

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 99-0528-CIV-LENARD

ESTATE OF WINSTON CABELLO,
et al.

Plaintiffs,

v.

ARMANDO FERNÁNDEZ-LARIOS,

Defendant.

_____ /

PLAINTIFFS' OPPOSITION TO DEFENDANT'S
MOTION FOR JUDGMENT AS A MATTER OF LAW, MOTION FOR NEW TRIAL
AND MOTION FOR REMITTITUR

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INTRODUCTION

The evidence adduced at trial proved that Defendant was either directly or secondarily liable as an aider and abettor or conspirator for the claims of extrajudicial killing, torture, and cruel, inhuman, or degrading punishment or treatment, arising from the killing of Winston Cabello Bravo. Moreover, the proof established that Mr. Cabello's death was not an isolated incident. Instead, the jury correctly concluded that his death was part of a larger scheme carried out by the squad of which Defendant admittedly was a member; in at least five cities in the north of Chile, Defendant and his squad killed at least 72 civilian prisoners of the military who were perceived to be opponents of the Pinochet regime. Thus, the jury found that Defendant was directly or secondarily liable for the crimes against humanity of which Mr. Cabello's killing was a part.

Defendant's motions ignore the totality of the evidence. They selectively discuss only evidence that other military officers had a part in Mr. Cabello's mistreatment and death, and avoid any discussion of Defendant's own role in these offenses. When taken as a whole, however, the evidence conclusively establishes Defendant's liability. Because Defendant has not carried his burden of showing that the verdict was not supported by substantial evidence, or that there was any prejudicial error, or that substantial justice was not done, there is no basis on which to grant his motions for judgment as a matter of law under FED. R. CIV. P. 50(a), for a new trial under FED. R. CIV. P. 59(a), or for remittitur.

The jury's award of \$3 million compensatory and \$1 million punitive damages is not only warranted by the evidence, it is significantly lower than damages awards in other cases brought under the Alien Tort Claims Act ("ATCA") 28 U.S.C. §1350 or the Torture Victim Protection Act ("TVPA") 28 U.S.C. §1350 note. Given the brutality of the offenses committed against Mr. Cabello and the jury's determination that Defendant was liable for those violations, the \$4 million verdict is low but reasonable. Thus, there is no basis for remitting any portion of the damages, and Defendant's motions should be denied.

STANDARDS

A. Motion for Judgment as a Matter of Law

A court may grant judgment as a matter of law if “a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue . . .” FED. R. CIV. P. 50(a)(1). “When considering a motion for judgment as a matter of law, the court ‘must consider all of the evidence and reasonable inferences arising therefrom in the light most favorable to the nonmoving party’ and ‘may not weigh the evidence or decide the credibility of witnesses.’” *SEC v. Adler*, 137 F.3d 1325, 1340 (11th Cir. 1998), quoting *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 439 (11th Cir. 1996); see also *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999). “The motion should be granted only if the evidence points so overwhelmingly in favor of one party that no reasonable person could draw a contrary conclusion.” *Martinez v. City of Opa-Locka*, 971 F.2d 708, 711 (11th Cir. 1992); *Mendoza*, 195 F.3d at 1244 (“the existence of a genuine issue of material fact precludes judgment as a matter of law;” where more than a “mere scintilla of evidence” exists, the motion cannot be granted); see also ROBERT E. JONES & GERALD E. ROSEN, FEDERAL CIVIL TRIALS & EVIDENCE 13:32 (2003) (citing *Adler*, 137 F.3d at 1340).

