 1976 murder of Letelier and Moffitt, by giving false testimony and providing false information to prevent the extradition to the United States of certain persons involved in the car bombing. Defendant seeks to preclude the introduction at trial of Defendant's previous conviction or any mention of Defendant's involvement in the 1976 car bombing, because the prior conviction is irrelevant and inadmissible under Rule 404(b). In addition, Defendant argues that such evidence has little probative value but has great potential to unfairly prejudice the jury against Defendant, because the evidence would

create an improper inference of guilt. Alternatively, Defendant contends that the evidence is inadmissible under Rule 609, for purposes of impeachment, because the conviction is more than ten years old. Further, Defendant asserts that a limiting instruction would not be an adequate solution to the low probative value and highly prejudicial effect of Defendant's prior conviction.

Plaintiffs seek to introduce Defendant's prior conviction and evidence related to the 1976 car bombing, on grounds that it is inextricably intertwined with the Caravan of Death because each event was part of a continuing scheme by the Pinochet regime to destroy its perceived civilian opponents, and Letelier was a particular target of the Pinochet regime because he symbolized the deposed Allende government. Plaintiffs assert that both the Caravan and the Letelier car bombing were directed by the junta; that certain individuals (including Defendant and Pedro Espinoza Bravo) were involved in both events; and that Defendant was involved in both because he was a member of the Pinochet regime's Army and secret police, the DINA. In addition, Plaintiffs argue that the Letelier assassination is linked to the Caravan through certain witnesses, who have identified Defendant as a result of the publicity surrounding his 1987 guilty plea. Alternatively, Plaintiffs contend that the underlying facts concerning Defendant's conviction are admissible under Rule 404(b), on the issues of motive, knowledge and intent concerning Defendant's membership in the Caravan. Plaintiffs assert that Defendant's conviction proves that: (1) he was a loyal operative of the Pinochet regime; (2) he was willing to participate in killing its enemies; and (3) he was entrusted with executing its most sinister plots against civilians. In both cases, Plaintiffs

contend, Defendant claims to have been a mere functionary, and both events were conducted in military secrecy. Thus, Plaintiffs claim, proof of Defendant's conviction is relevant to determining his culpability for the claims alleged relating to the Caravan of Death.

Having reviewed the evidence, including the transcript of Defendant's Rule 11 hearing, the plea agreement and the various court opinions which implicate Defendant in several ways, the Court finds that the 1976 car bombing and Defendant's role therein are irrelevant to the issues in this case. Alternatively, even if Defendant's conviction and his alleged role in assisting with preparation for the car bombing were relevant to the issues of knowledge and intent in this case, the Court finds this evidence inadmissible under Rule 403, due to the substantial risk of prejudice to Defendant, combined with the risk of confusion of the issues and the significant amount of time which could be spent presenting evidence to the jury which is not very helpful to the determination of the actual issues at hand. This case is about the death of Plaintiffs' relative and determining Defendant's role therein. To the extent that Plaintiffs can show that Defendant participated in crimes against humanity during the discrete two-month period of the "Caravan of Death," the scope of this case extends beyond the single death of Winston Cabello in Copiapó on October 16, 1973, but no further.

Accordingly, it is

ORDERED AND ADJUDGED that:

1. Plaintiffs' Motion in Limine #1 for a Pretrial Order Permitting Plaintiffs to Present evidence of the Existence of and Facts Underlying Defendant's 1987 Conviction as an Accessory After the Fact to the Murder of an Internationally Protected Person (D.E. 191), is


DENIED.

2. Plaintiffs' Motion in Limine #2 for a Pretrial Order Permitting Plaintiffs to Offer Evidence Concerning Defendant's Role in the Disappearance of David Silberman Gurovich (D.E. 193), is **GRANTED IN PART AND DENIED IN PART**, consistent with this Order.

3. Defendant's Motion in Limine to Preclude Introduction of Defendant's Previous Conviction (D.E. 198), is **GRANTED**.

4. Defendant's Motion in Limine to Restrict Evidence to Events Relating to Treatment of Winston Cabello (D.E. 199), is **GRANTED IN PART AND DENIED IN PART**, as set forth in the body of this Order.

DONE AND ORDERED in Chambers at Miami, Florida this 18th day of September, 2003.



JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

cc: United States Magistrate Judge Andrea M. Simonton
All counsel of record
99-0528-CIV-LENARD/SIMONTON