

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,

vs.

ARMANDO FERNÁNDEZ-LARIOS,

Defendant.

PLAINTIFFS' SUPPLEMENTAL OPPOSITION TO DEFENDANT'S MOTION
IN LIMINE TO RESTRICT EVIDENCE TO EVENTS RELATING TO
TREATMENT OF WINSTON CABELLO

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INTRODUCTION

Defendant Armando Fernández Larios (“Fernández”) does not dispute that he was a part of the squad headed by General Sergio Arellano Stark (“Arellano”) that traveled to various cities in Chile and caused the deaths of at least 72 political prisoners.¹ Defendant Fernández does not even dispute that before he reached the town of Copiapó where Winston Cabello was killed, he knew that killings of political prisoners had occurred in towns he had just visited, and that he also knew that those killings were connected to his squad.² Defendant even admits that “being part of a member of Arellano made me have this kind of big problems in my conscience” because “in that moment I realize that they would kill a lot of persons and now I was part of that committee.”³

Defendant nevertheless contends that he has no liability for Winston Cabello’s death or the crimes against humanity of which it was a part. He contends that: (1) he did not directly kill Mr. Cabello; and (2) there is only one kind of secondary liability, so-called “command responsibility,” under which he cannot be liable because he did not give an order to kill Mr. Cabello.⁴ He is wrong on both counts.

Fernández was an officer in the Chilean army when General Augusto Pinochet Ugarte (“Pinochet”) staged the September 11, 1973 *coup d’etat* that resulted in Chile being governed by a military dictatorship.⁵ Fernández’s formal rank notwithstanding, his status in Pinochet’s

¹ See, e.g., Ex. 1, Fernández Depo. Tr. vol. 1 at 68:25-69:25, 135:20-137:19; Ex. 2, Defendant’s Answer to Second Amended Complaint, ¶¶ 30-31; Ex. 3, Report of the Chilean National Commission on Truth and Reconciliation (chaired by Raúl Rettig Guissen, hence the Commission is commonly known as the “Rettig Commission”), (“Rettig Report”), [vol. 1 at 278-280 (Antofagasta), 282-286 (Calama), 293-295 (Copiapó), 301-303 (La Serena), and 331-332 (Cauquenes), published by the Center for Civil & Human Rights, University of Notre Dame Press 1993 (trans. Phillip E. Berryman)]. All exhibit numbers refer to materials in the Appendix of Evidence and Testimony, filed herewith.

² See, e.g., Ex. 1, Fernández Depo. Tr. vol. 1 at 109:11-25.

³ Ex. 1, Fernández Depo. Tr. vol. 2 at 346:6-8, 346:15-16.

⁴ See Ex. 4, Defendant’s Trial Memorandum (“Deft. Trial Mem.”) at 2, 4, 6-8, 10; Ex. 5, Deft. Proposed Jury Instruction No. 3.

⁵ Ex. 1, Fernández Depo. Tr. vol. 1 at 54:23-55:21.

military was such that he was one of the first soldiers to enter the presidential palace on the day of the coup, where he found the ousted President Allende dead.⁶ Fernández was immediately tapped to join the squad led by General Arellano that would make a trip to southern Chilean cities between September 30 and October 6, 1973 and northern Chilean cities, including Copiapó (where Mr. Cabello was killed), between October 16 and 22, 1973.

On October 4 in Cauquenes, the squad killed four political prisoners. Although proof of his role there is unavailable, Fernández admitted he knew of the killings shortly after they occurred.⁷ The squad then returned to Santiago where Fernández did nothing to report that he and his fellow conspirators had been involved in killing civilian political prisoners.⁸

Fernández rejoined the squad which headed north and stopped next in La Serena on October 16. A fellow squad member testified that Fernández and others shot the 15 political prisoners killed in La Serena. Fernández admits he knew of the killings before proceeding to Copiapó later on October 16, 1973.⁹

For Copiapó, where Mr. Cabello was killed, there is direct proof that Fernández threatened harm to the prisoners, was involved in selecting the prisoners who were killed, brutalized a prisoner who later died, attempted to extract an ill prisoner from the hospital, and was present at the victims' burial in a mass grave.¹⁰ Fernández has no alibi for where he was when the killings occurred in Copiapó,¹¹ and the circumstantial evidence (including the weaponry he carried, the conditions of the corpses as seen at the time and as examined following their exhumation in 1990, and his demonstrable role in killings before and after

⁶ Ex. 1, Fernández Depo. Tr. vol. 1 at 62:11-63:18.

⁷ Ex. 1, Fernández Depo. Tr. vol. 1 at 106:11-16, 107:8-11, 108:2-7, 108:16-109:25, 112:19-23; vol. 3 at 587:13-18. Although the conspirators caused killings at earlier-visited cities, proof of the Defendant's involvement in those crimes is not available.

⁸ Ex. 1, Fernández Depo. Tr. vol. 1 at 112:19-113:1.

⁹ See evidence in support of Facts 4-5, *infra*.

¹⁰ See evidence in support of Facts 7-9, 12, *infra*.

¹¹ Ex. 1, Fernández Depo. Tr. vol. 1 at 141:11-15.

Copiapó) establishes that he was directly involved in slaying Mr. Cabello and the 12 other victims in Copiapó.¹²

After Copiapó, the squad proceeded to Antofagasta where Fernández, other members of the squad, and local military personnel killed 14 prisoners, and to Calama where they killed 26 prisoners. Direct evidence establishes Fernández's personal involvement in those killings.¹³ Thereafter, Fernández's military career in Chile bloomed and he was entrusted with a position in DINA, the secret police, where he played important roles in the assassination of Ambassador Orlando Letelier and the notorious disappearance of David Silberman.¹⁴

Defendant has moved to exclude all evidence except the "proof . . . about what interaction he had with Winston Cabello in Copiapo" contending that "[n]one of the evidence about events outside of Copiapo is relevant"¹⁵ Defendant's attempt to prevent the jury from learning why Mr. Cabello, a 28-year-old economist employed by the Allende government who was never charged with committing any crimes,¹⁶ was killed and the full story of the conspiracy that killed him should be rejected because it is based on three misconceptions.