B. Motion for a New Trial

The party requesting a new trial has a heavy burden; he must show that he has suffered prejudicial error or that substantial justice has not been done. *Florida Mun. Liab. Self Insurers Program v. Mead Reinsurance Corp.*, 796 F. Supp. 509, 514 (S.D. Fla. 1992) (citing *Del Rio Dist., Inc. v. Adolph Coors Co.*, 589 F.2d 176, 179 n.3 (5th Cir. 1979) (“Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial.”) (quoting 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2803 (1973 and 1991 supp.)). New trials should be granted only when “the verdict is against the clear weight of the evidence . . . or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the

direction of a verdict.”” *Ames v. Provident Life and Accident Ins. Co.*, 942 F. Supp. 551, 555 (S.D. Fla. 1994), *aff’d*, 86 F.3d 1168 (11th Cir. 1996), quoting *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984). “In ruling on a motion for new trial, the trial judge is permitted to weigh the evidence, but to grant the motion he must find the verdict contrary to the great, not merely the greater, weight of the evidence.” *Watts v. Great Atl. & Pac. Tea Co.*, 842 F.2d 307, 310 (11th Cir. 1988). “However, deference must be accorded to a jury’s verdict; it should not be overturned except ‘under most compelling of circumstances’ where it is seriously erroneous.” *Bell v. Potter*, 234 F. Supp. 2d 91, 100 (D. Mass. 2002), quoting *Flores-Suarez v. Turabo Med. Ctr.*, 165 F. Supp. 2d 79, 85 (D.P.R. 2001).

FACTUAL BACKGROUND

After a three-week trial, on October 15, 2003, the eight-person jury unanimously rendered a verdict for Plaintiffs on each of their claims. The jury’s verdict, which was reduced to a judgment entered by this Court on October 31, 2003, awarded the Plaintiffs a total of \$3 million compensatory damages and \$1 million punitive damages.

Both parties had a full opportunity to present evidence supporting their claims and theories to the jury. Plaintiffs presented the videotaped testimony of seven witnesses on direct and cross-examination,¹ the live testimony of six witnesses including the Defendant, read excerpts of letters rogatory responses from seven witnesses on direct and cross-examination, read the statements of two witnesses made to Chilean investigators, and introduced certain of the Defendant’s own admissions. The jury was not permitted to hear evidence regarding Defendant’s membership in Chile’s brutal secret police, the DINA. Nor was it permitted to hear that Defendant had participated in one of the most notorious events in Chilean and U.S. history — the 1976 assassination of the former Chilean ambassador to the United States,

¹ On September 23, 2003, the Court ruled that Plaintiffs would not be permitted to introduce testimony taken at voluntary depositions conducted in Chile prior to August 29, 2001, but that videotaped testimony of depositions taken after that date was admissible, because Defendant waived his objections to the manner in which the depositions were conducted.

Orlando Letelier, in Washington, D.C. — for which Defendant was convicted of a federal felony offense in 1987.

Although Defendant did not notice the depositions of anyone in Chile, in addition to cross-examining the witnesses who testified in the courtroom, Defendant read excerpts of the letters rogatory responses of seven witnesses on direct and cross-examination, presented additional portions of the videotaped depositions, and read to the jury statements made by two witnesses to Chilean investigators. Neither at trial, nor in his post-trial motions, has Defendant contended that he was denied an opportunity to present all available evidence, including evidence supporting his contention that local military officers actually killed the thirteen prisoners in Copiapó.

ARGUMENT

I. Plaintiffs' Claims are Not Time-Barred

Defendant argues that he is entitled to judgment as a matter of law because Plaintiffs' claims are time-barred. This Court has repeatedly addressed this issue, each time ruling that the statute of limitations was tolled until 1990, when the bodies of the thirteen prisoners killed at Copiapó on October 17, 1973 were located and exhumed. Thus, the Court has conclusively determined that the filing of Plaintiff's initial complaint in February 1999 was within the TVPA's ten-year limitations period, which the Court also held applies to the ATCA claims. *See Cabello Barrueto v. Fernández-Larios (Cabello II)*, 205 F. Supp. 2d 1325, 1330-1331 (S.D. Fla. 2002); *Estate of Cabello v. Fernández-Larios (Cabello I)*, 157 F. Supp. 2d 1345, 1367-68 (S.D. Fla. 2001).²

² In *Cabello II*, the Court reaffirmed its prior ruling that, under the principles of equitable tolling, the statute of limitations was tolled until 1990. *Cabello II*, 205 F. Supp. 2d at 1330-1331. The Court based its ruling on the Chilean military's deliberate concealment of the location and condition of the bodies and the confusion caused by the Chilean government's issuance of three different death certificates between 1973 and 1991. The Court further found that, once the junta was replaced with an elected civilian government in 1990, the tolling ceased. *See also Cabello I*, 157 F. Supp. 2d at 1367-68.

