

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

	ESTATE OF WINSTON CABELLO, ET AL.,	)	Docket No.
		)	99-0528-CV-
LENARD		)	
	Plaintiffs,	)	
		)	Miami, Fl.
33128		)	
	v.	)	October 9,
2003		)	
		)	
	ARMANDO FERNANDEZ-LARIOS,	)	
		)	
		)	
	Defendant.	)	
		)	
	-----x	)	

VOLUME 11

TRANSCRIPT OF TRIAL  
BEFORE THE HONORABLE JOAN A. LENARD  
and a jury

APPEARANCES:

For the Plaintiffs:	LEO P. CUNNINGHAM, ESQ. NICOLE M. HEALY, ESQ, JENNY L. DIXON, ESQ.
	ROBERT KERRIGAN, ESQ.
For the Defendant:	STEVEN W. DAVIS, ESQ.

Court Reporter:

Richard A. Kaufman, CMRR

RICHARD A. KAUFMAN, CMRR

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I N D E X

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WITNESSES FOR THE PLAINTIFF:

CHARGE CONFERENCE

WITNESSES FOR THE DEFENDANT:

EXHIBITS

PLAINTIFF

IN EVID.

DEFENDANT'S

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22  
23  
24  
25

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1 (Open court. Jury not present.)

vs.

2 THE COURT: Estate of Winston Cabello, et al.

3 Armando Fernandez-Larios, Case Number 99-0528.

4 Would counsel state their appearances.

5 (All parties present.)

made

6 THE COURT: In regard to the Rule 50 motions

directed

7 yesterday, beginning with the defendant's motion for a

reasons.

8 verdict, that motion is denied for the following

that

9 As to the statute of limitations portion of

Cabello

10 motion, in my prior order of June 5, 2002, which is

ten

11 versus Larios, 205 F. Supp. 2nd. 1325, I found that the

1990.

12 year limitation period did not begin to accrue until

So it was

13 This action was filed in I believe February of 1999.

14 within the ten-year period.

15 As far as the evidence that was adduced at  
trial  
16 regarding the limitation period beginning in 1990,  
there was  
17 testimony by Dr. Miranda that the excavation of the  
remains  
18 began in July of 1990, and in fact, the autopsy report  
that has  
19 been introduced into evidence of Winston Cabello was  
actually  
20 dated January 1991.

21 Based upon my prior rulings and the authority  
cited by  
22 the Court in both the orders issued by the Court, in  
addition  
23 to the June 5 order, would be the August 10, 2001 order  
of  
24 Cabello versus Fernandez Larios -- the Court finds  
there is  
25 sufficient evidence in the record upon the excavation  
of the

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1 remains and the findings of the autopsy report that  
this action  
2 was filed within the ten year period that began to  
accrue, did  
3 not begin to accrue until 1990. Therefore, on that  
basis the  
4 Rule 50 motion is denied.

23, Your 5 MS. HEALY: That would be Plaintiffs' Exhibit  
6 Honor.  
7 THE COURT: Thank you.  
8 In regard to the remaining bases for the  
defendant's 9 motion, the Court finds when considering the evidence  
in a 10 light most favorable to the plaintiff, which would be  
the 11 standard employed for the Rule 50 motion at the close  
of the 12 plaintiffs' case, the Court finds a reasonable jury  
could find 13 the defendant liable for the claims as alleged in the  
including 14 complaint. This is based upon the testimony at trial  
defendant 15 those persons specifically Enrique Vidal, who saw the  
in 16 with a corvo, the findings of Dr. Miranda of the manner  
Cabello may 17 which Winston Cabello, the injuries that Winston  
on his 18 have suffered, the fact there was no gun powder found  
by 19 clothing; the testimony as to how a corvo could be used  
20 Patricio Lapostol, and the description by Victor Bravo  
21 describing the manner in which Winston Cabello had been  
killed.  
22 In addition, there was testimony by other  
witnesses  
23 presented by the plaintiffs of the involvement of the  
defendant

violent 24 in violent activities, both before and after the  
25 activities that occurred at Copiapo.

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present 1 The admissions by the defendant that he was  
persons 2 and the evidence that he was part of the collection of  
in what 3 that traveled throughout the North and South of Chile  
Colonel 4 has been termed the Caravan of Death. The testimony of  
Calama, the 5 Arredondo, that in La Serena and Antofagasta and  
from 6 killings were committed by local people with directions  
which 7 the death squad, including Mr. Fernandez, the manner in  
and the 8 the 13 persons in Copiapo were taken out of the jail  
Morales that 9 involvement of the defendant as testified by Juan  
10 the involvement of the defendant in the process of  
11 interrogating and selecting the prisoners were  
eventually put 12 on the truck and subsequently killed.

Herrera, 13 In addition, there is testimony from Ruben  
14 who testified directly about the involvement of the  
defendant

Sierra, 15 in violent acts against him and the testimony of Jaime  
16 in addition, as to the involvement of the defendant in  
violent 17 acts against his person.  
18 While there is no direct testimony -- and the  
19 defendant is correct -- there is no direct testimony as  
to the 20 direct involvement of the defendant in the killing of  
Winston 21 Cabello at Copiapo; based upon the circumstantial  
evidence of 22 his involvement both before and after Copiapo, his  
involvement 23 in totality in the Caravan of Death, his involvement in  
the 24 choosing of the prisoners at Copiapo who were  
interrogated and 25 subsequently placed into the truck and killed, I find  
there is

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1 sufficient circumstantial evidence upon which a  
reasonable jury 2 could find the defendant liable for the claims as  
alleged in 3 the complaint.  
4 I will also deny the plaintiffs' Rule 50  
motion made 5 at the end of the defendant's case. The defendant has

6 presented sufficient evidence in the presentation of  
his case  
7 upon which a reasonable jury could find that the  
defendant had  
8 no involvement in the killing of Winston Cabello and,  
9 therefore, would not be responsible for the causes of  
action  
10 alleged in the complaint.

11 The defendant presented evidence from many of  
the  
12 military officers from Chile who were the persons who  
admitted  
13 to being involved in the Caravan of Death and the  
killings at  
14 Copiapo, and while there is some credibility decisions  
to be  
15 made by the jury on both sides as to whether or not the  
16 defendant was involved, there is evidence in the record  
to show  
17 that the defendant was not involved in the killings,  
that he  
18 was the lowest ranking officer, that he was not present  
at the  
19 area at the time that the killings took place,  
therefore, I am  
20 going to deny the plaintiffs' Rule 50 motion.

21 Obviously, this is a case of credibility  
22 determinations of decisions that the fact finder is  
going to  
23 have to make, which facts and which testimony and which  
24 evidence to accept or reject, and it is rightfully  
placed  
25 before this jury upon the conclusion of closing  
arguments and



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1 instructions on the law.

2 In this ruling, I also find that the  
defendant's

3 argument that there is a different standard for  
military

4 orders, for a person who indicates they are following  
orders as

5 the defendant indicated he is following orders; the  
case cited

6 by the plaintiffs, U.S. versus Kinder at 14 CMR, 742, a  
1954

7 decision from the U.S. Air Force Board of Review, sets  
out the

8 standard that I find applies here. In that case they  
dealt

9 with the defense of justification or following orders  
and at

10 page 770, the Air Force Board of Review quoted from the  
Manual

11 for Courts Martial, U.S. 1951; pertinent to the defense  
of

12 justification for a homicide, and that quotation in  
part is as

13 follows. A homicide committed in the proper  
performance of a

14 legal duty is justifiable. The general rule is that  
the acts

15 of a subordinate done in good faith and in compliance  
with his

16 justification

17 beyond

18 man of

19 illegal,

20 person

21 knowing

22 used as

23 for such

16 supposed duty or orders are justifiable. This  
17 does not exist, however, when those acts are manifestly  
18 the scope of his authority, or the order is such that a  
19 ordinary sense and understanding would know it to be  
20 and the military Court goes on to apply the reasonable  
21 standard. A person of ordinary sense and understanding  
22 the order to be illegal, that that order cannot then be  
23 a cloak of immunity to render justifiable an act but  
24 order would be unlawful.

25 That is page 773.

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1 are still

2 me.

3 There are things I want to point out to the Court.  
4 THE COURT: I am not finished yet.  
5 Where the acts ordered are manifestly behind  
6 the scope

7 of the specific officer's authority and the order is so  
8 palpably unlawful as to admit of no reasonable doubt on  
9 the

1 MR. DAVIS: Your Honor, I don't know if you  
2 pronouncing the rulings so I will sit down if you tell  
3 There are things I want to point out to the Court.  
4 THE COURT: I am not finished yet.  
5 Where the acts ordered are manifestly behind  
6 of the specific officer's authority and the order is so  
7 palpably unlawful as to admit of no reasonable doubt on

would 8 part of a man of ordinary sense and understanding; that

9 not justify a homicide resulting from such an order.

orders, it 10 While the defendant claims he was following

whether 11 then becomes a determination for the jury to make as to

sense and 12 or not this was an order such that a man of ordinary

Here 13 understanding would know it to be illegal or improper.

unarmed 14 the evidence in the record supports the fact these were

15 civilians, this was not an act of combat, and that the  
at 16 decedent, Winston Cabello, as well as the other persons

were taken 17 Copiapo and other places along the Caravan of Death,

law and 18 from their areas of confinement without due process of

19 killed.

denied. 20 On that basis, the Rule 50 motion is also

21 Yes, Mr. Davis.

first 22 MR. DAVIS: The Kinder case was cited for the

read it 23 time yesterday afternoon and I didn't have a chance to

it to 24 until last night and I didn't have a chance to address

25 the Court.

1                   Kinder cites a case, they talk about U.S.  
versus  
2                   Saglietto, 41 F. Supp. 21, which I would like to at  
least hand  
3                   up to the Court. I brought a highlighted copy of it.  
4                   THE COURT: You may.  
5                   MR. DAVIS: The two things that are difficult  
to deal  
6                   with respect to plaintiffs' position, Armando Fernandez  
does  
7                   not assert a justification defense in this proceeding.  
It has  
8                   never been part of this. This is not what this case is  
about.  
9                   Mr. Fernandez' position, as stated, and I think it is  
10                  uncontested in this record now that we have a complete  
factual  
11                  record of what the plaintiffs' claim is, has never been  
given  
12                  an illegal order in reference to anything at Copiapo.  
There is  
13                  no testimony anywhere in this record that Armando  
Fernandez was  
14                  given an order to do anything to Winston Cabello or any  
of the  
15                  other prisoners at Copiapo.  
16                  There is no testimony that Mr. Fernandez did  
anything  
17                  to any of the prisoners at Copiapo.  
18                  Mr. Fernandez, if you will, was given a lawful  
order

19 from his superiors to report to a helicopter, which he  
did. He

20 was on that helicopter from place to place --

21 THE COURT: My finding is there is sufficient  
22 circumstantial evidence that raises an inference that  
he was

23 involved, that a reasonable jury could find based upon  
the

24 testimony of his involvement before and after Copiapo,  
the fact

25 he was on the helicopter as it traveled throughout  
Chile; that

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1 he was chosen for this assignment. That there was  
testimony

2 that he was involved in violent acts involving other  
persons,

3 that he was seen possessing a corvo and another type of  
weapon

4 in Copiapo; that all of those facts are sufficient to  
raise an

5 inference and be supportive of circumstantial evidence  
that he

6 indeed was involved in the killings at Copiapo,  
including the

7 killing of Winston Cabello; and on that basis I have  
denied the

8 motion.

9 If you want to bring up this case when we  
discuss

10 appropriate

conspiracy in the jury charge, that would be the

11

time to do so.

12 your

13

MR. DAVIS: I am not trying to quarrel with

14

rulings --

15

THE COURT: Then don't.

16 make a

17

MR. DAVIS: I am not. I am just trying to

18

record.

19 is time

20

THE COURT: You have made your record. Now it

21

to sit down and go on to the jury charge.

22 it there

23

I haven't really read this case, but skimming

24 concerning

25

are some issues and I have thought about some issues

26 to

27

the conspiracy instruction and I think it would be best

28 time.

29

consider this particular case and your argument at that

30 begin

31

We are going to move on now.

32 with the

33

In my experience the best way to proceed is to

with one pack of the instructions, and we will begin

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34 take up

35

plaintiffs and just to go through them. Then we can

2 the issues and make sure we cover all the instructions.

3 First we have plaintiffs proposed jury  
instruction 1,  
4 consideration of the evidence, duties to follow  
instructions,  
5 no corporate party involved, the pattern jury  
instruction 2.1.