First, it ignores that as an aider and abettor and co-conspirator, Fernández can be liable *even if he had no interaction with Mr. Cabello in Copiapó.*¹⁷ By limiting the evidence to that

¹² See evidence in support of Facts 6-12, below.

¹³ See evidence in support of Facts 13-14, below.

¹⁴ See generally Ex. 36, Pltfs. Motions in *Limine* Nos. 1-2; see also Facts 18-19, below.

¹⁵ Ex. 6, Defendant's Motion in *Limine* to Restrict Evidence to Events Relating to Treatment of Winston Cabello ("Defendant's Motion" or "Deft. Mot.") at 2.

¹⁶ Zita Cabello Barrueto will also testify that her brother was killed without ever having been charged with committing a crime. See Ex. 17, Z. Cabello Depo. Tr. at 24:11-13.

¹⁷ Defendant is wrong when he claims that he cannot be liable unless he personally and directly committed each of the alleged violations, or ordered a subordinate to do so. See Ex. 4, Deft. Trial Mem. at 7, 10, 20; Ex. 5, Deft. Proposed Jury Instructions Nos. 3-6. As this Court has already ruled, Defendant may be liable if he aided and abetted or conspired with others who caused, performed or directed the wrongful acts. See *Cabello Barrueto v. Fernández-Larios*, 205 F. Supp. 2d 1325, 1331-1333 (S.D. Fla. 2002) (*Cabello II*) (defendant may be liable "for conspiring in or aiding and abetting the actions taken by Chilean military officials . . ."). See also *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 322 (S.D.N.Y. 2003) ("the concept of complicit liability for conspiracy or aiding and abetting is well-

of direct interaction between the defendant and Mr. Cabello, the evidence of conspiracy and aiding and abetting is necessarily excluded. For example, the existence and objectives of the conspiracy (comprised of the members of Arellano's squad and some local officers) is established by hearing the full story of what they did together in September and October of 1973. Nothing justifies preventing proof on the secondary liability theories the Court has already recognized apply here.¹⁸

Second, it ignores that one of the elements of two of the claims (Claims 5 and 6 for crimes against humanity) requires proof of a "widespread or systematic attack directed against any civilian population."¹⁹ Evidence establishing the scores of killings Fernández and his co-conspirators committed in La Serena, Calama, Antofagasta, and other cities in addition to Copiapó is, therefore, directly relevant to proving a central element to those claims.

Finally, it ignores that evidence of Defendant's personal acts of violence and of his co-conspirators' acts of violence against political prisoners other than Mr. Cabello proves elements of the other claims as well. For example, killings in other cities are relevant to establishing that

developed in international law, especially in the specific context of genocide, war crimes and the like."); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355 (N.D. Ga. 2002).

To establish a defendant's civil liability for aiding and abetting, "the plaintiffs must show: (1) that the defendant was generally aware of the 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). To establish a defendant's civil liability for conspiracy, the plaintiff must show the existence of: "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" (*id.* at 487), as well as the defendant's membership in the conspiracy. *See id.* at 481.

¹⁸ *See Cabello II*, 205 F. Supp. 2d at 1331-1333.

¹⁹ *See* Ex. 7, Pltfs. Trial Mem. at 20-22; *see also* Ex. 11, SAC ¶¶ 93, 100; *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8396 (KMW), 2002 WL 319887, at *9 (S.D.N.Y. Feb. 28, 2002) (a defendant's perpetration of certain "enumerated acts [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 a crime against humanity) (internal citations omitted). Defendant has not challenged this element; he submitted his own proposed jury instructions for the other claims but did not submit a proposed instruction on the crimes against humanity claims.

the acts against Mr. Cabello were intentional (an element of the torture claims)²⁰ and deliberate (an element of the extrajudicial killing claims).²¹ Proof regarding the victims outside of Copiapó is relevant to establishing that the torture of Mr. Cabello in Copiapó was not gratuitous; it was directed against potential opponents of the Pinochet junta and was, therefore, for a discriminatory purpose (an element of the torture claims).²² That Fernández personally killed before arriving in Copiapó and knew that others in the conspiracy had killed as well is relevant to establishing the foreseeability that the Caravan would kill in Copiapó (which is an element of co-conspirator liability).²³ Evidence of Fernández's role in killing prisoners in other cities visited by his squad is relevant to establishing his knowledge and intent concerning the killing of Mr. Cabello in Copiapó, and to demonstrating that, at the least, he substantially assisted in that killing.²⁴ Consequently, and as elaborated below, the motion to restrict the evidence should be denied.

**THE FOLLOWING FACTS ARE MATERIAL, AND THE EVIDENCE
ESTABLISHING THEM RELEVANT, TO THE CLAIMS AGAINST, AND DEFENSES
OF, DEFENDANT ARMANDO FERNANDEZ LARIOS**

Defendant's Motion did not specify a single item of evidence to be excluded. The following facts and supporting evidence are representative of what Defendant seems to be

²⁰ See Ex. 11, SAC ¶ 83; *see also* Ex. 7, Pltfs. Trial Mem. at 18-19; 28 U.S.C. § 1350 note § 3(b)(1) (1991).

²¹ See Ex. 11, SAC ¶¶ 62, 70, 78; *see also* Ex. 7, Pltfs. Trial Mem. at 17-18; 28 U.S.C. § 1350 note § 3(a) (1991).

²² See Ex. 11, SAC ¶ 83; *see also* Ex. 7, Pltfs. Trial Mem. at 18-19; 28 U.S.C. § 1350 note § 3(b)(1) (1991).

²³ See Ex. 11, SAC ¶¶ 58, 65, 73, 81, 92, 99, 106, 114; "[O]nce the conspiracy has been formed, all its members are liable for injuries caused by acts pursuant to or in furtherance of the conspiracy." *Halberstam*, 705 F.2d at 481; *Pinkerton v. United States*, 328 U.S. 640, 646 (1946) ("so long as the partnership in crime continues, the partners act for each other in carrying it forward"). *See also* Ex. 7, Pltfs. Trial Mem. at 22-28 and authorities cited therein.