Defendant has presented no new facts or law, and makes no new arguments regarding why this Court should reverse its prior decisions and now find that Plaintiffs' claims are time-barred. Thus, his motion for judgment as a matter of law on that basis should be denied.

II. Because the Evidence Overwhelmingly Supports the Verdict, Defendant's Motions for Judgment as a Matter of Law and For a New Trial Must be Denied

Without discussing any of the evidence actually adduced, Defendant asserts what the jury rejected: that the evidence "conclusively established that Defendant had no connection whatsoever with Mr. Cabello's detention, treatment or execution" (Deft. Br. at 5), and that "Plaintiffs failed to introduce any evidence that Defendant had any connection with Mr. Cabello's death." Deft Br. at 14. To the contrary, the jury's verdict was based on substantial evidence which established that Defendant was directly or secondarily liable for each of the four substantive claims asserted: extrajudicial killing;³ torture;⁴ cruel, inhuman or degrading

³ An extrajudicial killing is one committed under the actual or apparent authority or color of law of a foreign state and is:

[1] a deliberated killing [2] not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

28 U.S.C. § 1350 note § (3)(a) (1991).

⁴ In addition to the requirement that it be committed under the actual or apparent authority or color of law of a foreign state, the TVPA defines torture as:

[1] any act, directed against an individual in the offender's custody or physical control, [2] by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual [3] for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

28 U.S.C. § 1350 note § (3)(b)(1) (1991); *see also* United Nations Convention Against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 16, 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1344-1345 and n.25 (N.D. Ga. 2002); and S. REP. NO. 102-249, at 3 (1991).

treatment or punishment;⁵ and crimes against humanity.⁶

The evidence proved that Mr. Cabello was the victim of an extrajudicial killing. Heavily armed military personnel removed the prisoners from their beds late at night. Trial Tr. Vol. 2 at 120:8-14. Chilean military officers participated in killing the thirteen prisoners in Copiapó. *See* Deft. Br. at 1, 2; Trial Tr. Vol. 8 at 625:16-626:3. Mr. Cabello was never charged with or convicted of committing any crime, including any crimes for which he was sentenced to death. Trial Tr. Vol. 2 at 113:23-25; 124:20-25. Finally, to cover up the illicit nature of the killings, the authorities lied to the families and the public, falsely claiming that the prisoners were shot while trying to escape. Trial Tr. Vol. 7 at 459:20-460:6, 493:19-494:10.

The evidence also proved that the prisoners had been tortured: the thirteen victims had been prisoners of the Army until their deaths (Trial Tr. Vol. 7 at 485:9-15; Vol. 2 at 119:13-20, 120:18-20, 124:14-19); the victims, including Mr. Cabello, were subjected to the terror of being transported to a remote location, along with Jaime Sierra who had been severely beaten earlier that evening by the Defendant (Trial Tr. Vol. 5 at 328:1-3; 346:12-347:15; 350:1-5); the prisoners were hooded before being killed (Trial Tr. Vol. 5 at 326:4-13); they were shot repeatedly and at least some were sliced with *corvos*, leaving them horribly wounded and mutilated (Trial Tr. Vol. 5 at 327:1-7, 328:1-4, 9-11, 329:9-19); and the victims were singled out because they were perceived to be opponents of the junta. Trial Tr. Vol. 2 at 104:20-105:4,

⁵ The cruel treatment claim is akin to a lesser-included offense of torture because it does not require proof of two torture elements — that pain and suffering be “severe,” or that the harm was committed for a prohibited purpose. *See Mehinovic*, 198 F. Supp. 2d at 1348 and n.33.