6 Any objection?

7 MR. DAVIS: No objection, Your Honor.

8 THE COURT: Credibility of witnesses,  
plaintiffs  
9 proposed jury instruction 2, pattern jury instruction  
number 3.

10 Any objection?

11 MR. DAVIS: No objection. First, I have  
italicized  
12 consider and accept. What should be submitted should  
be  
13 without italics.

14 THE COURT: As I recall, italics is in the  
pattern.

15 MS. HEALY: It is, Your Honor.

16 THE COURT: I will check, though. I know I  
have faced  
17 this issue before with the criminal instruction.

18 Consider and accept are italicized in the  
pattern.  
19 That objection is overruled. It will be given as  
indicated.

20 Impeachment of witnesses, inconsistent  
statement,  
21 pattern jury instruction 4.1.

22 Any objection?

they 23 MR. DAVIS: I don't have that one in my packet

24 provided to me.

25 THE COURT: 4.1.

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objection to 1 MR. DAVIS: Right. I assume I have no

2 the 4.1 standard instruction.

3 THE COURT: You have no objection to 4.1?

4 MR. DAVIS: Correct.

instruction 5 THE COURT: I will also insert based on

6 number 1, it is at page 11 of the pattern which is the

Rather 7 introductory instruction. I don't see it included.

paragraph 8 than starting with the meat, we will have a two

instruct 9 instruction of this telling the jury I am now going to

10 them.

11 4.1 is given and I will insert the first page.

but I do 12 I don't know if I went over with you before,

13 give a packet of instructions to every juror without

that 14 identifying the citations and they are allowed to take

15 packet into the juryroom.



16 instruction number

4 was withdrawn. We go to proposed

17 proof, which

5, burden of proof. Only plaintiffs had burden of

18 is pattern instruction 6.1 modified to reflect multiple

19 plaintiffs and multiple claims. Any objection?

20 MR. DAVIS: No objection, Your Honor.

21 THE COURT: Proposed instruction number 6.

22 Application of federal law to events in Chile. Was there not

23 an objection to this?

24 MR. DAVIS: There was, Your Honor.

25 THE COURT: What is your objection?

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the law

1 MR. DAVIS: You are about to tell them what

supposed

2 is. Whether it has to do with Chile or not, they are

is. This

3 to apply the law and you will tell them what the law

4 is giving an argument, I believe, to the jury that is

5 unnecessary and not part of what the Court should be

law you

6 instructing them on. You will tell them this is the

7 are supposed to apply and here it is.

might be

8 MS. HEALY: We are merely concerned the jury

the 9 a little confused why they are deciding this case when  
10 events occurred in Chile which is the reason we  
proposed this 11 instruction. It will forestall notes coming out from  
the jury 12 about this question.

13 THE COURT: It may not always involve U.S.  
law. There 14 is some international law concept; is that correct?

15 MS. HEALY: Correct, incorporated into federal  
law.

16 THE COURT: I understand both parties'  
positions here.

17 I think without some kind of indication to the jury  
that sets 18 out for them this is not an issue for them, that we may  
get a 19 question. I will modify this instruction as follows.  
I will 20 only read the first sentence and modify that sentence.  
The 21 Court has determined this case involves U.S. law even  
though 22 the events occurred in another country.

23 Any objection?

24 MS. HEALY: No objection.

25 MR. DAVIS: The same objection as previously  
stated.

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1 THE COURT: That objection is overruled.  
2 Proposed jury instruction number 7,  
depositions.  
3 This is based upon the Seventh Circuit?  
4 MS. HEALY: Yes.  
5 THE COURT: Any objection?  
6 MR. DAVIS: No, but it ought to include at the  
same  
7 time reference to letters rogatory.  
8 THE COURT: I believe there is another  
instruction  
9 pertaining to letters rogatory.  
10 MS. HEALY: Yes.  
11 MR. DAVIS: And I object to it. It is number  
8.  
12 THE COURT: Let's look at number 8.  
13 What is your objection?  
14 MR. DAVIS: The however reference. The third  
15 paragraph.  
16 THE COURT: You don't want them to consider  
they were  
17 subject to cross examination?  
18 MR. DAVIS: These were questions prepared --  
it is  
19 like giving argument to the jury.  
20 THE COURT: Where does this instruction come  
from?  
21 MS. HEALY: There is no pattern instruction on  
letters  
22 rogatory. The plaintiffs crafted this. We modeled it  
after

for the 23 the deposition instruction but believe it is important  
rogatory 24 jury to understand the process by which the letter  
forth 25 process answered written questions without the back and

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part of 1 examination in a deposition and we modified the last  
2 it.

rule of 3 I would also point out depositions on written  
4 questions very much like a letter rogatory, federal  
identifying 5 civil procedure 31, actually has a procedure for  
which 6 cross examination, redirect and recross questions,  
rogatory 7 obviously wasn't followed here given the letter  
8 process.

9 THE COURT: I will strike the "however."

argue 10 MS. HEALY: Would you permit the plaintiffs to  
respondents 11 this issue to the jury, that the letters rogatory  
or the 12 were not asked -- the same as the videotape deponents  
13 other witnesses?

14 MR. DAVIS: Every question they submitted was

15 responded to and we as the defendant also submitted  
questions.  
16 Granted, no one was there to cross examine the  
witnesses but  
17 for them to be able to argue some additional lack of  
18 credibility beyond that which you could argue from a  
normal  
19 witness, is fundamentally unfair. Mr. Fernandez did  
not have  
20 the means to go down and find witnesses in Chile. The  
only  
21 ability he had to get witnesses was through the letters  
22 rogatory and we relied on them from Captain Diaz as  
well as  
23 others. They will argue we got the deposition, all  
they got  
24 are these crummy letters rogatory, they are no good,  
disregard  
25 them. That is an unfair argument. The letters  
rogatory are

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1 the only legitimate procedure that followed the rules  
of civil  
2 procedure for obtaining evidence in Chile.  
3 THE COURT: Unless you can show me some  
authority that  
4 indicates that is a valid argument or position to take  
5 concerning a letter rogatory; it is a vehicle provided  
by law.

6 If there is something in the process or through the  
case law or  
7 the rules that indicates that is a consideration that a  
jury  
8 should make, I will allow the argument, otherwise, no.  
9 MS. HEALY: Thank you, Your Honor.  
10 THE COURT: Number 8 is as modified.  
11 MR. DAVIS: Would you give them consecutively  
or  
12 combined as one.  
13 THE COURT: I will give them separately. 7 is  
14 granted. 8 is granted as modified. I think it is  
appropriate  
15 to separate the two. They are two separate vehicles  
and they  
16 should not be placed into one instruction.  
17 Proposed jury instruction number 9.  
18 MR. DAVIS: We don't have any objection.  
19 THE COURT: Number 10 --  
20 MR. DAVIS: I am sorry, Your Honor. We did  
have an  
21 objection to the first sentence. It says this case  
involves  
22 several claims against the defendant, all of which are  
23 permitted under federal law. You are telling them what  
the law  
24 is. I think "all" should be taken out and just say  
this case  
25 involves several claims against the defendant and you  
can go

1 into the description. If it wasn't permitted by  
federal law,

2 we wouldn't be here.

3 MS. HEALY: We have no objection to modifying  
it.

4 THE COURT: We are striking the first  
sentence? It

5 should be, this claim involves several offenses against  
the

6 defendant?

7 MR. DAVIS: Period.

8 THE COURT: Okay. It is given as modified.

9 Number 10.

10 MR. DAVIS: I object as being repetitive to  
what has

11 already been set forth. I would also point out there  
has been

12 no evidence about anything about an estate here. I  
assume they

13 will be asking for pain and suffering for the family  
but there

14 is nothing here about recovery by the estate. I will  
go down

15 to the wrongful death principals. Nothing like that  
has been

16 presented here and it would be an inappropriate  
instruction.

17 MS. HEALY: I believe Ms. Cabello testified  
she is the

18 representative of the estate and certainly to avoid  
confusion

19 on the part of the jury why she is a plaintiff in her  
own right  
20 and a plaintiff on behalf of the estate, we thought it  
was best  
21 to give an instruction explaining that the estate is a  
separate  
22 party.

23 THE COURT: I will not give the instruction at  
this  
24 time. I will hold it in abeyance in the event there is  
a  
25 question from the jury. If it becomes an issue from  
them, we

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1 can take it up then. The brunt of the instruction is  
2 inappropriate instruction to set out the relationship.  
There  
3 may be an objection to some of it and we can take it  
up. It  
4 may be a question from the jury, how does an estate  
recover.

5 There are enough issues for them to grapple  
with.

6 MS. HEALY: That will be fine.

7 THE COURT: I will deny it without prejudice.  
If it  
8 becomes a jury question, we will deal with it.

9 Have you prepared verdict forms?

10 MR. DAVIS: Defendant had submitted one back  
in June,



11 verdict form.

Your Honor, I believe June 19. We had a proposed

12 Do you have it?

13 THE COURT: I am sure we can get it.

14 go over I would like the parties to get together and

15 that.

16 MS. HEALY: We are actually satisfied with the  
17 defendant's verdict form except for question number 9  
which

18 relates to the statute of limitations issue. That  
should be

19 stricken.

20 THE COURT: Why don't you print that out and I  
can

21 take it up at the end of the session.

22 alternative Going back to jury instruction number 11,

23 means of proving a defendant's liability.

24 until I think we will have to hold this in abeyance

25 and some of the other instructions of conspiracy and aiding

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1 abetting are dealt with; is that correct?

2 MR. DAVIS: I believe so.

3 THE COURT: I will reserve on that.

an 4 Aiding and abetting. I believe both sides had

5 aiding and abetting proposed instruction?

I 6 Quite frankly, we can go through this now, but

7 really find that the claims themselves should go first,  
then

8 the aiding and abetting. There is an introduction. I  
will

9 tell them about the claims, then I am telling them  
about aiding

10 and abetting. That is a theory upon which the elements  
can be

11 proven.

12 I will change the order of this. We can go  
through it

13 now.

14 MS. HEALY: We would have no objection to  
modifying

15 the order in which these are given.

16 THE COURT: So far I think they are fine in  
the order

17 in which they are.

18 MR. DAVIS: You would go through -- you would  
define

19 extra judicial killing, torture?

20 THE COURT: Yes, the claims first, then go  
through --

21 if aiding and abetting is given, then it is appropriate  
to say

22 one way the defendant may be found liable for the  
claims you

23 have just heard is through these findings, otherwise I  
think it

24 gets very confusing.

25 Why don't I reserve on these and let's go to  
the

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1 claims first.

2 Number 14 is the first claim?

3 MS. HEALY: Yes, it would be.

4 THE COURT: What count is that in the  
complaint, in

5 the second amended complaint? Does the verdict form  
relate to

6 counts, Mr. Davis?

7 MR. DAVIS: It relates to extra judicial  
killing,

8 torture --

9 THE COURT: Does the verdict form name counts  
in the

10 complaint?

11 MR. DAVIS: No. It describes them by their  
shorthand

12 version.

13 MS. HEALY: Those would be Counts 1, 2 and 3.

14 THE COURT: There is more than one claim.  
What is the

15 difference between Counts 1, 2 and 3?

16 MS. HEALY: The difference is, the estate and  
all the

under 17 Cabellos are aliens and they are pleading these claims  
citizens 18 the ATCA and the PVBA. The other plaintiffs are U.S.  
19 so they are only pleading these claims under the PVBA.  
20 THE COURT: Let's look at the body of this.  
She is 21 printing out the verdict form now.  
22 Did you submit one also on extra judicial  
killings? 23 MR. DAVIS: Defense instruction 4.  
24 THE COURT: I will need your copy of the  
verdict form 25 to make a copy, please.

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1 Actually it should be extra judicial killing,  
because 2 it would only be one?  
3 MR. DAVIS: Yes.  
4 THE COURT: They are pretty similar.  
5 MR. DAVIS: The difference is the aiding and  
abetting 6 conspiracy and how they are going to address that.  
7 THE COURT: This instruction should only deal  
with the 8 elements that make up extra judicial killing, and the  
theories 9 of aiding and abetting and conspiracy should be dealt  
with

10 separately because aiding and abetting is not an  
element of  
11 extra judicial killing, nor is conspiracy an element.  
The  
12 elements are really a deliberate killing not authorized  
by a  
13 previous judgment, pronounced by a regularly  
constituted Court  
14 affording all of the judicial guarantees recognized.  
That is  
15 basically it; correct?  
16 MS. HEALY: That is correct.  
17 THE COURT: A deliberate killing not  
authorized by a  
18 previous judgment of law.  
19 MS. HEALY: And committed under color of law.  
We  
20 would be satisfied if the Court wished to do that  
simply  
21 deleting our element number 4 and addressing the  
theories of  
22 liability after the giving of the substantive  
instructions. We  
23 would oppose any insertion of a command responsibility  
concept  
24 into this instruction by the defendant.  
25 THE COURT: The second and third elements for  
the most

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1 part are the same? The plaintiffs quotes the statute.