²⁴ See Ex. 11, SAC ¶¶ 58, 65, 73, 81, 92, 99, 106, 114; *see also* *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.") (citing *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgement, ¶ 232 (ICTY Trial Chamber II Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999)); *Furundzija*, Case No. IT-95-17/1, Judgement ¶ 246 (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").

attempting to exclude. As explained herein, plaintiffs should be allowed to prove these and similar facts with this and similar evidence.

Fact No. 1: Fernández was one of the first officers to enter the presidential residence on the day of the coup d'état, where he found President Salvador Allende's body

Evidence: Fernández acknowledges that on September 11, 1973, the day of the *coup d'état* that ousted the constitutional government of Salvador Allende and replaced it with a self-appointed four-man military junta headed by Pinochet, Defendant entered *La Moneda*, the presidential residence occupied by Allende.²⁵ Once inside, Fernández found Allende dead.²⁶ A local garrison commander testified that Fernández was famous as the “hero of *La Moneda*,” for giving his own handkerchief to General Palacios Rhuman, who had injured himself.²⁷

Relevance: This evidence is relevant to establishing Fernández’s motive, intent, and knowledge in connection with the killing of Mr. Cabello and other political prisoners by establishing Defendant’s position in Pinochet’s military, as he embarked on the killings.

Fact No. 2: Arellano assumed control over the local Army commanders

Evidence: Arellano acknowledges that Pinochet designated him the junta’s “official delegate.”²⁸ As such, he had power over the local commanders.²⁹ Prisoners were killed in the cities of Cauquenes (October 4, 1973), La Serena (October 16, 1973) Copiapó (October 17, 1973), Antofagasta (October 19, 1973) and Calama (October 19, 1973), among others.³⁰

Witnesses including the commanders of two local garrisons have testified that Arellano’s squad

²⁵ Ex. 1, Fernández Depo. Tr. vol. 1 at 54:25-55:2, 56:7-12, 58:15-22.

²⁶ Ex. 1, Fernández Depo. Tr. vol. 1 at 62:11-63:18.

²⁷ Ex. 33, Rivera Depo. Tr. at 24:3-26:6.

²⁸ See Ex. 31, Arellano’s Letter Rogatory Response No. 8: “Q: Who ordered you to travel to the northern regions of Chile in October 1973? A: The Commander in Chief of the Army, General Augusto Pinochet Ugarte.”

²⁹ Ex. 32, A. Lapostol Depo. Tr. at 13:16-20; Ex. 33, Rivera Depo. Tr. at 31:5-32:16.

³⁰ See Ex. 3, Rettig Report, vol. 1 at 278-280 (Antofagasta), 282-286 (Calama), 293-295 (Copiapó), 301-303 (La Serena), and 331-332 (Cauquenes); see also Expected Testimony of Jorge Escalante, attached as Ex. B to Plaintiffs’ Supplemental Opposition to Defendant’s Motion *in Limine* to Preclude Expert Testimony.

(which included Fernández) carried out the killings of the civilian prisoners in their cities.³¹

Relevance: This evidence is relevant to establishing how the conspiracy consisting of Fernández, the other members of Arellano's squad, and soldiers in the local garrisons combined to kill the political prisoners, including Mr. Cabello. It is also relevant to establishing Fernández's motive, intent, and knowledge of the extrajudicial nature of the killings, and that they were committed under color of law.

Fact No. 3: *Defendant was aware that there was a connection between his squad and the deaths of four prisoners in Cauquenes, but he did not report this information when the conspirators briefly returned to Santiago*

Evidence: Fernández admitted that he was aware of the deaths of the four prisoners held by the military in Cauquenes, and that he was also aware that his squad was connected to those killings.³² He admitted that he did not tell anyone of the deaths of those civilians after returning to Santiago.³³ Instead, after spending a week or two in Santiago, Fernández admits he rejoined the squad and accompanied it to northern Chile.³⁴

Relevance: This evidence is relevant to establishing Fernández's knowledge of the objective of his squad and their role in killing political prisoners. The evidence is relevant to establishing the existence of a conspiracy, its objectives, and Defendant's membership in it, and his knowledge as he performed acts that assisted the human rights abuses. Evidence that the killings were caused by his squad is relevant to establishing that the killings were extrajudicial,

³¹ See Ex. 32, A. Lapostol Depo. Tr. at 17:5-19:3 (Arellano reviewed the prisoners' records; none had been sentenced to death), 25:24-28:5 (the prisoners were killed while Arellano chatted with Lapostol; Arredondo informed Arellano that "everything has been resolved"), 32:10-22 (Lapostol discovered the bodies after the helicopter departed), 40:20-25 (the killings at La Serena were illegal); Ex. 33, Rivera Depo. Tr. at 42:25-43:4 (Arellano reviewed prisoners' files), 51:4-52:12, 54:2-11 (Rivera discovered prisoners had been killed while he and Arellano were at the Chuquicamata mine), 57:6-58:10 (the killings at Calama were illegal). See evidence supporting Facts Nos. 5, 10, 13, and 14, *infra*. Even Fernández admits that the squad's travels were linked with the deaths of the prisoners in these cities. See evidence in support of Fact No. 16, *infra*.

³² Ex. 1, Fernández Depo. Tr. vol. 1 at 106:11-107:22, 109:20-25.

³³ Ex. 1, Fernández Depo. Tr. vol. 1 at 111:19-21, 112:7-15, 112:19-113:1.

³⁴ Ex. 1, Fernández Depo. Tr. vol. 1 at 111:19-21, 112:7-15.

that the torture was for a discriminatory purpose, and that the misconduct (of which Mr. Cabello's killing was a part) was widespread and systematic.³⁵

Fact No. 4: The objective in La Serena, as in other cities visited by Fernández's squad, included killing prisoners held by the military

Evidence: Fernández admits he traveled with his squad to La Serena.³⁶ The local garrison commander recalls they arrived in that city on October 16, 1973.³⁷ According to Sergio Arredondo Gonzalez ("Arredondo"), Arellano's second-in-command, their "mission was to verify the presence of prisoners [in La Serena] and according to the instructions, those people had, they had to eliminate them."³⁸ Specifically, "[t]he prisoners at the garrison" in La Serena "had to be eliminated."³⁹

Relevance: The evidence is relevant to establishing the existence and objective of the conspiracy. It is also relevant to establishing that the killings were widespread and systematic, as well as deliberate and extrajudicial.