⁶ The offense of crimes against humanity includes: “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds.” *Cabello I*, 157 F. Supp. 2d at 1366, n.12 (quoting Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, pt. II, art. 6(c), 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288); *Mehinovic*, 198 F. Supp. 2d at 1352 and n.44. *See also Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 WL 319887, at *9 (S.D.N.Y. Feb. 28, 2002) (perpetration of offenses including murder, torture, or unlawful imprisonment “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” constitutes crimes against humanity) (citations omitted).

125:1-126:21; Vol. 8 at 647:23-648:2, 19-23. The same evidence establishes that Mr. Cabello was subjected to cruel, inhuman, or degrading punishment or treatment.

Plaintiffs also proved that Mr. Cabello's killing was not an isolated offense but was part of a series of widespread and systematic killings of unarmed civilian prisoners and was thus a crime against humanity. The killings were widespread — at least 72 prisoners of the junta were killed by the squad, or at its direction, in at least five cities in the north of Chile. Trial Tr. Vol. 8 at 599:10-600:10, 601:23-602:20, 604:4-25, 625:16-626:10, 649:25-650:3; Vol. 9 at 768:7-14. The killings were systematic — the squad followed a well-orchestrated plan, killing or ordering the deaths of civilian prisoners in each of the cities after reviewing files maintained in each garrison (Trial Tr. Vol. 5 at 345:7-13, 350:12-14, 363:3-364:2); many prisoners were killed because they were perceived to be opponents of the regime (Trial Tr. Vol. 8 at 647:23-648:2, 19-23, 686:19-24);⁷ and Winston Cabello was one of those murdered in connection with the squad's mission. Trial Tr. Vol. 4 at 260:6-262:2; Vol. 5 at 329:9-15; Vol. 6 at 417:19-21.

A. The Evidence Demonstrates that Defendant Was Directly or Secondarily Liable for Winston Cabello's Killing and Mistreatment

Because the Defendant has not met his burden of proof under either the standard for judgment as a matter of law or for a new trial, his motions must be denied. The evidence on which the jury based its unanimous verdict conclusively demonstrates that Defendant is liable for Mr. Cabello's mistreatment and killing directly, or as an aider-abettor, or co-conspirator.

(1) The Evidence Demonstrates that Defendant is Liable as an Aider and Abettor

Defendant argues that he cannot be liable for Mr. Cabello's mistreatment and death because Plaintiffs have presented no direct evidence showing that he personally tortured or killed Mr. Cabello. Defendant argues that the evidence fails to show that he "acted in any way

⁷ One of the prisoners killed at Copiapó was the seventeen-year-old president of his high school class, Manuel Gortazar. Trial Tr. Vol. 2 at 125:20-23. Another, slightly older victim, Leopoldo Larravide, was the university's student body president, who became a father for the first time the night he was killed. Trial Tr. Vol. 2 at 125:24-126:6.

in connection with the death of Mr. Cabello” (Def’t. Br. at 5), and that “the evidence supports but only one conclusion: Defendant did not kill or torture Mr. Cabello.” *Id.* at 5, n.2. Defendant ignores the well-established principles of secondary liability by which an individual may be held liable for aiding and abetting another’s wrongful acts, or conspiring with others to commit illegal acts. *See Cabello II*, 205 F. Supp. 2d at 1333; *Mehinovic*, 198 F. Supp. 2d at 1355-1356 (the “*actus reus* of aiding and abetting requires ‘practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime.’”) (quoting *Prosecutor v. Furundzija*, No. IT-95-17/1-T, Judgement (Trial Chamber II, Dec. 19, 1998), ¶ 235)); *see also Presbyterian Church v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 323 (S.D.N.Y. 2003) (citing cases); *Prosecutor v. Tadic*, No. IT-94-1-A, Judgement (Appeals Chamber, July 15, 1999), ¶ 229 (Tab 12).⁸