2 MS. HEALY: We intended to track the statute.

3 THE COURT: Would you agree, Mr. Davis?

4 MR. DAVIS: I would agree. I would have no  
objection  
5 to using their second and third elements.

6 THE COURT: I will grant the plaintiffs'  
second and

7 third. Then the first element of the plaintiff an  
individual

8 deliberately killed Winston Cabello and the fourth, the  
9 defendant personally killed Winston Cabello or aided  
and  
10 abetted.

11 MR. DAVIS: There is only one person here, the  
12 defendant.

13 THE COURT: Why don't we make it three  
elements. The

14 defendant deliberately killed Winston Cabello. The  
second

15 being, while acting under actual or apparent authority  
or color  
16 of law of a foreign nation and the third, the killing  
of

17 Winston Cabello was not previously authorized, etc.

18 MS. HEALY: We would object to that. It seems  
to  
19 indicate the defendant has to personally and directly  
kill

20 Winston Cabello and it rules out the second liability.

21 THE COURT: The second liability would come in  
in the  
22 subsequent instruction.

23 MS. HEALY: The Court's statement which tracks  
24 Mr. Davis' would be somewhat misleading. The jury will  
already  
25 have in their mind the defendant had to kill Mr.  
Cabello rather

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1 than Mr. Cabello had to be killed by someone and there  
would be  
2 a difference about the defendant's personal involvement  
in this  
3 action.

4 THE COURT: How about there was a deliberate  
killing  
5 of Winston Cabello is this.

6 MS. HEALY: Or Winston Cabello was  
deliberately killed  
7 by a person acting under color of apparent authority.

8 MR. DAVIS: That is not the claim here.

9 MS. HEALY: Our point here is to explain  
deliberate

10 killing and the other elements and not to get to who  
was the --

11 the person who actually used the gun or the knife,  
because then

12 one begins to get into issues of secondary liability,

13 conspiracy and aiding and abetting. If the Court wants  
to

14 delete that from here, we would be satisfied.

15  
read it.

THE COURT: You said that so fast. Let me

16  
abetting

What happens in essence is, under aiding and

17  
and

or conspiracy, that theory is used -- let's take aiding

18  
19  
it

abetting. If somebody aids and abets and completes the

elements of aiding and abetting, it is as if they did

20  
defendant

themselves. So in essence they would be finding that

21  
abetting.

deliberately killed Winston Cabello by aiding and

22  
the

Maybe there should be a caution at the end of

23  
they find

instruction; but the element would have to be that if

24  
by the

Armando Fernandez deliberately killed Winston Cabello

25  
conspiracy; if

fact he aided and abetted, or he entered into a

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1 those instructions are granted.

2  
and I

MS. HEALY: I understand the Court's position

3 think it is something that lawyers understand, but to a

4  
Winston

layperson, by saying defendant deliberately killed

5 Cabello it presumes a direct action on the part of the



6 personally and

defendant, directed immediately at Mr. Cabello

7 address.

directly in a way that aiding and abetting doesn't

8 of the

THE COURT: That is why I am saying at the end

9 caution

instruction there should be a caution by the Court. I

10 number X

you members of the jury, however, you must consider

11 instructions -- the aiding and abetting instruction,

12 and direct

and Y, in deciding the elements of this instruction,

13 them to consider that.

14 because it

MS. HEALY: I am still somewhat concerned

15 Cabello

wouldn't get to things like causing the killing of Mr.

16 methodologies or

or agreeing to kill Mr. Cabello or any other

17 activities like

manner in which a defendant can participate in

18 Winston

this. That is why we prefer to go with something like,

19 under actual

Cabello was deliberately killed by a person acting

20 or apparent authority, etc.

21 brought.

MR. DAVIS: That is not the claim they

22 see

THE COURT: I need the complaint. I want to

23 exactly how it is detailed in the complaint.

24 the

MR. DAVIS: Mr. Fernandez is the one sued for

25 extra judicial killing, Your Honor.

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1 (Interruption.)

2 THE COURT: What would be the parties'  
position about

3 utilizing the language as it is detailed in the  
complaint; the

4 defendant deliberately and actively participated in the  
extra

5 judicial killing?

6 MR. DAVIS: That would be okay with us, Your  
Honor.

7 We don't object to that language.

8 MS. HEALY: If the Court gives the same kind  
of

9 cautionary instruction about aiding and abetting and  
10 conspiracy, because participated in, might imply to a  
juror

11 more than an agreement to kill Mr. Cabello and others,  
but also

12 an active role involving the physical killing of Mr.  
Cabello

13 may not be necessary.

14 THE COURT: I can give the cautionary -- let  
me go

15 through it.

16 The first element would be, and this is on  
proposed

17 jury instruction number 14, that the defendant  
deliberately and

Cabello. 18 actively participated in the killing of Winston  
19 Any objection?  
20 MR. DAVIS: None from the defendant.  
21 THE COURT: I will give a cautionary  
instruction. If  
22 you want to go back I will let you go back. Based upon  
my  
23 assuring you there is going to be a cautionary  
instruction is  
24 there any objection? You can go back but I have to do  
it one  
25 segment at a time.

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1 MS. HEALY: It would be helpful to know what  
the  
2 cautionary instruction would read.  
3 THE COURT: I will give you the whole thing  
and you  
4 can tell me. I understand your position.  
5 The second element is --  
6 MS. HEALY: I would propose the defendant  
acted under  
7 actual or apparent.  
8 THE COURT: Any objection to that?  
9 MR. DAVIS: I don't think so.  
10 THE COURT: Rather than that person killed  
Winston

under 11 Cabello while acting; it would be the defendant acted  
foreign 12 actual or apparent authority under color of law of a  
13 nation.

actual 14 Let me do it again. The defendant acted under  
15 or apparent authority or color of law of a foreign  
nation.

16 Any objection?

17 MR. DAVIS: No objection by the defendant.

18 THE COURT: Does that comport with your  
proposal,  
19 Ms. Healy?

20 MS. HEALY: It does.

21 THE COURT: That would be the second element.

22 The third element would be as it is detailed  
in the  
23 plaintiffs' proposed jury instruction.

24 MR. DAVIS: No objection, Your Honor.

25 THE COURT: Those three elements cover the  
element of

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1 extra judicial killing under the TVPA; correct, as  
detailed in  
2 the statute?

3 MR. DAVIS: I believe so.

4 THE COURT: You agree Ms. Healy?

5 MS. HEALY: Yes, Your Honor.

6 THE COURT: Now I will go into the cautionary  
7 instruction.

8 I can't do that until I rule. If aiding and  
abetting  
9 or conspiracy is granted, and I haven't ruled on it  
yet, I  
10 don't want to indicate a ruling one way or the other;  
there  
11 would be an additional paragraph, not part of the  
elements,  
12 that would say as follows: You may consider  
instruction or  
13 instructions X and Y to determine whether or not the  
plaintiffs  
14 have proved the elements above by a preponderance of  
the  
15 evidence.

16 MR. DAVIS: Defendant has no objection, Your  
Honor.

17 MS. HEALY: We wouldn't have an objection at  
the time,  
18 but that is subject to looking at any modifications to  
the  
19 aiding and abetting and conspiracy instructions which  
would tie  
20 into this.

21 THE COURT: It will be the three elements and  
the  
22 cautionary paragraph to the jurors that they may  
consider  
23 additional instructions to determine whether the  
elements have

24       been met.

25                       MS. HEALY: I know the Court would like to  
move on but

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1       I would like to return to the first element. In giving  
it  
2       further consideration, I am concerned still that the  
way it is  
3       phrased, deliberately and actively participated in,  
might lead  
4       a juror to assume more direct action is involved here  
than  
5       actually would be required for aiding and abetting or  
6       conspiracy. I would be inclined to modify it to say,  
the  
7       defendant deliberately and actively participated in  
events that  
8       led to the killing of Winston Cabello.

9                       MR. DAVIS: That is not an element of the  
statute,  
10      Your Honor.

11                      THE COURT: It has to be a deliberate killing.  
They  
12      have to find he deliberately killed him, either that he  
did it  
13      himself or he aided and abetted others to do it or he  
entered  
14      into a conspiracy to do it. That is the theory by  
which he  
15      deliberately killed.

is a 16 The element of the statute under the statute  
that 17 deliberate killing, not somebody participated in events  
18 led to it. There has to be a deliberate killing.

certainly 19 MS. HEALY: I understand that, Your Honor,  
20 that Mr. Cabello was deliberately killed is not an  
issue here.

said I 21 The defendant has put on evidence where Patricio Diaz  
22 took him out and killed him.

23 If one is looking at a conspiracy to kill, for  
24 example, the defendant can join a conspiracy in an  
attempt to  
25 kill a number of prisoners but not form an intent to  
kill

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number 1 Mr. Cabello personally. His intent may be to kill some  
2 of prisoners, but not necessarily a particular  
prisoner. That  
3 is why we tried to strip out who did the deliberate  
killing in  
4 our formulation.

Winston 5 Another alternative might be something like,

6 Cabello was deliberately killed by the defendant and/or  
other

7 persons.

8 MR. DAVIS: We have to go back to what Mr.  
Fernandez

9 is being sued for. Your Honor quoted the languages in  
the

10 complaint and you are citing to their language in the  
complaint

11 and they don't like it. Deliberately and actively  
killing

12 Mr. Cabello, that is what he is being sued for.

13 THE COURT: He has to have either killed him  
or

14 deliberately and actively participated by aiding and  
abetting

15 others and taking certain actions pursuant to aiding  
and

16 abetting, or, actively participating by being a member  
of a

17 conspiracy to kill.

18 MS. HEALY: We are entirely in agreement with  
that.

19 The problem is how to formulate this in a way that gets  
to what

20 the Court just said and explain to the jury there are  
any

21 number of ways a person can be liable for the killing  
of

22 another.

23 THE COURT: That is why they are referred to  
the other

24 instructions if those instructions are granted. They  
would

25 look at this instruction and then say let's see the  
ways the



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and 1 plaintiff can meet these elements and we look at aiding  
2 abetting or conspiracy if those instructions are  
granted.

3 MS. HEALY: I am concerned if we link the  
words 4 defendant, deliberately, and kill, the jury will say  
that means 5 direct participation in the death of Mr. Cabello and  
that is 6 not required here. We are concerned --

7 THE COURT: But it is required here under the  
elements 8 of the statute. It is just the theory by which that  
element is 9 met.

10 MS. HEALY: That is entirely correct. I am  
just 11 concerned the formulation that has been discussed here  
is 12 actually going to lead the jury astray, which is why we  
wanted 13 to stick with something like I proposed, that he was  
import 14 deliberately killed. We all agree on that, but not to  
has done 15 into that a requirement that the defendant personally  
16 the act that directly caused Mr. Cabello's death.

17 MR. DAVIS: I would object unless they are  
going to

18 stipulate Mr. Fernandez did not personally kill Mr.  
Cabello.

19 MS. HEALY: We wouldn't stipulate to that.  
The jury

20 can infer he did deliberately kill him himself or  
conspired

21 with others to do so and some other person may have  
done the

22 killing or he aided and abetted others who may have  
done the

23 killing. We want to leave the jury with those three  
methods by

24 which plaintiff proved the claims.

25 MR. DAVIS: They brought the claim and framed  
it the

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1 way they did. This is the last way they framed it in  
their

2 second amended complaint. They can't continue to  
change their

3 theories in this case.

4 THE COURT: I will reserve on the first  
element. The

5 second and third element and the cautionary instruction  
with

6 the caveat that I have to determine what X and Y are,  
until I

7 have ruled on the aiding and abetting, so I can look at  
all

8 three in conjunction with each other.

9 My inclination is to overrule the objection  
and grant  
10 that first element, but I want to look at it in  
conjunction  
11 with the aiding and abetting and conspiracy to make  
sure that  
12 the role -- that element both meets the requirements of  
the  
13 statutes and that the aiding and abetting or conspiracy  
are  
14 granted, there is sufficient reference to them.

15 MS. HEALY: The statute doesn't say the  
defendant has  
16 to personally cause the death of the individual,  
personally  
17 commit the killing.