Fact No. 5: Defendant killed prisoners in La Serena before Mr. Cabello was killed in Copiapó

Evidence: Arredondo testified that a group of soldiers and officers including Fernández, other military personnel from Arellano's group, and local military personnel, shot and killed fifteen prisoners in La Serena while the Caravan visited that city. Arredondo unequivocally identified Fernández as one of the killers: "I saw it, I was present at it."⁴⁰

³⁵ This evidence is relevant to proving that the killing of Mr. Cabello was part of a widespread and systematic attack against a civilian population, an element of the claim for crimes against humanity. See *Mehinovic*, 198 F. Supp. 2d at 1353; *Wiwa*, 2002 WL 319887, at *9; Article 7, Rome Statute of the International Criminal Court, U.N. Doc. A/CONF 183/2/Add.1 (1998). To prove the torture claim, Plaintiffs must establish that the harm to the victim was for a discriminatory or other prohibited purpose. See 28 U.S.C. § 1350 note § 3(b)(1) (1991); *Mehinovic*, 198 F. Supp. 2d at 1344-1346.

³⁶ Ex. 1, Fernández Depo. Tr. vol. 1 at 115:3-25.

³⁷ See Ex. 32, A. Lapostol Depo. Tr. at 10:14-11:1.

³⁸ Ex. 8, Arredondo Letter Rogatory Response No. 18.

³⁹ Ex. 8, Arredondo Letter Rogatory Response No. 19.

⁴⁰ Ex. 8, Arredondo Letter Rogatory Response No. 21(l)-(n).

Relevance: Evidence of Defendant's participation in the killings at La Serena (and, after Copiapó, at Antofagasta and Calama) is relevant to establishing his knowledge of the widespread and systematic misconduct in which he was engaged.⁴¹ It is circumstantial evidence of his knowledge and intent later in Copiapó, and as evidence of the conspiracy's *modus operandi*, it is evidence that Fernández directly participated in the killing of Mr. Cabello. It also refutes Defendant's "mere presence" defense and is relevant to establishing his knowledge and intent concerning each of the killings, including Mr. Cabello's.

Fact No. 6: Defendant Fernández was armed with a variety of weapons, including some designed to inflict severe injuries, when he debarked from the helicopter in Copiapó⁴²

Evidence: Defendant has admitted he was armed with a *corvo* (a curved knife) during the conspiracy's travels, including in Copiapó.⁴³ Enrique Vidal Aller ("Vidal"), Fernández's former military academy classmate, testified that Fernández stepped off the helicopter in Copiapó heavily armed with a semi-automatic rifle or machine gun, an automatic pistol or other side-arm, a *corvo* and a flail — a metal ball on a chain attached to a wooden handle.⁴⁴

Relevance: Evidence that the Defendant was heavily armed, including with weapons that would inflict disabling wounds, is relevant to proving his intent when he arrived in Copiapó. It is also relevant to proving that he participated in acts of violence against Mr. Cabello. The forensic evidence concerning the condition of Mr. Cabello's and the other prisoners' bodies and clothes after they were exhumed and examined in 1990 (*see* Fact No. 11,

⁴¹ Evidence that Defendant personally committed multiple extrajudicial killings in La Serena, Antofagasta and Calama is sufficient to establish his liability for crimes against humanity. *See Mehinovic*, 198 F. Supp. at 1354, n.50 (a defendant "is liable for the commission of [the charged acts] even if he was not aware that his conduct might rise to the level of a crime against humanity. International law provides that an actor is responsible if he knew or should have known that his conduct would contribute to a widespread or systematic attack against civilians.") citing *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgement (Trial Chamber May 21, 1999) ¶ 133 (defendant must have had "actual or constructive knowledge" of widespread or systematic attack).

⁴² It is unclear whether Defendant is challenging all of the evidence concerning Copiapó except that relating directly to Winston Cabello. Regardless, all of the evidence concerning Copiapó is undeniably relevant to Plaintiffs' claims.

⁴³ Ex. 1, Fernández Depo. Tr. vol. 1 at 76:19-77:1, 127:5-10.

⁴⁴ Ex. 12, Vidal Depo. Tr. at 12:13-13:1; Ex. 13, Herrera Depo. Tr. at 92:17-94:7, 100:13-23.

infra) indicates that their deaths were caused by gunshot wounds, knife wounds, and possibly blunt force trauma. Mr. Cabello's condition, including that he was slashed by a bladed weapon, and Jaime Sierra's condition (*see* Fact No. 8, *infra*), including that his face was crushed, is circumstantial evidence that, when combined with evidence of Defendant's weaponry, indicates that Fernández was directly involved in the mistreatment and deaths of at least Messrs. Cabello and Sierra.

Fact No. 7: Defendant sought information about, and threatened, prisoners in Copiapó

Evidence: After debarking from the helicopter, Fernández asked Vidal how many prisoners were at the regiment.⁴⁵ Fernández told Vidal that “you will soon find out” why his squad was in Copiapó,⁴⁶ and bragged to Vidal that he was Arrellano's “right-hand man” and that Arrellano “trust[ed] [him] totally.”⁴⁷ Fernández told Vidal that he would use the flail to “caress the little pigeons,” which Vidal understood to mean that the weapon would be used “to beat up the prisoners.”⁴⁸

Relevance: Evidence that the Defendant sought information about, and stated he intended to harm, prisoners is relevant to establishing his intent, his knowledge, and his understanding of the conspiracy's objective. It is also relevant to establishing that he acted in furtherance of his threats later that night by brutally killing Winston Cabello and the twelve other prisoners. The evidence is also relevant to proving the killings were extrajudicial and deliberate, and to disproving Fernández's “mere presence” theory.⁴⁹

⁴⁵ Ex. 12, Vidal Depo. Tr. at 10:5-11:1.

⁴⁶ Ex. 12, Vidal Depo. Tr. at 60:23-61:5.