To prove that the Defendant aided and abetted each of the violations alleged, the Plaintiffs had to, and did, prove three elements: (1) that one or more of the wrongful acts was committed; (2) that the Defendant substantially assisted some person or persons who personally committed or caused one or more of the wrongful acts; and (3) that the Defendant knew that his actions would assist in the illegal or wrongful activity when he provided the assistance. *See Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1410 (11th Cir. 1994), *modified on reh’g*, 30 F.3d 1347 (11th Cir. 1994); *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983); *Mehinovic*, 198 F. Supp. 2d at 1356, citing *Furundzija* (Trial Chamber II), ¶ 235. Here, Plaintiffs were required to prove even more because the jury instructions given over Plaintiffs’ objections required the jury to find that the Defendant actively participated in the substantive offenses in order to be found liable as an aider-abettor or co-conspirator.

The evidence established that Defendant’s actions substantially assisted the squad and the local officers in Mr. Cabello’s killing, torture and mistreatment. The evidence showed that

⁸ The international materials cited herein were supplied to the Court on June 7, 2003; the references herein to “Tab ____” refer to those materials.

among other things Defendant: asked Enrique Vidal how many prisoners were at the Copiapó garrison (Trial Tr. Vol. 6 at 407:20-24); was armed with a dangerous weapon consisting of a spiked metal ball on a chain (*id.* at 409:14-24); was armed with a *corvo* (*id.* at 432:6-13); threatened to harm the prisoners (“to caress the little pigeons”) with the spiked weapon (*id.* at 425:9-426:8, 429:7-14); was present in the *fiscal’s* office when Sergio Arellano reviewed the prisoners’ files and/or reviewed the files himself (Trial Tr. Vol. 5 at 352:6-24, 353:12-14, 365:2-367:17, 368:7-13); interrogated prisoners (Trial Tr. Vol. 5 at 350:15-20, 351:14-16; Trial Tr. Vol. 6 at 410:7-14, 423:21-424:2); attacked and severely wounded Jaime Sierra (Trial Tr. Vol. 5 at 346:12-347:15, 349:21-350:5); and attempted to extract Ruben Herrera from the hospital the night that the Copiapó prisoners were killed. Trial Tr. Vol. 2 at 139:20-140:25, 141:24-142:25, 145:7-18.

That Defendant also knew that his actions would assist the squad’s objectives was clear: he told Vidal that “you will soon find out,” why the squad was in Copiapó (Trial Tr. Vol. 6 at 431:24-432:5); he threatened to injure the prisoners (Trial Tr. Vol. 6 at 426:7-8, 429:7-14); he selected and reviewed prisoners’ files and interrogated prisoners (Trial Tr. Vol. 5 at 350:6-14, 351:14-16, 351:22-353:2, 365:1-19); he was in the room when Arellano said that he was identifying the prisoners to be eliminated (Trial Tr. Vol. 5 at 361:24-367:17); and in response to Request for Admission No. 35, admitted that Arellano gave the order to load the prisoners onto the truck that night. Trial Tr. Vol. 8 at 620:15-19. Defendant also admitted knowing that prisoners were killed during the squad’s visits to cities before Copiapó. Trial Tr. Vol. 8 at 625:16-626:3. Thus, Defendant knew his actions would assist the squad in its mission to select and kill civilian prisoners, one of whom was Winston Cabello.

(2) *The Evidence Shows that Defendant Conspired to Commit the Violations*

Plaintiffs also proved the three elements necessary for the jury to find the Defendant liable as a co-conspirator, specifically that: (1) two or more persons agreed to commit a wrongful act; (2) the defendant, knowing the unlawful purpose of the plan, willfully joined in it; and (3) one or more of the violations was committed by someone who was a member of the

conspiracy and acted in furtherance of the conspiracy. *See Cox*, 17 F.3d at 1410; *Halberstam*, 705 F.2d at 477; and *Pinkerton v. United States*, 328 U.S. 640, 646-648 (1946).