18 THE COURT: That is what your complaint says.  
19 Paragraph 58 in the first claim for relief says,  
defendant  
20 Fernandez Larios actively participated in the extra  
judicial  
21 killing of the decedent Winston Cabello.

22 Next it says defendant Fernandez Larios also  
23 participated in the extra judicial killing of the  
decedent  
24 Winston Cabello as a joint tort feisor co-conspirator  
and  
25 participant in a common scheme and defendant Fernandez  
Larios

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other  
common  
Cabello.

1 procured, counseled, aided and abetted and assisted the  
2 members of General Arellano's squad in effecting the  
3 plan and scheme, that resulted in the death of Winston

mirrors  
abetting.

4 The third sentence of paragraph 58, I take it  
5 the other claims and that would be the aiding and

he  
and then  
participated as

6 The first allegation by the plaintiff is that  
7 actively participated in the extra judicial killing,  
8 that he aided and abetted other members and he  
9 a co-conspirator.

believe it  
I am  
first  
--

10 MS. HEALY: When all three are combined, we  
11 is correct how the plaintiffs can prove his liability.  
12 just concerned by essentially stripping out only that  
13 sentence and putting it in this particular instruction

other  
other,  
then I will make a final ruling on that first element.

14 THE COURT: That is why I want to look at the  
15 instructions and look at them in conjunction with each  
16

17 MS. HEALY: Thank you, Your Honor.

18 THE COURT: Let's go on to torture.

19 It may be we just change in that first element  
the

"and," it 20 "and" to an "or." That may solve it. Rather than  
21 would be "or."

22 MS. HEALY: I would like a moment to ponder  
that.

23 THE COURT: Okay. There need to be active  
24 participation for both the conspiracy and aiding and  
abetting.

25 Think about it. I am not asking for your position now.  
A

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1 light bulb just went off in my head.

2 Torture. We have the same problem here,  
basically?

3 MS. HEALY: We do, indeed.

4 MR. DAVIS: Looking at the statute, the  
statute itself

5 under torture says, reading from section 3B of the  
Torture

6 Victim Protection Act, and it says, torture means any  
act

7 directed against an individual in the offender's  
custody or

8 physical control by which all these things --

9 THE COURT: They don't disagree with that.  
The

10 plaintiff has a second element -- you are saying the  
offender

11 has to be Mr. Fernandez Larios?

12 MR. DAVIS: Yes. Frankly, this should not go  
to the  
13 jury because there is no evidence he was in his  
physical  
14 control or his custody.

15 THE COURT: Let me put that to rest. There is  
16 certainly evidence of constructive physical control or  
custody,  
17 that he was part of the group that took control of the  
decendent  
18 when he was placed on the truck, removed from the jail;  
so that  
19 would be constructive physical control, maybe not  
actual  
20 control, and there is an active participation in the  
21 choosing -- there is evidence that shows active  
participation  
22 in the choosing of Winston Cabello as one of the names  
on the  
23 list or the files as a person to be put on the truck.

24 MR. DAVIS: That is how they are proceeding  
but this  
25 is a separate claim, it is a claim of torture and the  
statute

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1 is unequivocal and it says in the offender's custody or  
2 physical control. It doesn't say the offender's  
constructive

3 custody or constructive control, and I believe the  
statute  
4 would be directed against people for against whom there  
is  
5 evidence they physically led a torture, all the things  
that are  
6 set forth in the statute.

7 THE COURT: I understand what you are saying.  
You are  
8 saying he has to be the offender and actually have that  
person  
9 before him in his custody and control and inflict the  
torture  
10 on him pursuant to the statute?

11 MR. DAVIS: Correct. It goes to some of my  
other  
12 positions in this case, but even the Ford case and the  
Church-  
13 woman case, that was secondary liability and they talk  
about  
14 the control that the person had over the subordinate  
troops.  
15 That would acknowledge if there was evidence Mr.  
Fernandez  
16 Larios ordered A, B and C to do this torture, that  
should be a  
17 claim to go to the jury, but here the statute says  
directed  
18 against an individual while in the offender's custody  
or  
19 physical control. They have not proven that in this  
case.

20 THE COURT: I don't find it has to be sole  
custody or  
21 control. It can be joint custody and control. It  
can't be

22 person A and person B takes somebody into a room and  
tortures  
23 them and person B is not the person who actually  
touches the  
24 person but walks with the person into the room, is  
there while  
25 person A tortures the person and person B is absolved  
from a

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1 torture claim because he was only the person that  
walked him  
2 and stood in the room while the other person actually  
did the  
3 physical act. I don't believe that is the intent of  
the  
4 statute that Congress passed.

5 MR. DAVIS: I would agree with that, Your  
Honor, but  
6 where is the evidence of that here in this case? There  
isn't.

7 MS. HEALY: Putting aside the evidence, we  
would agree  
8 with the Court's position and disagree with Mr. Davis.

9 THE COURT: Certainly there is evidence of  
custody and  
10 control of the pattern of persons being removed from  
prisons  
11 who were basically civil servants under the Allende  
Government



12 removed from

who were rounded up, then under these events were

13 various

the prison by a group of individuals and were killed by

14 it was

means, which were not incident to lawful sanctions and

15 intentionally inflicted.

16 Let's look at these instructions.

17 defendant

I would propose the same first element. The

18 of

deliberately or actively participated in the infliction

19 on

severe pain and suffering, whether physical or mental,

20 of the

Winston Cabello. I would mirror the number one element

21 extra judicial claim.

22 defendant

MR. DAVIS: That would start with the

23 intentionally or actively participated?

24 statute or

THE COURT: Yes, it is intentional in the

25 the claim that is filed.

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1 modification.

MS. HEALY: I would have a slight

2 break and

Before we finalize it I would like a chance to have a

3 consult with my colleagues.

4 I would propose the defendant intentionally  
inflicted  
5 severe pain or suffering, whether physical or mental on  
Winston  
6 Cabello, or actively participated in the infliction of  
severe  
7 pain and suffering, etc.

8 THE COURT: I was just thinking about a  
modification  
9 that included that, though I would insert  
"intentionally,"  
10 again.

11 The first element would be, the defendant  
12 intentionally inflicted severe pain and suffering,  
whether  
13 physical or mental on Winston Cabello or actively  
participated  
14 in the intentional infliction of severe pain and  
suffering,  
15 whether physical or mental on Winston Cabello. That  
would be  
16 the first element.

17 The second element would be, Winston Cabello  
was in  
18 the defendant's custody or physical control.

19 The third element would be, the intentional  
infliction  
20 of severe pain or suffering on Winston Cabello was done  
while  
21 acting under the actual or apparent authority or color  
of law  
22 of a foreign nation.

23 MS. HEALY: That ends up being a little  
confusing. I

24 propose we go back to what we did with killing, the  
defendant  
25 acted under apparent authority.

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1 THE COURT: That is fine. That was the second  
element  
2 in the extra judicial killing.

3 The defendant acted under actual or apparent  
4 authority, or color of law of a foreign nation.

5 MS. HEALY: As to the second element, the  
Court has  
6 already identified the issue of constructive custody or  
7 control. It would be good to incorporate that into the  
second  
8 element.

9 MR. DAVIS: I object to them changing what  
they  
10 previously submitted as a second element, which by the  
way,  
11 their instruction tracks the language of the statute.

12 THE COURT: I will leave it the way it is. If  
you  
13 want to propose an additional instruction that talks  
about  
14 custody or physical control, what comes to my mind is  
the  
15 possession, constructive or actual possession  
construction in

16 the criminal Eleventh Circuit pattern instruction. I  
will give  
17 you an opportunity. We will break at one and during  
the lunch  
18 break both sides can see whether there is something  
that  
19 indicates something more definitive by case law or some  
form of  
20 instruction.

21 Where does the fourth element come from?

22 MS. HEALY: That actually comes from section  
3(b)(1)  
23 of the statute. It is rather a long paragraph, but it  
talks  
24 about the purposes of the intentional infliction of  
harm  
25 obtaining from that individual or third person  
information.

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1 THE COURT: That wasn't what applied here. It  
wasn't  
2 for information or a confession.

3 MS. HEALY: There are a number of different  
prohibited  
4 purposes. We shorthanded them.

5 THE COURT: Any reason based on discrimination  
of any  
6 kind.

7 Any objection to the fourth element?

8 MR. DAVIS: I don't know what discriminatory  
purpose  
9 means here. The answer is, yes, I would object to the  
10 discriminatory purpose. There is nothing in this  
record about  
11 that. It is for purposes of intimidation or  
punishment.

12 THE COURT: What would be the discriminatory  
purpose?

13 MS. HEALY: Mr. Cabello was a member of the  
Allende  
14 Government and the Pinochet regime was targeting former  
15 government personnel.

16 THE COURT: That objection is overruled. I do  
find  
17 there is evidence in the record for a discriminatory  
purpose,  
18 that means that the decedent was a member of the  
Allende  
19 Government and these actions were directed to  
specifically  
20 target those persons who were members of the Allende  
21 government.

22 The fourth element will be granted.

23 I believe that covers -- we don't need to go  
into the  
24 fifth element and the same cautionary paragraph would  
apply?

25 MS. HEALY: Yes.

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1                   MR. DAVIS: May I hear the first element, what  
your

2                   thinking is on the first element or your ruling?

3                   THE COURT: The defendant intentionally  
inflicted

4                   severe pain or suffering, whether physical or mental on  
Winston

5                   Cabello or actively participated in the intentional  
infliction

6                   of severe pain or suffering, whether physical or  
mental, on

7                   Winston Cabello. It would mirror the first element in  
the

8                   extra judicial killing.

9                   MR. DAVIS: I thought before you said the  
defendant

10                  intentionally or actively participated, then had a  
clause in of

11                  inflicted severe pain.

12                  THE COURT: Here it is. The defendant  
intentionally

13                  inflicted severe pain or suffering whether physical or  
mental

14                  on Winston Cabello or actively participated in the  
intentional

15                  infliction of severe pain or suffering, whether  
physical or

16                  mental, on Winston Cabello. It should be severe pain  
or

17                  suffering. Then there would be the same cautionary  
conclusion.

18                  You may consider instructions X and Y to determine  
whether or

19                  not the plaintiffs have proven the elements above by a

20 preponderance of the evidence.

21 MS. HEALY: We have another proposed  
modification.

22 Instead of the defendant under actual or apparent  
authority, it

23 would be the defendant and or others acting with him,  
acted

24 under.

25 MR. DAVIS: The claim is against Mr. Fernandez  
and not

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1 and/or others, and it should stay with the defendant.

2 THE COURT: What I indicated the third element  
would

3 be, the intentional infliction of severe pain or  
suffering on

4 Winston Cabello was done while acting under the actual  
or

5 apparent authority or color of law of a foreign nation.

6 MS. HEALY: Thank you. I think my notes were  
7 incorrect on that.

8 THE COURT: I see what happened. I proposed  
that --

9 you wanted me to go back to what we did with the first  
one and

10 that one was, the defendant acted under actual and  
authority or

11 apparent color of law.

12                   You want, the defendant acted under actual or  
apparent

13                   authority or color of law of a foreign nation?

14                   MS. HEALY: Or we can go with the Court's  
formulation.

15                   THE COURT: That mirrors the first one, that  
mirrors

16                   extra judicial killing.

17                   MS. HEALY: Instead of the intentional  
infliction, it

18                   would be the killing was done under the actual or  
apparent

19                   authority.

20                   THE COURT: That is what I proposed. You  
objected to

21                   it.

22                   MS. HEALY: I am rethinking my objection.

23                   THE COURT: You have no objection to my  
original

24                   proposal? I will read it again.

25                   The third element would be, the intentional  
infliction

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1                   of severe pain or suffering on Winston Cabello was done  
while

2                   acting under the actual or apparent authority or color  
of law

3                   of a foreign nation.

4                   Do you want me to read all of them to you?



5 MR. DAVIS: No. I thought we said the  
defendant's  
6 actions -- whether the defendant's actions were done.

7 THE COURT: The first element is, that the  
defendant

8 intentionally inflicted severe pain or suffering  
whether

9 physical or mental, on Winston Cabello or actively  
participated

10 in the intentional infliction of severe pain or  
suffering

11 whether physical or mental on Winston Cabello.

12 The second element is, Winston Cabello was in  
the

13 defendant's custody or control.

14 The third element is the intentional  
infliction of

15 severe pain or suffering on Winston Cabello was done  
while

16 acting under the actual authority or apparent authority  
under

17 color of law of a foreign nation.

18 The fourth element, severe pain and suffering  
was

19 inflicted for the purpose of intimidation, punishment  
or any

20 discriminatory purpose and the cautionary paragraph  
after the

21 elements is, you may consider instructions X and Y to  
determine

22 whether or not the plaintiffs have proven the elements  
above by

23 a preponderance of the evidence.

