

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 99-0528-CIV-LENARD
MAGISTRATE JUDGE SIMONTON

ESTATE OF WINSTON CABELLO,
et al.

Plaintiffs,

v.

ARMANDO FERNÁNDEZ-LARIOS,

Defendant.

**PLAINTIFFS' SUPPLEMENTAL OPPOSITION TO DEFENDANT'S
MOTION *IN LIMINE* TO PRECLUDE EXPERT TESTIMONY**

INTRODUCTION

Plaintiffs' Opposition to Defendant's Motion *in Limine* to Preclude Expert Testimony explained that Defendant's motion should be denied because the experts are fully qualified in their respective fields, and their testimony concerning, *inter alia*, events in Chile in 1973, including the events relating to the deaths of at least 72 civilian prisoners of the junta which were caused by Defendant's squad (often referred to as the "Caravan of Death"), will be helpful to the jury.¹ In this Supplemental Opposition and the attached proffers of the experts' testimony, Plaintiffs supply additional details concerning the experts' qualifications, testimony and opinions, and how this testimony is relevant to these proceedings.²

I. PLAINTIFFS' EXPERT WITNESSES ARE QUALIFIED TO TESTIFY TO THE PROFFERED FACTS AND OPINIONS

Plaintiffs are offering the testimony and opinions of two expert witnesses, Ambassador Roberto Garretón and Jorge Escalante, both of whom are Chilean nationals and experts in their respective fields. Ambassador Garretón is an expert on human rights law and violations, particularly those human rights abuses that occurred during the military regime headed by General Augusto Pinochet Ugarte ("Pinochet"), as well as on the Chilean legal system, including as it applied to persons detained by the junta. Jorge Escalante is a published author and an experienced investigative journalist who has spent years studying the events that occurred in Chile in September-October 1973, now commonly known as the Caravan of Death. As set forth in the proffers of their expected testimony, attached hereto as Exhibits A and B

¹ Plaintiffs no longer intend to call Joan Simalchik as an expert witness.

² Plaintiffs previously supplied to the Defendant and filed with the Court summary expert reports. The attached proffers are submitted to provide the Court with a more detailed discussion of the witnesses' anticipated testimony.

respectively, Ambassador Garretón's and Mr. Escalante's experience and credentials demonstrate that they are sufficiently qualified to testify to these facts and opinions.

Ambassador Garretón's expertise is derived largely from his extensive experience as a leading legal advocate with a Church-based legal organization for victims of repression under the Pinochet regime and their families, and his study of the regime's abuse of the legal and governmental system to accomplish its objectives. Mr. Escalante's expertise is derived largely from his extensive investigation and study of available records and testimony concerning the Caravan, and repeated interviews with the families of Caravan victims, fellow prisoners of the victims, and military commanders and personnel at the garrisons visited by Defendant and his cohorts. Courts in this Circuit have recognized that expert witnesses who have substantial experience in their fields or who have a field of study are qualified to present their opinions or other useful information to the jury.³

Further, Ambassador Garretón's and Mr. Escalante's testimony and opinions are based on reliable information, the type upon which professionals in their fields usually rely. Contrary to Defendant's contentions (*see* Defendant's Motion *in Limine* to Preclude Expert Testimony at 2), although not all the material and records on which they base their opinions may be

³ *See United States v. Frazier*, 322 F.3d 1262, 1267 (11th Cir. 2003) (error to exclude testimony of forensic investigator with extensive experience investigating rapes); *United States v. Paul*, 175 F.3d 906, 910-11 (11th Cir. 1999) (30 years of experience qualified witness as an expert in handwriting analysis); *Maiz v. Virani*, 253 F.3d 641, 669 (11th Cir. 2001) (witness permitted to testify as an expert concerning the patterns and practices of Mexican immigration based upon his personal experience rather than verifiable testing or studies); *United States v. Floyd*, 281 F.3d 1346, 1349 (11th Cir. 2002) (witness permitted to testify as an expert as to where gun and ammunition were manufactured based on experience in examining firearms and ammunition). Other courts are in accord. *See Lauria v. Nat'l R.R. Passenger Corp.*, 145 F.3d 593, 596-97 (3d Cir. 1998) (under Rule 702, a witness can qualify as an expert on the basis of practical experience alone; no formal degree, title or educational specialty is required); *Waldorf v. Shuta*, 142 F.3d 601, 625-27 (3d Cir. 1998) (same); *United States v. Osidach*, 513 F. Supp. 51, 72 n.8, 76-78 (E.D. Pa. 1981) (in denaturalization proceeding, individuals who had experience in administering the Displaced Persons Act were qualified as experts to testify concerning application of the Act and whether the defendant would have been granted citizenship had he been truthful).

independently admissible (*see* Ex. A at 9, Ex. B at 8), Rule 703 provides that an expert witness's opinion may be based on otherwise inadmissible evidence. FED. R. EVID. 703. Defendant's conclusory assertion (*see* Deft. Mot. at 2) is insufficient to demonstrate that plaintiffs' expert testimony should be excluded.