Here, the evidence proved that a conspiracy to kill civilian prisoners existed and that Defendant was a member of that conspiracy. *See* Trial Tr. Vol. 7 at 546:18-547:5. The evidence demonstrated that Defendant was aware of the squad's purpose and acted to accomplish its objectives. Knowing that prisoners were killed while the squad visited garrisons in the south, Defendant returned to Santiago (*see* Trial Tr. Vol. 8 at 636:17-20) and later rejoined the squad for the second stage of its operation in the north. *Id.* at 630:10-12. By the time the squad reached Copiapó, after his involvement in killing fifteen prisoners in La Serena (*id.* at 599:10-601:9), despite his denials (*id.* at 681:18-25), Defendant knew that one of the squad's objectives was to kill prisoners held by the local garrisons. In Copiapó, he helped Arellano select the files of the prisoners who were to be killed (Trial Tr. Vol. 5 at 352:6-24, 353:12-14, 365:2-367:17, 368:7-13), brutally and viciously injured one prisoner (Jaime Sierra) (*id.* at 346:12-347:15, 349:21-350:5), and threatened others. *Id.* at 425:9-426:8, 429:7-14. In at least two other cities visited by the squad after Copiapó, Defendant personally participated in killing the prisoners. Trial Tr. Vol. 8 at 601:23-603:15 (Antofagasta) and 603:16-605:18 (Calama).

One of the objects of the conspiracy indisputably was to kill civilian prisoners held at the military garrisons in cities in the north of Chile. Thus, it was foreseeable to the Defendant that Mr. Cabello and other prisoners would be killed in Copiapó. Whether Defendant knew Winston Cabello's name, or held any animosity toward him, or personally intended to kill him, is of no significance. Mr. Cabello was one of a group of prisoners killed at the same time as part of a plan executed by the squad, possibly with the assistance of local officers. Even if he did not personally kill Mr. Cabello, Defendant is liable for the actions of his co-conspirators who were involved in the killing. *See, e.g., United States v. Alvarez*, 755 F.2d 830, 847-851 (11th Cir. 1985) (members of drug conspiracy were guilty of killing BATF agent and wounding another in shoot-out; gun battle was reasonably foreseeable consequence of cocaine transaction).

Defendant argues that he cannot have been a member of a conspiracy to kill prisoners including Mr. Cabello, because there was no “concerted agreement” between himself and others and because there is no evidence that he carried out any orders to torture or kill the prisoners. Deft. Br. at 10, citing *United States v. Saglietto*, 41 F. Supp. 21, 33 (E.D. Va. 1941). Defendant’s reliance on *Saglietto* is unfounded. In *Saglietto*, the captain of an Italian merchant ship (which was part of Italy’s naval reserve fleet) was convicted of conspiring to disable Italian ships docked in a Virginia harbor. The evidence established that he forwarded a message from a naval superior to the captains of the other ships directing them to disable their engines upon Italy’s entry into World War II. The appellate court reversed his conviction, holding that not only had the defendant complied with a *lawful* order, but also that, because the order had been given in wartime, the captain was “acting under the compulsion of the grave penalties which military law traditionally prescribes for nonobedience to military orders,” and that the defendant’s “[p]articipation in a crime actuated solely by the compelling fear of personal harm negatives the very requisites of conspiracy.” *Id.* at 32-33 (emphasis added).

Here, Defendant offered no evidence that he performed any act (except reporting to the helicopter in Santiago) pursuant to the order of a military superior. Instead, he denies engaging in any of the squad’s criminal acts. *See* Deft. Br. at 10.⁹ Because there is no basis on which he can argue that he acted pursuant to a superior’s orders, rather than by agreement, his citation to *Saglietto* is inapposite. Moreover, unlike the lawful order at issue in *Saglietto*, any order to participate in injuring or killing unarmed civilian prisoners would have been plainly illegal. *See United States v. Kinder*, 14 C.M.R. 742, 781-782 (1954) (it is no defense to a charge of conspiracy to murder an unarmed civilian that the defendant was ordered to do so by a superior

⁹ Defendant presented no evidence that the Caravan of Death operated in compliance with any lawful orders.

officer, because such orders are clearly illegal).¹⁰ Regardless of whether Defendant contributed to the deaths of Mr. Cabello and the other prisoners in Copiapó pursuant to any illegal orders from his superiors, or whether he committed those acts wholly on his own volition without any prior directive is ultimately irrelevant.¹¹ Defendant's role in selecting, extracting, threatening and injuring the prisoners in Copiapó was sufficient for the jury to find him liable for conspiring to commit the violations.