⁴⁷ Ex. 12, Vidal Depo. Tr. at 37:13-16.

⁴⁸ Ex. 12, Vidal Depo. Tr. at 43:23-25, 56:5-18.

⁴⁹ Contrary to his contentions, Defendant was not a spectator to these events. *See* Ex. 4, Deft. Trial Mem. at 5. While a person who was “merely present” at the scene of a crime is not culpable, as the evidence discussed above demonstrates, Fernández engaged in affirmative acts that contributed to the deaths of Mr. Cabello and others in Copiapó, and killed prisoners in other cities. Thus, his “mere presence” defense is not entitled to any consideration. *See Jacobs v. Singletary*, 952 F.2d 1282, 1290 (11th Cir. 1992) (where defendant was indicted for being one of three persons involved in a shooting of two police officers, but the evidence was unclear as to

Fact No. 8: Defendant crushed a Copiapó prisoner's face, likely causing fatal injuries

Evidence: Juan de Dios Morales Alcota (“Morales”), a corporal⁵⁰ present in Copiapó, observed Fernández hit a prisoner, Jaime Sierra (“Sierra”), with a rifle. After Sierra fell face down on the ground, Fernández kicked Sierra with his boot, slamming his forehead into the ground. The impact “sounded like a watermelon.” After the beating, Sierra begged Fernández to kill him to stop the pain.⁵¹ Forensic examination of Jaime Sierra’s body following his exhumation revealed that “there was a complete absence of the entire facial structure.”⁵²

Relevance: Evidence that Defendant deliberately injured Sierra demonstrates his knowledge of, and willing participation in, the brutalization of the political prisoners that was an objective of the conspiracy. That Defendant perpetrated such a violent act on one prisoner under his control is circumstantial evidence of his involvement in the deliberate killing,⁵³ and torture⁵⁴ of Winston Cabello that same night. Evidence of Defendant’s attack on Sierra is also relevant to disproving his “mere presence” theory.

Fact No. 9: Defendant assisted in selecting and extracting prisoners to be killed in Copiapó

Evidence: Morales testified that, not long after the helicopter arrived, Fernández requested a list of the prisoners’ names from the military prosecutor. Morales observed Fernández checking off prisoners’ names.⁵⁵ Fernández and others also interrogated prisoners.⁵⁶

whether she had actually fired any shots, she was not entitled to mere presence instruction, instead the judge properly instructed the jury on aiding and abetting).

⁵⁰ Ex. 10, Morales Depo. Tr. at 7:9-10.

⁵¹ Ex. 10, Morales Depo. Tr. at 12:14-23, 16:4-20.

⁵² Ex.14, Doctors’ Depo. Tr. at 19:25-20:1; *see also* Ex. 15, Report of Study of Human Remains No. 7/90, “Conclusions,” ¶¶ 2, 5.

⁵³ To be liable for an extrajudicial killing under the TVPA, plaintiffs must prove that Mr. Cabello’s death was “[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.” 28 U.S.C. § 1350 note § 3(a) (1991).

⁵⁴ To be liable for torture under the TVPA, plaintiffs must prove that while Mr. Cabello was in the custody of the military, he was subjected to severe pain or suffering, whether physical or mental, for the purpose of obtaining information, punishment, intimidation or discrimination. *See* 28 U.S.C. § 1350 note § 3(b)(1) (1991).

⁵⁵ Ex. 10, Morales Depo. Tr. at 19:23-20:17, 21:4-5, 28:3-17.

One of the prisoners, Dr. Ivan Murua Chevesich (“Murua”), was under interrogation in the prosecutor’s office when Arrellano and Fernández arrived and reviewed the prisoners’ files. In Fernández’s presence, Arrellano identified the prisoners to be killed or “eliminated.”⁵⁷

Fernández attempted to extract Angel Ruben Herrera Jofre (“Herrera”) from his bed in the Copiapó hospital. Fernández ordered Herrera to dress and accompany him. Fernández hit Herrera with the butt of his rifle and insisted that he get up. A doctor, who outranked Fernández, interceded and prevented him from taking Herrera.⁵⁸

Relevance: Evidence of Defendant’s role in the selection of the prisoners to be killed — one of whom was Mr. Cabello — establishes Defendant’s involvement in their deaths later that night. The evidence is relevant to establishing that he substantially assisted in the killings.⁵⁹ The evidence is also relevant to establishing the extrajudicial nature of the killings of Mr. Cabello and the other prisoners because the fact that there was such a selection process hours before their deaths means the victims were not determined by a judicial process. Fernández’s participation in the selection of the prisoners who would be “eliminated” demonstrates Defendant’s knowledge of the extrajudicial nature of the killings.

⁵⁶ Ex. 10, Morales Depo. Tr. at 17:2-18:15, 19:4-22.

⁵⁷ Ex. 16, Murua Depo. Tr. at 20:3-8, 22:17-24:5.

⁵⁸ Ex. 13, Herrera Depo. Tr. at 92:10-100:23.

⁵⁹ Plaintiffs have asserted not only that Defendant personally committed the offenses alleged in the SAC, but also that he aided and abetted and conspired with others to commit these offenses. Evidence that Defendant assisted in the selection of the prisoners to be killed demonstrates that he gave “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.” *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 323 (citing cases); *see also Mehinovic*, 198 F. Supp. 2d at 1356 (same standard); *Halberstam*, 705 F.2d at 478. The evidence is further relevant to demonstrating that Defendant had the *mens rea* necessary to prove his liability for aiding and abetting. *Mehinovic*, 198 F. Supp. 2d at 1356; *Furundzija*, Case No. IT-95-17/1-T, ¶¶ 232, 246 (the defendant need not know which crime the principal intends to commit; if he “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.”). Likewise, this evidence is relevant to proving that Fernández was a witting member of the conspiracy, and is liable for his co-conspirators’ actions. “[O]nce the conspiracy has been formed, all its members are liable for injuries caused by acts pursuant to or in furtherance of the conspiracy.” *Halberstam*, 705 F.2d at 481.