In *United States v. Corey*, 207 F.3d 84 (1st Cir. 2000), the district court permitted an ATF agent to offer expert testimony based upon his research on the issue of whether the gun that defendant purchased had traveled in interstate commerce. In conducting his research, he contacted a Smith & Wesson Company historian who told the expert that the gun had not been manufactured in Maine (where the case had been brought), and therefore concluded it had traveled in interstate commerce. On appeal, defendant challenged the introduction of the expert's testimony claiming it was unreliable and based on inadmissible hearsay. The First Circuit affirmed, however, finding that the testimony was reliable because his opinion was based on his own research, consultations with Smith & Wesson employees and his prior experience.

In *Cordon Holding v. Northwest Publishing Corp.*, 98 Civ. 4797, 2002 U.S. Dist. LEXIS 6111, at *4 n.2 (S.D.N.Y. 2002), a copyright infringement case, the court reached a similar conclusion and granted expert status to an art historian who was a curator and expert on the artist, M.C. Escher. The witness was permitted to testify about Escher's "artistic process" although that testimony was substantially based on hearsay. *Cordon*, 2002 U.S. Dist. LEXIS 6111, at *4 n.2.

Opinion testimony concerning historical events is also appropriate where such information will assist the jury in determining facts at issue in the case. For example, Ambassador Garretón will testify that Chile had been a stable, democratic nation prior to the *coup d'etat* that replaced the constitutionally elected government of Salvador Allende with a military junta headed by General Pinochet, and that in his opinion the "laws" and rules enacted and the summary processes implemented by Pinochet and the junta corrupted the legal system that had been in place in Chile. In other human rights cases brought under the Alien Tort

Claims Act (“ATCA”) and Torture Victim Protection Act (“TVPA”) in the Eleventh Circuit, the courts have admitted expert testimony to explain, among other things, the historical context of the conflict precipitating the abuse, particularly for claims involving torture and crimes against humanity where discrimination and persecution are elements of the claim.⁴ Courts in the Eleventh Circuit and elsewhere have also found expert testimony concerning historical events to be helpful in other types of cases.⁵

For example, in *INS v. Naujalis*, 240 F.3d 642 (7th Cir. 2001), the Court upheld the deportation of a retired Lithuanian soldier for association with a battalion that assisted the

⁴ In *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002), the court admitted the expert testimony of a former senior researcher for Human Rights Watch concerning the historical background of the conflict in Bosnia-Herzegovina in an action for torture; cruel, inhuman or degrading treatment; and crimes against humanity. *Id.* at 1329 n.2. *See also Ford v. Garcia*, 289 F.3d 1283, 1295-96 (11th Cir. 2002) (admitting as expert testimony ambassador’s opinions concerning political, economic and military situation in El Salvador), *cert. denied*, 123 S.Ct. 868 (2003).

⁵ *See Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281 (11th Cir. 1995) (finding professors qualified as experts to testify about history of racial discrimination); *United States v. Koziy*, 540 F. Supp. 25, 27 n.1 (S.D. Fla. 1982), *aff’d*, 728 F.2d 1314 (11th Cir. 1984) (admitting testimony from Holocaust expert concerning various groups’ participation in the extermination of the Jewish population). *See also State of New Jersey v. State of New York*, No. 120, 1997 WL 291594 (U.S. March 31, 1997) (permitting historians to testify concerning issue of whether New Jersey or New York was sovereign over Ellis Island); *Hunter v. Underwood*, 471 U.S. 222, 229-30 (1985) (experts, including historians, permitted to testify about intent of challenged constitutional provision); *Friesland Brands, B.V. v. Vietnam Nat’l Milk Co.*, 221 F. Supp. 2d 457, 458, 461-462 (S.D.N.Y. 2002) (in trademark infringement case where Chinese ideogram on a condensed milk can label was alleged to be infringing, plaintiffs’ expert, an art historian with “expertise in Chinese culture,” was permitted to testify concerning the meaning of ideogram); *United States v. Linnas*, 527 F. Supp. 426, 430 n.6 (E.D.N.Y. 1981) (in denaturalization proceeding, professor qualified as expert witness concerning Nazi invasion of Estonia), *aff’d*, 685 F.2d 427 (2d Cir. 1982); *Osidach*, 513 F. Supp. at 83-84 (same); *Cayuga Indian Nation v. Pataki*, 165 F. Supp. 2d 266, 300-301 (S.D.N.Y. 2001) (permitting an ethno-historian, a cultural anthropologist, and a historian to testify as experts concerning the historical aspects of land claim litigation even though court questioned the “academic rigor”); *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997) (where tribe brought action challenging registration and licensing fees imposed by state on Indian-owned vehicles, on remand, court permitted testimony by history professor concerning the interpretation of the treaty in the context of U.S. Indian policy in the mid 19th century), *aff’d*, 157 F.3d 762 (9th Cir. 1998).