(3) *A Reasonable Jury Could Have Found that Defendant Was Liable as a Direct Participant in Mr. Cabello's Mistreatment and Killing*

The jury could also have found from the evidence that Defendant was directly liable for killing or mistreating Mr. Cabello. The prisoners, including Mr. Cabello, were killed by gunshots and/or stabbing wounds. Some of them were brutally beaten with blunt objects. Defendant was armed with a spiked weapon, a rifle, a submachine gun and a *corvo* (Trial Tr. Vol. 6 at 409:14-24, 432:6-25); in fact, he possessed the only *corvo* in Copiapó at the time. Trial Tr. Vol. 8 at 647:16-20, Vol. 6 at 433:8-11. Victor Bravo testified that he saw Mr. Cabello's body shortly after he was killed and that "Winston had a cut on his ear, if I remember correctly he had a gash, a wound from his ear down through his throat." Trial Tr. Vol. 5 at 329:13-15. Dr. Elvira Miranda testified that she found evidence of knife wounds on Winston Cabello's clothing. Trial Tr. Vol. 4 at 260:23-261:7. Further, narrating the exhumation video, Dr. Miranda testified that, "[t]his corresponds to Winston Cabello's jacket in which you could

¹⁰ It is no defense to a claim under international law that the defendant complied with a domestic law or order that was *per se* illegal. *See United States v. Montgomery*, 722 F.2d 733, 737-738 (11th Cir. 1985).

¹¹ Likewise, the U.S. Manual for Courts-Martial contradicts Defendant's assertion (*see* Deft. Br. at 2) that military officers may not be held liable for conspiring with their superiors to commit crimes. Under Article 81, "[a]ny person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct." Manual for Courts-Martial, Executive Order 12473, 49 FR 17152, 17298 (1984) (emphasis added). The use of the phrases "any person" and "any other person" means exactly that — it is no defense to a charge of conspiracy that one of the co-conspirators was a subordinate officer. *See Kinder*, 14 C.M.R. at 779 n.12.

see oblique longitudinal tears. . . . This is the area of the jacket where you could see linear tears surrounded by traces of blood around it.” *Id.* at 241:17-25.

The jury had ample basis to conclude that the Defendant had a direct role not only in Mr. Cabello’s death but also in the other related offenses that formed part of the crimes against humanity. In his videotaped testimony, Juan Morales described Defendant’s role in brutally beating Jaime Sierra (Trial Tr. Vol. 5 at 346:12-347:15), and in his letter rogatory response Sergio Arredondo testified that he witnessed Defendant participate in killing prisoners in Antofagasta and Calama, two of the other cities visited by the squad. Trial Tr. Vol. 8 at 601:23-603:15, 603:16-605:18. Altogether, the jury could reasonably have found from the available evidence that Defendant was directly involved in the offenses alleged.

III. DEFENDANT’S CLAIM FOR REMITTITUR SHOULD BE DENIED

Remittitur is appropriate only when the award “exceeds the amount established by the evidence.” *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1448 (11th Cir. 1985). Defendant argues that the jury’s award of \$3 million compensatory and \$1 million punitive damages was “excessive.” As discussed above, substantial evidence supports (in fact, compels) the jury’s finding that the Defendant is liable for each of the claims. The amount of the award is reasonable, if not low, given the facts of this case. Moreover, that the jury awarded \$2 million of the compensatory damages to Mr. Cabello’s estate, for the extrajudicial killing and crimes against humanity claims, \$1 million in compensatory damages to the individual plaintiffs, and \$1 million in punitive damages to the estate, indicates that the jury carefully considered the claims and the evidence before reaching a decision.