24 MS. HEALY: These are difficult instructions,  
but we  
25 agree with the version the Court just gave.

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1 MR. DAVIS: That would be essentially how the  
elements  
2 would read on the extra judicial killing?

3 THE COURT: I didn't hear you.

4 MR. DAVIS: I just wanted to be parallel to  
the extra  
5 judicial killing, how you had formulated extra judicial  
killing  
6 in the third element as well.

7 THE COURT: In that one the defendant acted  
under  
8 actual or apparent authority or color of law of a  
foreign  
9 nation. This one is the intentional infliction done  
while  
10 acting under the actual or apparent authority.

11 MR. DAVIS: I think the burden is still what  
12 Mr. Fernandez did. To that extent I would object to  
the extent  
13 it doesn't relate to what actions of the defendant were  
in  
14 connection with that element.

15 THE COURT: I will overrule that objection  
based upon

16 the wording of the statute which talks about any acts  
directed  
17 against an individual in the offender's custody or  
physical  
18 control. There has to be a finding that the individual  
was in  
19 the offender's custody or physical control. It does  
not  
20 preclude an act that would be done by another person, I  
don't  
21 find, as long as that person is in the offender's  
custody or  
22 physical control, any act.

23 MS. HEALY: We would like to have what is now  
the  
24 third element of torture also mirror the second element  
of  
25 extra judicial killing so we have parallels between the  
two

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1 instructions.  
2 THE COURT: You are now going back and forth  
on this.  
3 The second element of extra judicial killing,  
the  
4 defendant acted under actual or apparent authority or  
color of  
5 law of a foreign nation. I want that for the third  
element,  
6 that the defendant --

7 MS. HEALY: I am suggesting we adopt the third  
element  
8 of the torture instruction as just given and  
incorporate that  
9 into the second element --  
10 THE COURT: No, I will not go back to extra  
judicial  
11 killing.  
12 Both objections are overruled.  
13 Let's look at proposed jury instruction number  
16,  
14 under color of law.  
15 Any objection?  
16 MR. DAVIS: No.  
17 THE COURT: I will give this after the claims.  
This  
18 will come after degrading treatment and crime against  
humanity.  
19 It would have to come after 19. 16 will be after 19.  
20 MS. HEALY: I would point out under color of  
law is  
21 actually an element, although we don't object to --  
22 THE COURT: I just wanted to give all the  
claims  
23 first.  
24 Physical or mental suffering. This tracks the  
25 statute?

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1 MS. HEALY: It does substantially.

2 THE COURT: Where does the statute talk about  
what  
3 severe physical pain and suffering includes?

4 MS. HEALY: That is the area we made some  
5 modifications because there is no real discussion about  
6 physical pain or suffering in the statute, only mental  
pain or  
7 suffering.

8 THE COURT: Any objection?

9 MR. DAVIS: I don't understand the necessity  
for this  
10 instruction. We have the damage instruction on pain  
and  
11 suffering -- I understand it is talking about what  
happened  
12 with the element relating -- the third element under  
torture.  
13 I object, it is unnecessary. They can argue what they  
think it  
14 is.

15 THE COURT: I will strike the first sentence.  
The  
16 mental pain or suffering is detailed in the statute.  
Quite  
17 frankly, I think physical pain and suffering is self-  
evident,  
18 based upon the facts.

19 MS. HEALY: That would be fine.

20 THE COURT: This will also come after 19. It  
is given  
21 as modified.

for 15. 22

Let's take 15 minutes. We will be in recess

23

(Thereupon a recess was taken, after which the following proceedings were had.)

25

(Open court. Jury not present.)

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vs.

1

THE COURT: Estate of Winston Cabello, et al.

2

Armando Fernandez-Larios, Case Number 99-0528.

3

Would counsel state their appearances.

4

(All parties present.)

5

to

THE COURT: Two matters. First of all I want

6

Sierra.

clarify a ruling I made this morning in regard to Jamie

7

testimony

There was not actually testimony by Mr. Sierra. The

8

encounter

was by Mr. Morales Alcada in which he relates the

9

which Sierra

that he saw between Fernandez Larios and Sierra in

10

at page

as prisoner was interrogated and beaten. That would be

11

350 of the transcript. I just wanted to clarify that.

12

have not

In addition, juror number 7 has called. We

13

an

yet gotten in touch with her teacher although Lisa left

her 14 extended message. She has indicated another person in  
so she 15 corporation is going to handle the meeting on Tuesday  
16 will be here.

17 At this juncture we can make a decision after  
want to 18 tomorrow, or you can give me your input as to how you  
jury 19 handle juror number 5, if you want him to remain on the  
know 20 and are willing to fly him out to Jamaica; the jurors  
concerned 21 nothing of the numbers what is required so as far as  
22 his presence is required.

23 I will leave that to you to ponder and you can  
let me 24 know tomorrow. He will come in tomorrow and my  
preference be 25 he come also on Tuesday when they begin deliberation he  
is and

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him on 1 if in fact he is going to be released I would release  
makes 2 Tuesday because it is a three day weekend and it always  
experience of 3 me feel more secure having a long weekend and the  
their 4 some jurors, where I had one fly to Colombia, people in

5 family get sick, so I like to start off the week with  
as many  
6 jurors as possible. I would bring juror number 5 in on  
Tuesday  
7 and if both sides want him to remain and you are  
willing to fly  
8 him to Jamaica and he is willing to stay, we will  
continue with  
9 eight and eight would deliberate. If the position of  
the  
10 parties is such you are willing to let him go and  
deliberate  
11 with seven, you can give me your positions on that.

12 Let's continue with plaintiffs' proposed  
instruction  
13 number 18, cruel, inhuman, degrading punishment.

14 We have the same third element instruction  
here?

15 MS. HEALY: Yes and the same in the next  
instruction.

16 MR. DAVIS: Paralleling what we have done on  
the  
17 previous instructions, Mr. Fernandez being the  
defendant, they

18 have to prove Mr. Fernandez inflicted mental pain or  
physical  
19 suffering on Mr. Cabello. That is the basic structure  
we had  
20 previously, either he did it --

21 THE COURT: Actively participated in it.

22 Any objection to changing the first element to  
mirror  
23 the first two elements on the other claims?

24 MS. HEALY: It has already been decided on the  
other



greater 25 claims. Actively participated does seem to require a

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1 degree of responsibility and participation -- maybe not  
2 responsibility, but active participation by the  
defendant. So

3 we would be concerned about that. We are importing  
theories of

4 responsibility into these instructions, which is what  
the Court

5 had originally not wanted to do and if we are going to  
do that,

6 I prefer we do something like actively participated or  
7 encouraged or agreed, so we import all of the forms of  
8 potential proof with respect to secondary liability.

9 THE COURT: I will take them all out and leave  
it -- I

10 will take out active participation as the first  
element. I

11 will not add anything else. Under aiding and abetting  
and

12 under conspiracy, there must be an act in furtherance  
of the

13 conspiracy.

14 MS. HEALY: I understand. I am not  
necessarily

15 objecting to the giving of the instruction as the Court  
has

16 formulated it. I wanted to express my concern and  
essentially

17 preserve our rights on appeal with respect to the  
instructions.

18 THE COURT: I will overrule that and may  
revisit it at

19 the time I consider the conspiracy instruction.

20 The first element would be that the defendant  
21 inflicted mental or physical suffering, anguish,  
humiliation,

22 fear, debasement on Winston Cabello or the defendant  
actively

23 participated in the infliction of mental or physical  
suffering,

24 anguish, humiliation, fear, debasement on Winston  
Cabello.

25 That would be the first element.

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1 The second element would be that the defendant  
acted  
2 under color of law, and that would be it; correct? The  
third  
3 element would be stricken?

4 MS. HEALY: Again we would leak the  
instruction --

5 THE COURT: I will include the paragraph  
rather than

6 the third element, I will include the paragraph that

7 infliction of mental or physical suffering, anguish,

8 humiliation, fear or debasement on Winston Cabello --  
you may  
9 consider instructions X and Y to determine whether or  
not the  
10 plaintiffs had proven the elements above by the  
preponderance  
11 of the evidence.

12 MR. DAVIS: We have no objection to that  
instruction,  
13 Your Honor.

14 THE COURT: Other than what you previously  
voiced, do  
15 you have any objection?

16 MS. HEALY: We would like you to modify it to  
you  
17 should consider.

18 THE COURT: That is denied. They don't have  
to -- it  
19 is a determination for the jury to determine whether or  
not the  
20 defendant aided or abetted in the participation of  
these acts  
21 or whether he was a member of the conspiracy. They  
don't have  
22 to, and "may" gives them the opportunity to either  
consider  
23 that or say no, we don't want to consider that because  
we don't  
24 believe the facts support it.

25 It is a determination for the jury to  
determine

1 whether or not those additional theories should be  
considered.

2 It should not be a directive. It is permissive and it  
is  
3 permissive intentionally by the Court.

4 Number 19, crimes against humanity. Does the  
5 defendant have a proposed crimes against humanity?

6 MR. DAVIS: I do not, Your Honor.

7 MS. HEALY: We never received one.

8 THE COURT: Again, there is more than one  
crime  
9 against humanity claimed? All of these should be  
"claims," in  
10 plural?

11 MS. HEALY: Yes.

12 THE COURT: And torture as well?

13 MS. HEALY: There is only one torture claim.  
All of  
14 them except torture should be "claims."

15 THE COURT: The first claim in conjunction  
with what  
16 has been determined by the Court in the other causes of  
action  
17 instructions would be, that the defendant --

18 MS. HEALY: This is a rather complicated  
instruction.

19 The first element doesn't have to be actions by the  
defendant.

20 It is the killing of Mr. Cabello that is related to the

of 21 defendant's conduct here. Not necessarily the backdrop  
22 widespread, systematic activity.  
23 So, any modification should really go to the  
second 24 element.  
25 THE COURT: Any objection to the first  
element,

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1 Mr. Davis, as is?  
2 MR. DAVIS: It would seem to me -- I still  
think it 3 has to be Mr. Fernandez as being the person who did the  
4 crime -- he is sued for violating a crime against  
humanity and 5 would have to specify that not one or more individuals.  
His 6 liability is predicated on whatever acts he did. That  
is my 7 trouble. It would have to be defendant specific in its  
8 reference.  
9 MS. HEALY: I think that is not actually a  
correct 10 statement of the law. It is Mr. Cabello's killing  
which is the 11 crime against humanity. The backdrop of how that  
occurred is 12 the crime against humanity. It is like in penal code  
terms, it

13 would be an extra element.

14 THE COURT: That is not how it is pled.

15 MS. HEALY: We didn't plead that Mr. Fernandez  
16 committed every single act.

17 THE COURT: Actively participated in the acts  
of extra  
18 judicial killing, torture and/or inhumane acts alleged  
herein.

19 The defendant also participated in the acts of extra  
judicial  
20 killing, torture and other inhumane acts alleged herein  
as a  
21 joint tort feason, co-conspirator, etc.

22 MS. HEALY: That is correct but we don't want  
the jury  
23 instructed Mr. Fernandez has to be proven liable for  
every  
24 single killing along the Caravan of Death, but  
certainly those  
25 other killings, the other 71 people who were killed  
form the

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1 backdrop against which Mr. Cabello's killing has been  
brought  
2 into this Court.

3 THE COURT: Your fourth element goes to the  
fact he  
4 either personally killed him or aided and abetted or  
conspired

5 with others?

6 MS. HEALY: We agree. We are saying the first  
element

7 shouldn't be changed. That goes to the widespread  
systematic

8 nature of the activity, not just against Mr. Cabello  
but all

9 the other cities in which the Caravan visited.

10 There isn't evidence Mr. Fernandez was seen  
killing

11 anyone at Cauquenes. We have testimony he participated  
in the

12 killings in the other cities but not that he directly  
13 participated in Cauquenes.

14 THE COURT: I will grant the first element. I  
will

15 grant the second element.

16 We now come to knew or should have known.

17 What is your position, Mr. Davis?

18 MR. DAVIS: I think they will still have to  
say his

19 killing, and what Mr. Fernandez' involvement was,  
again, he

20 directly participated -- excuse me. He participated or  
21 actively participated in the event. If they don't have  
either

22 one of those two elements, he is not liable, so they  
have to

23 somewhere show an act or prove to the jury --

24 THE COURT: I am talking about element three,  
he knew

25 or should have known, which goes to the knowledge of  
the attack

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1 which is committed as part of a widespread or  
systematic attack

2 directed against any civilian population. Their  
element is he

3 knew or should have known.