Nazis in acts of persecution. Naujalis joined the new “2nd Battalion” of the Lithuanian army before the Nazis took over Lithuania. That battalion was transferred to Minsk in Byelorssia, and assisted a German battalion in “a series of killing missions” in October of 1941, in which over 11,000 men, women, and children were killed. Naujalis claimed he did not personally participate in any of the killing missions because he was in the city of Minsk all of October 1941 performing unspecified “guard” duties at a train station. The Board of Immigration Appeals had found Naujalis deportable for “assisting in” persecution, finding “inherently improbable” his claim that he never personally participated in the 2nd Battalion’s atrocities based, in part, on the government’s expert historian who testified about Naujalis’ role and the activities of the company to which he was assigned. *Id.* at 645, n.7.

Thus, under the applicable legal standards, Plaintiffs’ experts are qualified to testify as to the proffered facts and opinions.

II. THE PROFFERED TESTIMONY IS RELEVANT AND WILL BE HELPFUL TO THE JURY

It is likely that a jury in Miami in 2003 will be unnecessarily incredulous about the evidence they hear in this case. The jurors need to understand the historical context that led army officers to kill unarmed civilian prisoners — citizens of their own nation — on government instructions. The jurors cannot fulfill their fact-finding role if they do not understand the essential background from which conclusions about the plan, objectives, and actions of the Caravan, and Defendant’s intent and knowledge, can be understood and inferred. Further, an American jury will need the background testimony of these experts to understand why any inclination in this country to believe that someone would be arrested or executed by government authorities only for good reason does not necessarily hold true for Chile in late 1973. The experts’ testimony will assist the jury by explaining the *coup d’etat* and the conflict between constitutionalists and junta supporters; the radical changes military rule wrought on

civilian freedom and civil rights; the military's abuse of legal processes while paying them lip service; the inability of victims' families to obtain credible information concerning their loved ones or to obtain any remedy in Chile for their abuse; the mechanisms of control the government used, including resorting to secret police to terrorize civilians; the government's selection of the operatives whose squad and actions are now referred to as the Caravan of Death; the logic underlying the events the squad perpetrated and how they served the junta; the squad's selection of its victims; and how the squad's members subsequently thrived under the military dictatorship in Chile.

A. Ambassador Roberto Garretón

Ambassador Garretón's testimony will help the jury to understand that:

- Prior to the coup, Chile had been one of the few countries in South America with a strong history of democracy and respect for the rule of law.
- Pinochet and the military junta ended democratic rule and corrupted the legitimate legal process that had existed in Chile.
- The junta promulgated laws and rules that permitted military authorities to detain and imprison individuals without charges or trials for indefinite periods of time, and to retroactively penalize actions that had been legal at the time they occurred.
- Pinochet and the junta used the military and a secretive state security organization, the *Dirección Nacional de Inteligencia* ("DINA"), to repress civilians and quell any potential opposition to the regime. Torture, arbitrary detentions, extrajudicial killings and other abuses were common from September 11, 1973 through the 1980s.
- A collection of army officers, including Defendant Fernández, commanded by General Sergio Victor Arellano Stark ("Arellano"), traveled throughout Chile at the direction of Pinochet. This squad targeted community leaders, including

people who had been members of Allende's government. The victims were not criminals, but were instead community leaders and others who were perceived as likely opponents of the junta.

- Victims and their families were unable to obtain credible information about their loved ones in light of consistent denials of responsibility by military and government officials. Judicial relief was unavailable during Pinochet's regime. Indeed, the military regime enacted an amnesty law in April 1978 designed to preclude prosecution for torture and murder.