Other cases brought under the ATCA have yielded much higher damage awards for substantially similar conduct; \$3 million in compensatory damages and \$1 million in punitive damages is on the low end of such awards in comparable cases. *See, e.g., Filártiga v. Peña-Irala*, 577 F. Supp. 860, 866-867 (E.D.N.Y. 1984) (awarding father and daughter plaintiffs \$5 million each in punitive damages, plus compensatory damages for the wrongful death of their son and brother); *Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627, 1996 U.S. Dist. LEXIS

4409, at *2, 7 (S.D.N.Y. Apr. 9, 1996) (awarding plaintiffs who brought claims relating to Rwandan genocide \$500,000 each for pain and suffering and \$1 million each in punitive damages for each relative's death, as well as \$5 million each for the plaintiffs' emotional injuries; victims included plaintiff's siblings and their siblings' wives and children); and *Xuncax v. Gramajo*, 886 F. Supp. 162, 189-92, 198 (D. Mass. 1995) (awarding three plaintiffs \$2 million each in compensatory damages for the summary execution of their husband, father and sister, and \$5 million each in punitive damages, among other awards).

Cases brought under the Foreign Sovereign Immunities Act for harm stemming from terrorist attacks, kidnapping, torture and murder abroad also provide guidance concerning reasonable compensatory damages awards. In *Dammarell v. Islamic Republic of Iran*, 281 F. Supp. 2d 105 (D.D.C. 2003), the court awarded \$10 million to each spouse, \$5 million to each child, \$3.5 million to each parent, and \$2.5-3.0 million to each sibling for the deaths of relatives killed in the 1983 U.S. Embassy bombing in Beirut, Lebanon. In determining the appropriate amount of damages, the court looked to similar cases (primarily involving kidnapping, torture and killing by terrorist organizations) and found that, on average, spouses recovered \$8-12 million, children recovered \$1.5-12 million, and siblings recovered \$2.5-5 million. See also *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 5, 29-32 (D.D.C. 1998) (young woman was killed in bus bombing; compensatory damages of \$5 million each to victim's parents, and \$2.5 million each to her four siblings). Because Defendant failed to introduce any evidence concerning damages, he cannot now complain that the award — which falls at the low end of the range of awards in comparable cases — is excessive. See *Mason v. Ford Motor Co.*, 307 F.3d 1271, 1276 and n.10 (11th Cir. 2002).

Likewise, the facts of this case compelled the imposition of punitive damages: “the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.” *BMW v. Gore*, 517 U.S. 559, 575 (1996). Given that Defendant participated in the brutal and intentional killing of an unarmed civilian prisoner, a punitive damages award of \$1 million is reasonable, particularly when measured against a

compensatory damage award of \$3 million. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513, 1523-1524 (2003) (punitive damages are intended to punish defendants for wrongs done to the plaintiffs and must be reasonably related to compensatory damages); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1370-1372 (2003) (affirming punitive damages award of \$50 million where compensatory damages were \$15 million; punitive damages are intended to punish reprehensible conduct and 3:1 ratio between punitive and compensatory damages was not unconstitutionally large).

Finally, because Defendant failed to object to the form of the verdict before the jury was excused (in fact, the form used was substantially the form he had proposed), his objections to the damages questions on the verdict form (Deft. Br. at 15) are waived as untimely. *Austin-Westshore Construction Co. v. Federated Dept. Stores, Inc.*, 934 F.2d 1217, 1226 (11th Cir. 1991). Under the facts of this case, there is no basis for remittitur.

CONCLUSION

For the foregoing reasons, Plaintiffs ask that the Court deny the Defendant's Motion for Judgment as a Matter of Law, Motion for New Trial and Motion for Remittitur.

Dated: November ____, 2003

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