Fact No. 10: The prisoners were killed late at night along the road south of Copiapó

Evidence: The prisoners were loaded into a truck for transport to the location known as “Cuesta Cardones” on the highway south of Copiapó, where they were killed alongside the road.⁶⁰ Afterwards, their bodies were left in a truck on October 17, 1973, before they were buried late that night or early the next morning.⁶¹

Relevance: The evidence is relevant to establishing that the killings were extrajudicial, and that the perpetrators were conscious of the impropriety of their conduct and attempted to prevent discovery of the details of their crimes. This evidence establishes the knowledge and intent of all involved. To further conceal the criminal nature of the killings, the military lied to the public and the families about the killings; the initial reports falsely alleged that the prisoners were killed while trying to escape as they were being transported to La Serena.⁶² The pattern of conduct repeated in each of the cities at which the squad stopped is relevant to showing Fernández’s knowledge of the squad’s objectives and the widespread and systematic nature of the killings.

Fact No. 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

Evidence: The prisoners’ deaths were caused by projectile wounds, and in some instances blunt force trauma or knife wounds.⁶³ Victor Bravo Monroy (“Bravo”), the Provincial Head of the Service of Identification and Registry,⁶⁴ observed the condition of the bodies at the

⁶⁰ Ex. 10, Morales Depo. Tr. at 29:13-31:21.

⁶¹ Ex. 10, Morales Depo. Tr. at 32:21-34:3, 34:4-15.

⁶² See Ex. 17, Z. Cabello Depo. Tr. at 34:13-24.

⁶³ See Exs. 15, 18-29, Reports of Studies of Human Remains, “Conclusions,” prepared by Drs. Elvira Miranda Vasquez, America Gonzalez Figueroa and Carlos Silva Lazo, of the Medico-Legal Service, Ministry of Justice of the Republic of Chile; see also Ex. 14, Doctors’ Depo. Tr. at 19:16-20:1, 21:4-22:1, 23:15-24:10, 28:13-31:4.

⁶⁴ Ex. 30, Bravo Depo. Tr. at 7:13-15.

gravesite. They bore evidence of brutal knife wounds, as well as gunshot wounds.⁶⁵ Mr. Cabello “had a cut on his ear . . . and he had a gash, a wound, from his ear down through his throat.”⁶⁶

Jaime Sierra was one of the thirteen prisoners the conspirators killed in Copiapó. At the gravesite, Bravo noted that Sierra was missing one of his eyes.⁶⁷ When Sierra’s body was exhumed in 1990, his skull showed “a complete absence of the entire facial structure.”⁶⁸

Relevance: The evidence of the condition of Mr. Cabello’s corpse, and that of the other prisoners, is relevant to establishing that they were tortured. When combined with the evidence of Defendant’s weapons, it is also relevant to establishing Defendant’s direct involvement in Mr. Cabello’s killing.⁶⁹ Given that the Defendant, but not the local army officers,⁷⁰ was armed with a *corvo*, and that Mr. Cabello suffered knife wounds, a jury should conclude that Defendant was involved in causing those wounds.⁷¹ The evidence of Jaime Sierra’s abuse is also relevant to the claim that Mr. Cabello was tortured and suffered cruel or inhuman treatment because it can be inferred that he would have heard or seen Sierra’s suffering before both of them were killed. A jury should conclude that the other prisoners, including Mr. Cabello, were forced to ride into the desert in the middle of the night in a truck in which Jaime Sierra was suffering from his brutal injuries; that would constitute the infliction of severe mental suffering which is an element

⁶⁵ The autopsy confirmed that the prisoners’ bodies and their clothing showed evidence of knife wounds in addition to gunshot wounds. Ex. 14, Doctors’ Depo. Tr. at 19:16-20:1, 21:4-22:1, 23:15-24:10.

⁶⁶ Ex. 30, Bravo Depo. Tr. at 11:4-12:18, 15:14-22.

⁶⁷ Ex. 30, Bravo Depo. Tr. at 13:23-14:4.

⁶⁸ See Ex. 14, Doctors’ Depo. Tr. at 19:25-20:1; Ex. 15, Report of Study of Human Remains No. 7/90, “Conclusions,” ¶¶ 2, 5 (although the testimony does not expressly identify the individual with the crushed skull as Sierra, the report states that Sierra’s death was caused by “cranio-facial trauma” which “by itself is necessarily fatal”).

⁶⁹ Ex. 14, Doctors’ Depo. Tr. at 23:20-24:10.

⁷⁰ Ex. 12, Vidal Depo. Tr. at 61:8-18, 62:11-24.

⁷¹ Such evidence demonstrates that Mr. Cabello was subjected to torture before his death, and suffered cruel, inhuman or degrading punishment or treatment. See *Mehinovic*, 198 F. Supp. 2d at 1347-1348; see also *Abebe-Jira v. Negewo*, 72 F.3d 844, 847-848 (11th Cir. 1996); *Cabello II*, 157 F. Supp. 2d at 1361.

of the torture claim and would also constitute cruel and inhuman treatment.⁷²

Fact No. 12: Defendant was present at the burial of the thirteen prisoners in Copiapó

Evidence: Bravo testified that he saw a tall thin officer, whom he later identified as Fernández, at the mass grave when the thirteen prisoners were buried.⁷³

Relevance: Evidence of the victims' burial in a mass grave is relevant to establishing the extrajudicial nature of their deaths. Evidence of Defendant's presence at the burial establishes further circumstances from which it can be inferred that Defendant directly participated in the killings: he assisted in selecting prisoners to be killed,⁷⁴ attempted to extract a prisoner from the hospital,⁷⁵ he was present at the burial,⁷⁶ and he has no alibi for his whereabouts in between.⁷⁷

Fact No. 13: Defendant killed prisoners in Antofagasta after Copiapó

Evidence: Fernández has admitted being in Antofagasta when the prisoners were killed on October 19, 1973.⁷⁸ Arredondo has testified that the prisoners were killed by personnel from the Caravan and the local Army unit:⁷⁹ they "were executed with short bursts, with their faces covered."⁸⁰ Fernández was one of those who shot the prisoners.⁸¹

Relevance: Evidence of Defendant's participation in the killings at Antofagasta is relevant to establishing his knowledge of the widespread or systematic misconduct in which he was engaged. It is also circumstantial evidence that he directly participated in the killing of

⁷² Torture Victim Protection Act of 1991, 28 U.S.C. § 1350, note (1991); *Mehinovic*, 198 F. Supp. 2d at 1332-1340; *Xuncax v. Gramajo*, 886 F. Supp. 162, 169-171 (D. Mass. 1995).