4 MR. DAVIS: It has to be knew.

5 THE COURT: What is the authority for should  
have

6 known.

7 MS. HEALY: That comes from the Mehinovic  
case.

8 Footnote 50 on page 1354. That is 198 F. Supp. 2nd  
1322.

9 THE COURT: Do you have any authority to  
support your

10 position, Mr. Davis, it should be knew or should have  
known?

11 MR. DAVIS: Only on the facts of the case she  
cited

12 and we talk about that case in page 3 of our response  
where we

13 talk about the defendant there had participated  
directly and

14 there was evidence of the participated directly in the  
human

15 rights violations that were alleged. He was physically  
placed,

16 if you will, with witnesses, at the events that  
occurred to the



17 various people. That is a factual distinguishment  
between

18 Mehinovic and anything that happened here.

19 THE COURT: How is it factually  
distinguishable?

20 MR. DAVIS: There has not been a single  
witness that

21 has Armando Fernandez doing anything directly to  
Winston

22 Cabello and there is no evidence in the record that  
says that.

23 In that case -- he is really being sued for aiding and  
24 abetting, although they will argue he was personally  
liable;

25 but in Mehinovic, which was a default case, but the  
fact is the

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1 Judge there found that was the law, but that particular  
2 defendant in that particular case, and I think there  
were three

3 different plaintiffs, there was some evidence of what  
he did

4 personally, he either shouted at them or was  
participating with

5 the people beating them and there is direct evidence of  
what

6 the defendant there did.

7 That is why I think that is different from  
what we

8 have here and again, they would have to prove some sort  
of  
9 direct personal involvement that this defendant had, to  
get on  
10 to this particular claim.

11 MS. HEALY: I would like to make one  
correction. I  
12 believe there is a typographical error. It should be  
13 widespread or systematic conduct. Again, that would  
relate to  
14 element 2 in which the same phrase occurs.

15 THE COURT: I will grant the known or should  
have  
16 known, citing to Mehinovic case at 198 F Supp. 2nd  
1322, an  
17 April 29, 2002 and May 2, 2002 amended decision by the  
Northern  
18 District of Georgia in the District Court, based upon  
footnote  
19 50, international law provides an actor is responsible  
if he  
20 knew or should have known that his conduct would  
contribute to  
21 a widespread or systematic attack against civilians.

22 I may change the third and fourth element and  
make  
23 that the last element.

24 In that case the Court found that the  
plaintiffs had  
25 shown that the ethnic cleansing of the Bosnia and Serb  
campaign

all  
defendant  
a  
1 against Muslims was widespread and common knowledge to  
2 persons in the areas affected by it, such that the  
3 should have been aware his actions would contribute to  
4 widespread or systematic campaign or attack against the  
5 civilian population.

and  
in  
been  
containing  
Government  
those  
servants,  
group of  
these  
at least  
took, first  
city -- how  
18  
6 Here, the plaintiffs have introduced testimony  
7 evidence of the widespread nature of the actions taken  
8 numerous cities across the country of Chile in what has  
9 typified as the Caravan of Death, of this helicopter  
10 various military men from the Pinochet Military  
11 flying from city to city and withdrawing from prisons  
12 members of the Allende Government, primarily civil  
13 who had been rounded up and participating in -- this  
14 persons then participating in the systematic killing of  
15 persons. That this was done over a period of time and  
16 there were two separate routes that the helicopter  
17 to the South then to the North, flying from city to  
18 many cities were involved?

19 identified.

MS. HEALY: Five altogether that we have

20 of the

THE COURT: Five cities throughout the breadth

21 structure of

Chilean countryside, it covered the whole physical

22 route, the

the Country of Chile, and I find that based upon the

23 went

fact there was more than one helicopter excursion that

24 of the

from city to city, there was a practice of taking out

25 rounded

various holding facilities those persons that had been

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1 minimum

up by the Allende Government; that the defendant at a

2 the

should have been aware his actions would contribute to

3 systematic or widespread campaign against the civilian

4 population.

5 Northern

I would cite the authority cited by the

6 A, Case

district of Georgia, Prosecutor versus K A Y E S H I M

7 1999.)

Number I CTR-95-1-T. Judgment (trial chamber May 21,

8 Judgment

Prosecutor vs. K O R D I C, Case Number I T-95-14/2.

9 (trial chamber III February 26, 2001.) That case  
quoting the

10 Kayeshima case.

11 Maybe that should be the fourth element  
because it is

12 the killing of Winston Cabello in conjunction with the  
13 systematic killing of a civilian population that the  
defendant

14 knew or should have known was a systematic killing.  
Maybe it

15 is reversed.

16 MS. HEALY: That is correct. We would like to  
correct

17 the error. Widespread or systematic.

18 THE COURT: I did correct it.

19 MR. DAVIS: You have to have in there  
somewhere he

20 actively participated in the killing of Mr. Cabello.

21 THE COURT: I agree. That is the fourth  
element.

22 That element will read, the defendant either personally  
killed

23 Winston Cabello or actively participated with others  
who killed

24 Winston Cabello.

25 MS. HEALY: We have the same concern here.

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1 MR. DAVIS: Your Honor, earlier I thought you  
had said

with 2 actively participated in the killing of, as opposed to  
conspiracy 3 other persons; because whatever you determine on the  
4 charge or aiding and abetting -- the defendant either  
killing of 5 personally killed or actively participated in the  
6 Winston Cabello. It should be parallel to what you  
said in the 7 other three instructions.

8 THE COURT: Actively participated in the  
killing of 9 Winston Cabello. You are correct. That active  
participation 10 comes through aiding or abetting or being a member of  
the 11 conspiracy. The acts of a co-conspirator, an act done  
by a 12 co-conspirator are then the acts, would be the acts of  
the 13 defendant even if he does not commit those acts, but  
because he 14 is a member of the conspiracy.

15 I would change -- I would make the fourth  
element the 16 third element and the third element the fourth element.

17 MR. DAVIS: Your Honor, just for the record,  
and I 18 know you have ruled on this. We would object to the  
crime 19 against humanity claim going to the jury on the basis  
that the 20 claim cited in Mehinovic were claims relating to an  
ethnic

21 cleansing, truly a crime against of a genocidal nature  
is what  
22 they have identified there, and don't believe, and  
certainly  
23 what happened in Chile that was testified to was  
horrible, but  
24 whether it would rise to the level of a genocidal type  
25 situation as set forth in apparently the cases cited  
and in the

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1 claims made in Mehinovic.  
2 THE COURT: My finding is, there was a  
widespread and  
3 systematic violation directed against a civilian  
population.  
4 That population being civilians who were employed by  
the  
5 Allende Government.  
6 Proposed jury instruction number 20.  
7 MR. DAVIS: Defendant objects to that  
instruction,  
8 Your Honor.  
9 MS. HEALY: I believe we are actually at  
numbers 12  
10 and 13.  
11 THE COURT: Let's deal with 20, first.  
12 If you want the sympathy or prejudice  
instruction,

13 which is part of the pattern jury instructions; you  
should not  
14 rely on either sympathy or prejudice for or against  
either  
15 side. I would be more inclined to give it rather than  
16 political views.

17 MS. HEALY: We would go with the sympathy or  
prejudice  
18 instruction.

19 THE COURT: This one is denied.  
20 It is in pattern jury instruction 2.1 of the  
criminal  
21 instructions, the first paragraph. You must make your  
decision  
22 only on the basis on the testimony and other evidence  
23 presented here during the trial and you must not be  
influenced  
24 in any way by either sympathy or prejudice for or  
against, in  
25 this case it would be the plaintiffs or the defendant.

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Your 1 MR. DAVIS: No objection to that instruction,  
2 Honor.

3 MS. HEALY: No objection.  
4 We will substitute the paragraph of 2.1 from  
the  
5 criminal.



Let's 6 Now we are going back to proposed number 11.  
7 deal with 12 and 13 first.  
8 The defendant has a proposed aiding and  
abetting?  
9 MR. DAVIS: We do not. We objected to aiding  
and  
10 abetting.  
11 I take that back. We submitted one with our  
most  
12 recent submission.  
13 THE COURT: What is your position as to aiding  
and  
14 abetting, I am not clear now?  
15 MR. DAVIS: Our position is that he should not  
be  
16 subjected to aiding and abetting liability. I think we  
set  
17 forth in our prior papers why that is, he has to be  
found he  
18 personally participated against the decedent. I  
understand  
19 Your Honor's ruling on that. I am stating the position  
since  
20 you asked me what my position is on that.  
21 We object to any aiding and abetting  
instruction going  
22 to the jury based both on the law and the evidence  
submitted to  
23 the jury.  
24 Notwithstanding that, we have proposed  
pursuant to  
25 your instruction an aiding and abetting instruction  
that

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1 encompasses liability as we understand it and the key  
element  
2 of all of these claims, there has to be some key action  
that  
3 the defendant committed that was specifically directed  
towards  
4 the victim. That is the thrust of what we would be  
submitting  
5 is the law, if Your Honor is inclined to give an aiding  
and  
6 abetting instruction and letting that go to the jury.

7 That is our position. We set forth an  
instruction  
8 trying to tailor it to the same cases that plaintiffs  
had  
9 cited.

10 THE COURT: Based upon my prior ruling, I  
found in  
11 Cabello II, 205 F.2nd 1325 at page 1334, the defendant,  
the  
12 Court finds as a matter of law the defendant may be  
held liable  
13 under the ATCA for conspiring in or aiding and abetting  
the  
14 action taken by others.

15 MR. DAVIS: I understand that, Your Honor. We  
are  
16 trying to define now what he had to do in order to aid  
and abet

17 or conspire.

18 It still comes down to factors of specific  
acts that

19 this defendant chose to commit, or had control of what  
20 happened -- that caused the injuries and death that are  
alleged  
21 in this case.

22 With that in mind, you are looking at  
secondary

23 liability issues by definition because aiding and  
abetting a

24 conspiracy saying you did not do it, there are other  
ways to

25 try to find it.

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1 The cases cited to the Court are cases, and  
these go

2 hand in hand in some ways, are cases in the civil  
context -- a

3 civilian context, not of a military context; and  
looking at the

4 cases cited yesterday as well as the case I handed up  
to you

5 today, you still have to look at what actions the  
defendant

6 did, and I need to reiterate, Your Honor, there is no  
evidence

7 here that Mr. Fernandez was ordered to do anything as  
to

8 Mr. Cabello, and I again submit the Kinder case that  
was cited

9 to you was a case where the defendant there used a  
10 justification defense, where he said, I was ordered to  
kill

11 this person by my superior and I refused it.

12 That is not our defense here. We do not claim  
what

13 happened was justified and that is what justifies his  
actions.

14 We claim Mr. Fernandez was given lawful orders, that  
is, to

15 report to a helicopter and he was on the helicopter and  
that is

16 what Mr. Fernandez did. Those orders are lawful orders  
and no

17 one has disputed those are not lawful orders in this  
case.

18 So it comes full circle where do you express a  
junior

19 military personnel's legal liability in the context of  
what we

20 have in evidence in this case, and I think there still  
has to

21 be a finding -- there is a finding in conspiracy law as  
well,

22 you have to be participating in an overt act in  
furtherance of

23 the conspiracy.

24 Again, there would have to be, a definition --  
or that

25 the defendant had to have committed some active act  
they could

1 prove towards the death of Mr. Cabello.

2 THE COURT: Let's look at the plaintiffs'  
proposed

3 jury instruction number 12. Striking the first two  
words, it

4 will start with, the defendant may be found liable --

5 MR. DAVIS: We object to it, even if he  
personally did

6 not do them.

7 MS. HEALY: He doesn't have to be directly  
responsible

8 for these violations or directly committed them himself  
as long

9 as he aided or abetted someone else. I don't know how  
we can

10 delete that entirely since that is what aided and  
abetted is

11 about.

12 THE COURT: I am looking at the pattern jury  
13 instruction. Albeit it is under Title 18 U.S. Code  
Section 2.

14 It is criminal aiding and abetting. It talks about  
guilt. The

15 guilt of a defendant in a criminal case may be proved  
without

16 evidence the defendant personally did every act  
involved in the

17 commission of the crime charged. The law recognizes  
that,

18 ordinarily, anything a person can do for one's self may  
also be

19 accomplished through direction of another person as an  
agent,  
20 or by acting together with or under the direction of  
another  
21 person or persons in a joint effort.