This testimony will assist the jury in determining that the killing and torture of Winston Cabello was deliberate, intentional, and done under color of law.⁶ Further, it will assist the jury in determining that the conduct was widespread and systematic and directed against innocent civilians.⁷ Ambassador Garretón's testimony is relevant to Defendant's liability as it assists the jury in understanding the circumstances from which Defendant's knowledge and intent can be inferred.⁸

⁶ This testimony is relevant because it relates to the claims asserted in the Second Amended Complaint. See SAC ¶¶ 62, 70, 78, 83. As an element of the claims for the torture and extrajudicial killing of Mr. Cabello under the TVPA, Plaintiffs must prove that these acts were committed "*under actual or apparent authority, or color of law, of any foreign nation.*" 28 U.S.C. §1350 note §2 (1991) (emphasis added). Plaintiffs must also prove that the acts against Mr. Cabello were intentional, which is an element of the torture claim (28 U.S.C. § 1350 note § 3(b)(1) (1991)) and deliberate, which is an element of the extrajudicial killing claim. 28 U.S.C. § 1350 note §3(a) (1991).

⁷ This testimony also bears upon the claims asserted in the Second Amended Complaint. Plaintiffs' claims for crimes against humanity require proof that Mr. Cabello's murder was part of a "widespread or systematic attack directed against any civilian population." See SAC ¶¶ 93, 100; *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8396 (KMW) 2002 WL 319887, *9 (S.D.N.Y. Feb. 28, 2002). Plaintiffs must further prove that Mr. Cabello's killing was extrajudicial. See SAC ¶¶ 59, 66, 74; 28 U.S.C. § 1350 note §3(a) (1991).

⁸ Plaintiffs may prove their claims by showing that Defendant directly committed or that he aided and abetted or conspired with others to commit any of the alleged offenses. See SAC ¶¶ 58, 65, 73, 81, 92, 99, 106, 114. To establish Defendant's civil liability for aiding and abetting, "the plaintiffs must show: (1) that the defendant was generally aware of the

B. Jorge Escalante

Mr. Escalante's testimony will help the jury in understanding that:

- Arellano was designated Pinochet's official delegate and in that capacity was given authority over local military commanders.
- Arellano and a squad of army officers, including Defendant Fernández, traveled throughout Chile in September-October 1973 and caused the extrajudicial killing, torture, and abuse of over 72 civilians who were prisoners of the junta.
- The squad's mission was to kill selected prisoners in order to instill fear in the civilian population and within the ranks of the military, particularly military personnel outside Santiago perceived as "soft" on likely opponents of the regime.
- The squad's mission was also to ensure that army commanders did not resist or challenge Pinochet's authority.
- To fulfill these objectives, the squad selected garrisons in the regions where the military commanders had not used excessive force against civilians after the coup. At those garrisons, the squad singled out particular persons for execution. The civilian prisoners selected for execution were community leaders, including people who had been members of the Allende government.

defendant's role as part of an overall improper activity at the time he provides the assistance; and (2) that the defendant knowingly and substantially assisted the principal violation." *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); *see also Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983); *Mehinovic*, 198 F. Supp. 2d at 1356 (it is "sufficient that the accomplice knows that his or her actions will assist the perpetrator in the commission of the crime.") (citation omitted); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgement, ¶ 246 (ICTY Trial Chamber II, Dec. 10, 1998), reprinted in 38 I.L.M. 317 (1999)) (if the accused "is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor").

To establish Defendant's civil liability for conspiracy, Plaintiffs must show that he was a party to: "an agreement to do an unlawful act or a lawful act in an unlawful manner; an overt act in furtherance of the agreement by someone participating in it; and injury caused by the act." *Halberstam*, 705 F.2d at 487.

- In many cases, the victims were detained and killed without ever being charged with committing any crime.
- A number of army officers who made up the squad, including Defendant Fernández, went on to have distinguished military careers. Not only did these men rapidly advance through the ranks of fellow army officers, they were also often appointed to prestigious positions within the government or abroad.

This testimony will assist the jury in determining that the killing and torture of Winston Cabello was deliberate, intentional and done under color of law.⁹ It also will assist the jury in determining that Fernández was a knowing participant in the squad¹⁰ and that the conduct was widespread and systematic and directed against civilians who had not committed any crime.¹¹ Moreover, Mr. Escalante's testimony will assist the jury in determining Defendant's intent and knowledge.¹²

⁹ *See, supra*, footnote 6.

¹⁰ As discussed above, in footnote 8, testimony on this issue relates to Defendant's intent and knowledge, which is relevant to Defendant's liability.

¹¹ *See, supra*, footnote 7.

¹² *See, supra*, footnote 8.

CONCLUSION

For the foregoing reasons, the plaintiffs ask that the Court deny defendant's motion to preclude expert testimony.

Dated: June ____, 2003

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