⁷³ Ex. 30, Bravo Depo. Tr. at 20:24-21:24.

⁷⁴ Ex. 10, Morales Depo. Tr. at 19:23-20:17, 21:4-5, 28:3-17; Ex.16, Murua Depo. Tr. at 20:3-8, 22:17-24:5.

⁷⁵ Ex. 13, Herrera Depo. Tr. at 95:2-96:24.

⁷⁶ Ex. 30, Bravo Depo. Tr. at 20:24-21:24.

⁷⁷ Ex. 1, Fernández Depo. Tr. vol. 1 at 141:11-15.

⁷⁸ See, e.g., Ex. 1, Fernández Depo. Tr. vol. 1 at 158:22-25, 159:23-160:1.

⁷⁹ Ex. 8, Arredondo Letter Rogatory Response Nos. 61, 61(c).

⁸⁰ Ex. 8, Arredondo Letter Rogatory Response No. 61(i).

⁸¹ Ex. 8, Arredondo Letter Rogatory Response No. 61(l)-(n).

Mr. Cabello in Copiapó. It also refutes his “mere presence” defense and is relevant to establishing his intent in connection with each of the killings, including Mr. Cabello’s.

Fact No. 14: Defendant killed prisoners in Calama

Evidence: Fernández has admitted being in Calama when the prisoners were killed on October 19, 1973.⁸² Arredondo has testified that Fernández, other military personnel from his squad and local military personnel shot and killed twenty-six prisoners in Calama.⁸³

Grimilda Sanchez Gomez (“Sanchez”), a prisoner at the garrison, witnessed Fernández participate in selecting prisoners to be removed. She watched from a window as Fernández supervised as prison guards loaded prisoners, whose heads had been covered with bags, into waiting trucks. Sanchez later learned that these prisoners, including her son, were killed.⁸⁴

Relevance: Evidence of Defendant’s participation in killing prisoners in Calama is relevant for the same reasons as evidence of his participation in the killings in Antofagasta.

Fact No. 15: Defendant was a member of Arellano’s squad when they participated in killing prisoners in southern Chilean cities and later, in northern cities

Evidence: Defendant admits he traveled with Arellano and his squad throughout southern and northern Chile.⁸⁵ Fernández claims to have served as Arellano’s bodyguard during both the southern and northern trips made by Arellano’s squad although he acknowledges he had no training or prior experience as a bodyguard and could not recall

⁸² See, e.g., Ex. 1, Fernández Depo. Tr. vol. 1 at 165:8-14.

⁸³ Ex. 8, Arredondo Letter Rogatory Response Nos. 63-64, 66. While denying liability, Arellano claims that when he and Rivera returned to Calama after visiting the Chuquicamata mine, 26 prisoners held in the Calama jail were dead and Defendant was one of the perpetrators. “I returned to Calama after 20:00 hours and I was greeted by the sad news that Colonel Arredondo, with Major Marcelo Moren and Fernando [*sic*] Larios, . . . removed 26 of the prisoners from prison under the pretext of taking them to the war council which had to go forward in the early afternoon in the Calama Regiment. Instead of taking them to said tribunal, . . . they transferred them to Pampa de Topater where they were murdered. After this event Marcelo Moren went to the regiment and informed the war council that that they had to disband because all of the prisoners had rebelled and they had to be executed.” Ex. 31, Arellano Letter Rogatory Response No. 64; see also Ex. 33, Rivera Depo. Tr. at 47:14-49:9, 51:4-12.

⁸⁴ Ex. 9, Sanchez Depo. Tr. at 25:20-27:24, 31:20-22, 32:23-25.

⁸⁵ Ex. 2, Defendant’s Answer to SAC ¶¶ 30-31.

specific duties he executed as a bodyguard.⁸⁶

Relevance: This evidence establishes Defendant's membership in the conspiracy, his knowledge of its true mission, and his intent to assist in achieving its objectives.⁸⁷

Fact No. 16: At the time of the killings in September-October 1973, Fernández was aware of the connection between the Caravan and the deaths of prisoners

Evidence: Fernández admitted he knew about the deaths of the prisoners in Cauquenes,⁸⁸ La Serena,⁸⁹ Copiapó,⁹⁰ Antofagasta,⁹¹ and Calama,⁹² shortly after the prisoners in each of those cities were killed. He also admitted he knew of the connection between Arellano's squad to the deaths of the prisoners in each of those cities at the time.⁹³

Relevance: Evidence of Defendant's knowledge of the conspiracy's connection to the killings is relevant to establishing his motive, intent, and knowledge. It is relevant to the foreseeability that the conspirators would cause the deaths of prisoners, including Mr. Cabello.

Fact No. 17: Defendant joined the DINA in October or November 1973

Evidence: Fernández admits that in October or November of 1973, he joined the clandestine security organization that later was identified as the DINA,⁹⁴ which has been described as a military organism under Pinochet's control.⁹⁵ Fernández has described the DINA's purpose

⁸⁶ Ex. 1, Fernández Depo. Tr. vol. 1 at 69:19-25, 78:20-79:2; vol. 2 at 453:19-21.

⁸⁷ As discussed in greater detail in Plaintiffs' supplemental response to Defendant's Motion *in Limine* concerning the admissibility of expert testimony and in the exhibits attached thereto, Plaintiffs' expert witnesses, Ambassador Roberto Garretón and Jorge Escalante, will provide testimony that will assist the jury to understand the context in which these events occurred.

⁸⁸ Ex. 1, Fernández Depo. Tr. vol. 1 at 106:11-16, 107:8-11, 108:2-7, 108:16-109:25, 112:19-23; vol. 3 at 587:13-18.

⁸⁹ Ex. 1, Fernández Depo. Tr. vol. 1 at 117:19-22.