22 MS. HEALY: We have also looked at that  
pattern  
23 instruction. I don't think that gets to the law here  
on aiding  
24 and abetting in a civil context which requires  
substantial  
25 assistance or practical assistance or encouragement.

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1 THE COURT: The defendant may be found liable  
if you  
2 find that he aided and abetted others in acts against  
the  
3 plaintiff or in acts committed against Winston Cabello.

4 In order to prove the defendant liable for  
aiding and  
5 abetting any of the violations against Winston Cabello  
the  
6 plaintiffs must prove the following by a preponderance  
of the  
7 evidence.

8 First, one or more of the violations -- I  
don't know  
9 what that means. What are the violations?

10 substantive

MS. HEALY: It is a term we used for the

11 open to

offenses, killing, torture, etc. We would certainly be

12

some other way of describing the claims.

13 claims?

MR. DAVIS: Wouldn't it be proper just to say

14

THE COURT: I like claims better.

15 it

One or more of the claims -- it would be were,

16

would be one or more.

17

MS. HEALY: Correct.

18 or

THE COURT: -- were committed by some person

19

persons --

20 hard to

MS. HEALY: The only concern about that, it is

21

commit a claim, which is one of the concerns we had

22 when we

first drafted this.

23

MR. DAVIS: What if it read instead of one or

24 more,

say that the particular claim was committed.

25

MS. HEALY: I still think that will not work.

I would

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1

propose something like wrongful acts.

2

THE COURT: I was thinking about wrongful

acts.

that 3 How about one or more of the wrongful acts  
persons? 4 comprise the claims were committed by person or  
committed. 5

MR. DAVIS: I would agree with that up to  
or 6 You are defining the liability elsewhere by some person  
7 persons.

8 THE COURT: I am sorry?

9 MR. DAVIS: I would agree with that --

the 10 THE COURT: What would it read, one or more of  
11 wrongful acts that comprise the claims --

12 MR. DAVIS: Was committed.

and 13 MS. HEALY: There has to be a primary violator  
14 that is the person or persons I was attempting to get  
to.

15 THE COURT: It is mentioned in the second  
element.

16 One or more of the wrongful acts that  
comprised the 17 claims were committed, the first element.

18 The second element, the defendant  
substantially

19 assisted some person or persons who personally  
committed or 20 caused the wrongful acts that comprise the claims.

21 MR. DAVIS: I would think you would use  
personally  
22 committed and end it there on the second as well.  
Defendant



23 substantially assisted some person or persons who  
committed the  
24 wrongful act, or however you define the claim.

25 MS. HEALY: We have concerted activity by a  
group.

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1 For example, the defendant has put on evidence General  
Arellano  
2 gave the order through Colonel Haag to Captain Diaz  
that led to  
3 the wrongful acts committed against Winston Cabello.  
There is

4 a chain of causation here. We don't want the jury to  
think  
5 Fernandez Larios gave an order to Captain Diaz that  
caused the  
6 death of Winston Cabello.

7 THE COURT: The defendant assisted some person  
or  
8 persons who personally committed or caused the wrongful  
acts  
9 that comprise one or more of the claims.

10 Third, as it is. That would be the knowledge  
element.

11 MR. DAVIS: Your Honor, I thought you deleted  
the knew  
12 or should have known on the aiding or abetting because  
it has  
13 to be knowledge on aiding or abetting. This is only  
knew, not

14 should have known. The defendant knew his actions  
would assist

15 in the illegal or wrongful activity at the time he  
provided the

16 assistance.

17 MR. DAVIS: I am sorry, I was looking  
elsewhere.

18 We would object to the last paragraph.

19 THE COURT: Where does that come from? What  
is the

20 authority for that?

21 MS. HEALY: Helberstam versus Welch -- I am  
sorry, the

22 wrong citation.

23 THE COURT: That seems to be totally opposite  
to an

24 aiding and abetting relationship.

25 MS. HEALY: It comes from Prosecutor versus

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1 F U R U N D Z I G A, and the quote is, "it is not  
necessary the

2 aider or abettor should know the precise crime that was

3 intended, which in the event was committed. If he is  
aware one

4 of a number of crimes will probably be committed and  
one of

5 those crimes was in fact committed, he has intended to

6 facilitate the commission of the crime and is guilty as  
an

7 aider or abettor."

8 THE COURT: Has that been incorporated into  
American

9 jurisprudence?

10 MS. HEALY: I have not found that particular  
citation

11 in a U.S. case. At this point, I would say, not yet.

12 THE COURT: What is your best case that  
establishes

13 the agency relationship for a tort?

14 MS. HEALY: The Helberstam case talks at great  
length

15 about the aiding and abetting concept in a civil  
setting. In

16 that case the wife who had been sued did not have  
direct

17 knowledge that her husband was a burglar and did not  
know at

18 all her husband was out that night when he killed the  
19 plaintiff's decedent and yet she was held liable for  
the death

20 of the decedent because it was foreseeable to her that  
in the

21 course of her husband's activities, burglary  
activities, a

22 homeowner would die.

23 THE COURT: I will review that case over the  
lunch

24 break. We will break at this time until 2:15.

25 I expect we can probably finish this up in  
about an

1 hour.

2 MR. DAVIS: I would hope so, Your Honor.

3 (Luncheon recess.)

4

5

6

7

8 AFTERNOON SESSION.

9 (Open court. Jury not present.)

10 THE COURT: Estate of Winston Cabello, et al.

vs.

11 Armando Fernandez-Larios, Case Number 99-0528.

12 Would counsel state their appearances.

13 (All parties present.)

14 THE COURT: As to the additional paragraph

that is

15 requested for aiding and abetting, I have reviewed the

16 Helberstam case, which really does not make a -- though

in

17 dicta it speaks about reasonable foreseeability. It is

not the

18 basis upon which they make their finding, and I have

reviewed

19 the international tribunal, the prosecution of persons,

which

20 is the language that is contained in the paragraph that

is

21  
defendant's

submitted by the plaintiff. I will grant the

22

objection to that paragraph and I do not find there is

23

sufficient authority upon which to base a reasonable

24

foreseeability finding in the jury instructions.

25

to you

It will be the three elements as I indicated

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1

earlier.

had an

2

MS. HEALY: Your Honor, at this point we have

lunch hour

3

opportunity to do a little bit of research over the

the first

4

ourselves and I would like to go back and talk about

requiring us

5

element in each of the substantive claims. We are very

6

concerned, what the Court appears to be doing by

Cabello

7

to prove either the killing, for example, that Winston

defendant

8

was deliberately killed by the defendant or the

manner in

9

actively participated; that only discusses the first

direct

10

which the defendant may be found liable, which is the

found

11

involvement. The other two manners by which he may be

12

liable for aiding or abetting and conspiring aren't

13 encompassed.

14 THE COURT: My finding is the act of  
participation may

15 be accomplished by aiding and abetting or conspiracy  
and each

16 instruction refers the jury to that instruction and we  
will not

17 go back and reword those instructions. I find they are

18 sufficient and appropriate.

19 MS. HEALY: Again for the record, we object to  
that

20 instruction.

21 THE COURT: Okay.

22 We now move to plaintiffs' proposed jury  
instruction

23 number 13, conspiracy.

24 Was there a submission by the defendant?

25 MR. DAVIS: There was, Your Honor, although I  
would

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1 like the Court to consider the case that I handed up  
this

2 morning as well, United States versus Saglieto, a case  
I found

3 last night reading the military case, the Kinder case.

4 THE COURT: This is an additional case?

5 MR. DAVIS: No, U.S. versus Saglietto --

6 THE COURT: I do have it.

7 MR. DAVIS: In that opinion, pages 32 and 33,  
they  
8 discuss conspiracy as it relates to orders given to  
military  
9 personnel and I have a suggestion for that law to be  
10 incorporated into this instruction. We did a Westlaw  
check on  
11 it while -- frankly, this morning and it has never been  
12 overruled. It has been cited with approval in the  
Fifth  
13 Circuit for other propositions but this is according to  
14 Westlaw, it is still good law from what we determined  
this  
15 morning.

16 THE COURT: What is your proposal?

17 MR. DAVIS: If Your Honor has a copy of the  
opinion,  
18 you get to -- it discusses the law of conspiracy in  
connection  
19 with a military personnel and at page 33 it talks about  
the  
20 general law of conspiracy. Then under headnotes 12 to  
15 as  
21 labeled in the paragraph but in the middle of the  
paragraph,  
22 the language says, "but a person in the military  
service who  
23 carries out the order of a superior officer is not  
acting in  
24 pursuance of any agreement or understanding previously  
entered  
25 into by the concerted action of himself and his  
superior and

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1 where his participation in the agreement was as a  
result of his  
2 own choice. On the contrary, he is acting under the  
compulsion  
3 of the great penalties which military law traditionally  
4 prescribes for non-obedience to military orders.  
Participation  
5 in a crime, actually is solely by compelling fear of  
personal  
6 harm, the very requisites of conspiracy."  
7 Mind you, Your Honor, my argument would be the  
lawful  
8 orders of going to the helicopter. That is where you  
would go  
9 and if you want to qualify the order with lawful order,  
I would  
10 accept that; but any definition, because I believe  
their  
11 position would be, if a soldier receives an unlawful  
order,  
12 that is, to kill, execute, torture, mistreatment of  
prisoners,  
13 that doesn't get you where you want to go as far as a  
defense  
14 and I agree with that statement of the law. That as  
you know  
15 is not our defense in this case. We have never, and  
never will  
16 argue this was a justified following of an order.  
17 Mr. Fernandez' involvement in the helicopter was always



18 pursuant to valid orders for which he was obligated to  
follow  
19 and absent some sort of greater showing -- they can't  
say  
20 merely at the closing because he is on the helicopter  
he is  
21 liable.

22 It would be with a modification as set forth -  
-

23 THE COURT: What is it you are proposing?

24 MR. DAVIS: A modification of the conspiracy  
25 instruction that would incorporate the language I just  
quoted

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1 to the Court in some fashion.

2 MS. HEALY: We would strenuously object. Mr.  
Davis is  
3 attempting to argue both the superior orders defense  
and then  
4 say his client never received an illegal order. He  
can't have  
5 it both ways. The first time his client went to the  
helicopter  
6 before the trip South, maybe that order was a lawful  
order. By  
7 the time he rejoined the helicopter, he knew the  
purpose of the  
8 conspiracy and he joined knowing that purpose. Mr.  
Davis

9            hadn't addressed any of the evidence that shows his  
client's  
10            substantive and personal involvement in the conspiracy.  
That  
11            would be an inaccurate statement of the law and import  
an  
12            element into his case that is completely unfounded.

13                        I refer the Court to the lead case on illegal  
orders,  
14            U.S. versus Calley, which relates to the My Lai  
massacre, 22  
15            U.S. CMA 534, and I would point the Court to pages 538  
to 540.

16                        THE COURT: Was that previously cited by  
plaintiff?

17                        MS. HEALY: I don't believe so.

18                        THE COURT: Do you have a copy for me?

19                        MS. HEALY: I do, which I can supply to the  
Court.

20                        While it is true military officers are  
required to  
21            follow the lawful orders of their superiors, they have  
no  
22            privilege where they follow illegal orders, and in fact  
are  
23            liable for acts done in compliance with illegal orders.

24                        Mr. Davis hasn't cited to any illegal orders  
his  
25            client received, so his argument about receiving orders  
are

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1 simply inappropriate.

2 I would point out, however, Colonel Arredondo  
3 testified the order was to kill the prisoners with  
respect to  
4 La Serena, Antofagasta and Calama. If he wants to  
admit  
5 receiving that order and come up with a justification  
defense  
6 he should have put on evidence.

7 THE COURT: Where in the Calley decision does  
it deal  
8 with the conspiracy issue?

9 MS. HEALY: It is not a conspiracy case, Your  
Honor.

10 THE COURT: Why am I reading it?

11 MS. HEALY: I am merely pointing out one  
cannot  
12 conspire as a military officer -- I am not entirely  
clear what  
13 his argument is because he seems to want it both ways.  
His  
14 client cannot be a co-conspirator because he was a  
military  
15 officer, yet didn't conspire because he never received  
an  
16 illegal order and never did anything illegal. That  
seems to be  
17 his argument.

18 We would strenuously oppose any injection of  
an  
19 illegal order defense into this case, or jury  
instruction on  
20 illegal orders into this case

21 (Interruption.)

22 THE COURT: The Saglietto case, the criminal  
23 indictment for conspiracy, and the ruling in that case,  
was  
24 based upon the facts that the Court found that a  
directed  
25 verdict should have been granted based upon the facts  
of that

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1 case. That the defendants were citizens of a nation  
that was  
2 at war. They did not conceive or plan the acts which  
were  
3 done. That they had no choice or decision to make  
unless to  
4 disobey, thereby subject themselves to grave penalties  
and the  
5 fact what they did was done solely in response to a  
military  
6 command.