⁹⁰ Ex. 1, Fernández Depo. Tr. vol. 1 at 135:20-137:16.

⁹¹ Ex. 1, Fernández Depo. Tr. vol. 1 at 159:23-160:1.

⁹² Ex. 1, Fernández Depo. Tr. vol. 1 at 165:8-14.

⁹³ Ex. 1, Fernández Depo. Tr. vol. 1 at 109:20-25.

⁹⁴ Ex. 1, Fernández Depo. Tr. vol. 1 at 47:19-48:4; Ex. 34, Rule 11 Hearing Tr. at 23:12-14; Ex. 2, Defendant's Answer to SAC ¶ 13.

⁹⁵ See *Letelier v. Republic of Chile*, 502 F. Supp. 259, 264-265 (D.D.C. 1980).

as “to control the left wing that was fighting against Pinochet.”⁹⁶

Relevance: Evidence of his 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.

Fact No. 18: Defendant participated in the 1976 assassination of former Chilean Ambassador to the United States Orlando Letelier and the cover-up of that crime

Evidence: Defendant has admitted participating as a DINA member in the assassination of the former Chilean Ambassador to the United States, Orlando Letelier.⁹⁷ Defendant pleaded guilty to being an accessory after the fact to the Ambassador’s murder. His plea was based on his perjury before the Chilean Supreme Court, which obstructed justice in the United States, all of which was done with the agreement of his co-conspirators and former DINA superiors, including fellow Caravan of Death conspirator, Pedro Espinoza Bravo.⁹⁸

Relevance: As this Court has already found (*see* Ex. 35, Aug. 21, 2001 Order Granting in Part and Denying in Part Motion to Strike at 3-4), Fernández’s involvement in the Letelier assassination is relevant to proving that he acted under color of law — an element of the claims for extrajudicial killing and torture pleaded under the TVPA. As Plaintiffs argued in their Motion *in Limine* No. 1 and in response to Defendant’s Motion *in Limine* to Exclude Evidence of Conviction, this evidence is also relevant to establishing Defendant’s knowledge and intent.

Fact No. 19: Defendant was involved in the 1974 disappearance of David Silberman

Evidence: On or about October 4, 1974, Fernández traveled to the Santiago penitentiary.

⁹⁶ Ex. 1, Fernández Depo. Tr. vol. 1 at 81:19-82:2.

⁹⁷ Ex. 34, Rule 11 Hearing Tr. at 23:12-14, 43:14-16, 47:14-18; Ex. 1, Fernández Depo. Tr. vol. 1 at 221:2-10, 222:25-223:25, 225:24-226:10, 228:5-229:4, 229:23-230:1, 240:14-242:11, vol. 2 at 293:11-14, 398:8-23.

⁹⁸ Ex. 34, Rule 11 Hearing Tr. at 10:12-11:8; *see also* Ex. 36, Pltfs. Motion *in Limine* No. 1 at 3-7; Ex. 2, Deft. Answer to SAC ¶ 16; Ex. 1, Fernández Depo. Tr. vol. 2 at 248:11-16, 248:17-249:22, 251:21-252:7, 280:25-282:2, 295:10-18.

There he met with the warden, Jorge Ortiz Aedo (“Ortiz”).⁹⁹ Fernández identified himself as a military officer, but used the name of “Alejandro Quinteros.”¹⁰⁰ Ortiz later identified “Quinteros” as Fernández.¹⁰¹ Fernández arrived at the prison with a military escort driving a car without rear license plates, a common practice for the security service.¹⁰²

Fernández explained that he had come to take custody of one of the prisoners, David Silberman Gurovich (“Silberman”).¹⁰³ Silberman had been the general manager of the state-owned copper mine.¹⁰⁴ After the coup, he was tried by a *consejo de guerra* and sentenced to thirteen years in prison.¹⁰⁵ Ortiz released Silberman to Fernández’s custody.¹⁰⁶ Silberman disappeared, and has not been seen since that date.¹⁰⁷

Relevance: Evidence of Defendant’s role in the removal of Silberman from the Santiago jail, as discussed in Plaintiffs’ Motion *in Limine* No. 2 is relevant to establishing Defendant’s knowledge and intent. It is also relevant to establishing that he acted under color of law in committing wrongful acts.

⁹⁹ Ex. 37, Ortiz Depo. Tr. at 9:25-10:20, 12:12-15:11, 16:25-17:24.

¹⁰⁰ Ex. 37, Ortiz Depo. Tr. at 14:23-15:11.

¹⁰¹ Ex. 37, Ortiz Depo. Tr. at 16:25-17:24; *see also* Ex. 3, Rettig Report vol. 2 at 563.

¹⁰² Ex. 37, Ortiz Depo. Tr. at 13:3-14:4, 16:5-13.

¹⁰³ Ex. 37, Ortiz Depo. Tr. at 13:3-14:22.

¹⁰⁴ Ex. 37, Ortiz Depo. Tr. at 11:6-12.

¹⁰⁵ Ex. 3, Rettig Report, vol. 2 at 563. As a report of a foreign government agency, the Rettig Report is admissible under FED. R. EVID. 803(8)(c); *see Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 156-170 (1988); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1144 n.11, 1187 (E.D. Pa. 1980) (Rule 803(8)(C) “encompasses the findings of public offices or agencies of state and foreign governments”), *aff’d sub. nom in part, rev’d in part on other grounds, In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983); *see also In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988*, 37 F.3d 804, 827-828 (2d Cir. 1994) (admitting report prepared by Scottish investigator); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1482-83 (D.C. Cir. 1991) (admitting report of International Civil Aviation Organization, including appendix containing preliminary Soviet intercept report). *See* Ex. 3, Rettig Report, vol. 1 at 13-25 for a discussion of the Commission’s methodology in conducting its investigation and reaching its conclusions.

¹⁰⁶ Ex. 37, Ortiz Depo. Tr. at 14:14-16:18.

¹⁰⁷ Ex. 37, Ortiz Depo. Tr. at 18:22-19:4.

CONCLUSION

Fernández's attempt to exclude all the circumstantial evidence and evidence of his secondary liability for the offenses alleged in the SAC should be denied.

Dated: June __, 2003

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