7 It is not the defense's theory these acts were  
8 performed pursuant to a military command. Their theory  
is he  
9 was never given these orders, he was not part of it.  
That he  
10 neither received the orders nor participated in any  
killings,  
11 nor the killing of Winston Cabello.

12                   As there has been no evidence adduced by the  
defendant  
13                   of any orders given to him or that he was acting under  
the  
14                   compulsion of grave penalties which military law  
traditionally  
15                   prescribes for non-obedience, or that he was given the  
order  
16                   and because of his position as an inferior officer had  
no  
17                   choice but to act upon the order that was given to him,  
I do  
18                   not find there is a basis in fact upon which to give  
any  
19                   further instruction as is set out in the criminal case  
of  
20                   United States versus Saglietto.

21                   We now turn to the proposed instruction by the  
22                   plaintiffs.

23                   The defendant may be found liable if you find  
that he  
24                   conspired with someone who committed an act against  
Winston  
25                   Cabello, or caused acts to be committed against Winston

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1                   Cabello.

2                   A conspiracy is an agreement of two or more  
persons to

3                   commit one or more wrongful act. To prove the  
defendant liable

4 for conspiring to commit any of the acts committed  
against  
5 Winston Cabello, the plaintiffs must prove by a  
preponderance  
6 of the evidence, first, two or more persons agreed to  
commit a  
7 wrongful act, and that the defendant joined the  
conspiracy  
8 knowing at least one of the goals in the conspiracy or  
9 attempting to help accomplish it.

10 Third, one or more of the violations was  
committed by  
11 someone who was a member of the conspiracy and acted in  
12 furtherance of the conspiracy.

13 Fourth, the violation could reasonably have  
been  
14 foreseen to be a necessary or natural consequence of  
the  
15 conspiracy.

16 Where does all this language come from?

17 MS. HEALY: We would point the Court to -- the  
civil  
18 conspiracy case is Pinkerton and Alvarez. Other  
19 co-conspirators can be attributed to this defendant and  
that  
20 actions that are reasonably foreseeable could take  
place within  
21 the course and furtherance of the conspiracy, can also  
be  
22 attributable to this defendant.

23 THE COURT: Where do the elements come from?

24 MS. HEALY: They come from Helberstam, and in

25 particular, page 477 of Helberstam. On 477 the Court  
says, the

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1 first element is an agreement between two or more  
persons.

2 Second. To participate in an unlawful act.

3 Third. An injury caused by the unlawful overt  
act

4 performed by one of the parties to the agreement.

5 Fourth. Which act was done pursuant to and in  
6 furtherance of the common scheme.

7 We have incorporated some of the Pinkerton  
liability

8 language in there.

9 THE COURT: Where are the elements in  
Helberstam?

10 MS. HEALY: 477.

11 THE COURT: What headnote is that?

12 MS. HEALY: It comes under A, legal framework,  
after

13 note 6.

14 THE COURT: I see A in that column. There is  
footnote

15 6.

16 MS. HEALY: The paragraph begins, "as pristine  
legal

17 concepts" --

18 THE COURT: Okay.

19                   Is there an objection to the four elements set  
forth?

20                   MR. DAVIS: Yes. There has to be some sort of  
21 discussion about this defendant committing an overt act  
22 pursuant to the conspiracy. There has to be some  
discussion  
23 about the defendant doing something pursuant, not just  
in the  
24 third element, one or more of the violations was  
committed by  
25 someone who was a member of the conspiracy. The  
defendant

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1                   would have had to have done something in furtherance of  
the  
2 conspiracy.

3                   THE COURT: That is not what Helberstam says.  
What is  
4 your authority for that?

5                   MR. DAVIS: The case I previously cited and  
the case I  
6 cited yesterday, Amato, 495 F.2nd 545.

7                   THE COURT: My understanding of the  
conspiracy, there  
8 has to be an overt act performed by somebody connected  
to the  
9 agreement. It doesn't have to be performed by this  
party.



10 MR. DAVIS: If that is the construct, Mr.  
Fernandez  
11 would have been liable according to law according to  
what they  
12 argue by joining the helicopter the second time. Under  
their  
13 theory of the case if you are saying it was an illegal  
order,  
14 that is why there has to be something to incorporate  
the fact  
15 about valid order versus invalid order in these  
instructions.

16 THE COURT: Where in the Amato case does it  
require  
17 actions by the actual person who is the defendant,  
rather than  
18 a member of the conspiracy?

19 MR. DAVIS: Unfortunately the last two pages  
of my  
20 argument comes from Westlaw headnote 5, to establish a  
person  
21 as a participant in a conspiracy, the evidence must show  
the  
22 defendant intended to join or cooperate in the illegal  
venture.

23 He has to do something in furtherance of the venture.

24 THE COURT: It has to show intent. That he  
intended  
25 to join and cooperate, not that he performed an overt  
act.

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1                   MR. DAVIS: It would make no sense in this  
context  
2                   where he is ordered to be in the helicopter, that is  
all I am  
3                   talking about, being in the helicopter itself. They  
can argue  
4                   that to the jury and the jury will say he is on the  
helicopter,  
5                   therefore he is liable.

6                   THE COURT: The conspiracy is not to be on the  
7                   helicopter. The conspiracy is to travel to the various  
cities  
8                   and take those persons who were civil servants of the  
Allende  
9                   Government, take them from their areas of confinement  
and harm  
10                  them or kill them.

11                  MR. DAVIS: The undisputed evidence in this  
case,  
12                  General Arellano had carried out his mission to do  
something  
13                  close to that if not exactly that and that Mr.  
Fernandez was  
14                  ordered to be on the helicopter and Mr. Fernandez had  
no  
15                  control over where the helicopter went or what it did.

16                  THE COURT: You can argue that to the jury.

17                  MR. DAVIS: If this instruction means because  
he was  
18                  on the helicopter after a death occurred he is liable -  
-

19                  THE COURT: Is that what you intend to argue?

20                  MS. HEALY: No. There is an intent element  
here. He

and 21 joined the conspiracy knowing of at least one objective

22 intending to further it.

23 Given we have an intent element, in fact we  
have overt

24 acts here, it is not an issue in this case but we  
wouldn't need

25 to prove an overt act because there are plenty of overt  
acts by

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1 other co-conspirators. Riding in the helicopter wasn't  
the

2 sole conspiracy, there is much more than that. Riding  
in the

3 helicopter was only the first step that got him to the  
places

4 to take the action to carry out the conspiracy.

5 THE COURT: I will grant the first element,  
grant the

6 second element, grant the third element and the fourth  
element

7 is the Pinkerton element?

8 MS. HEALY: Yes.

9 THE COURT: What basis in civil case law do  
you find

10 for Pinkerton?

11 MS. HEALY: I am afraid there is a limited  
body in the

with 12 U.S. cases. The international cases, Furundeija, deals

13 the foreseeability of the violation as part of the  
conspiracy.

14 In particular, I would point the Court's attention to  
the

15 Furundeija appeal case, the July 21, 2000 case.

16 THE COURT: Pinkerton is, the membership in  
the

17 conspiracy is equivalent to the knowledge and intent  
for the

18 substantive offense. That is what Pinkerton relates  
to.

19 MS. HEALY: Under Pinkerton there is a  
liability. One

20 perpetrator is responsible --

21 THE COURT: For the substantive offense, not  
for the

22 conspiracy.

23 MS. HEALY: For the offenses committed by

24 co-conspirators.

25 In other words, in this particular case, if

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1 Mr. Fernandez intended that prisoners should die, that  
was part

2 of the objective of the conspiracy he sought to  
accomplish. He

3 didn't necessarily have to have the specific intent  
that

4 Winston Cabello should die. If Mr. Diaz, acting as a  
5 co-conspirator, killed Mr. Cabello in the course and  
6 furtherance of the conspiracy, Mr. Fernandez is liable  
for that  
7 act.

8 THE COURT: But it is not an element of the  
conspiracy  
9 under Pinkerton. Membership in the conspiracy is the  
equivalent  
10 of knowledge or intent for the substantive offense  
under  
11 Pinkerton. The reasonable foreseeability goes to his  
knowledge  
12 or intent for the substantive offense, not as an  
element of the  
13 conspiracy under any conspiracy theory.

14 MS. HEALY: I agree this is a modification.

15 THE COURT: It is an extension of Pinkerton?

16 MS. HEALY: Yes.

17 THE COURT: I will deny the fourth element.

18 Where does the language in the next paragraph  
come  
19 from. For a conspiracy to have existed, it is not  
necessary  
20 that the conspirators made a formal agreement or that  
they  
21 agreed on every detail of the conspiracy. Further, the  
22 agreement, common scheme, plan or purpose, does not  
have to  
23 have been arranged nor formulated in advance. The  
existence of  
24 such agreement, plan or purpose may be inferred from  
the fact

effect a 25 that two or more persons acted together to put into

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1 joint enterprise with a wrongful or criminal aim.

2 Where does that come from?

drawn 3 MS. HEALY: The last sentence of that would be

1411, 4 from the Cox case, which is 17 F.3rd 1386 at 1410 and

prove the 5 which discusses the use of circumstantial evidence to

actually drawn 6 existence of the conspiracy. The rest of it is

7 in great part from the Ninth Circuit criminal pattern

8 instruction on conspiracy.

under 9 THE COURT: Cox deals with criminal conspiracy

10 RICO?

11 MS. HEALY: Yes.

about the 12 Again I would cite to Alvarez which talks

during 13 reasonable foreseeable nature of, in that case a murder

murder was 14 the course of a drug conspiracy. The Court found

each of 15 foreseeable and there was a high level of anxiety on

16 them.

17 THE COURT: I will grant the first sentence,  
for a  
18 conspiracy to have existed, it is not necessary  
conspirators  
19 made a formal agreement or agreed on every detail of  
the  
20 conspiracy.

21 I will strike the next two sentences.

22 Where does the last paragraph come from?

23 MS. HEALY: It is drawn from Pinkerton.

24 THE COURT: The first sentence is general  
conspiracy  
25 law. Each member of the conspiracy is liable for the  
actions

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1 of the other conspirators performed during the course  
and  
2 furtherance of the conspiracy. Is that not general  
conspiracy  
3 law?

4 MS. HEALY: It is, Your Honor.

5 THE COURT: I will grant that sentence and  
strike the  
6 last one.

7 We will be recessing at 3:30. If we don't  
finish, the  
8 jurors will have to come in later tomorrow.

9 We are now up to compensatory damages, number

21 --

10 the alternative means of proving defendant's liability  
-- I  
11 don't think it is really necessary.

12 MS. HEALY: Given the first element of the  
first three  
13 substantive claims, the first elements of the crimes  
against  
14 humanity claims with which we have great concern  
because it  
15 imposes a much higher burden on us, we would like to  
have this  
16 alternative means instruction because that would  
explain to the  
17 jury each of these claims is the same -- the claims  
have  
18 certain elements. There are three different ways in  
which we  
19 could prove those claims and those elements, directly,  
aiding  
20 and abetting or through conspiracy. We would very much  
like to  
21 keep that in.

22 MR. DAVIS: We object to the instruction, Your  
Honor.

23 THE COURT: I will allow the instruction to  
come in  
24 modifying number 3. The modification would be, he  
entered into  
25 a conspiracy with persons to commit the violations.

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1                   MR. DAVIS: Could it not just say, as  
otherwise  
2                   described in these instructions, because you will be  
handing  
3                   this to the jury, they will be able to read the  
conspiracy  
4                   instruction, read the aiding and abetting instruction.

5                   THE COURT: This is fine. It sets out what I  
will  
6                   instruct them.

7                   Compensatory damages, any objection?

8                   MR. DAVIS: No, Your Honor.

9                   THE COURT: Punitive damages, number 22. Any  
10                  objection?

11                  MR. DAVIS: No objection, Your Honor.

12                  THE COURT: That is given as well.

13                  Deliberate ignorance?

14                  MR. DAVIS: Strenuous objection.

15                  THE COURT: Go ahead.

16                  MR. DAVIS: Again, we are now getting --  
conspiracy is  
17                  difficult enough, Your Honor, but deliberate ignorance  
is a new  
18                  thing pled, it came out Monday night at 11 something  
when I  
19                  first got this.

20                  He is in the military. He is ordered to be  
where he  
21                  has to be. It is almost imposing a duty -- it is  
actually  
22                  seeking to impose a duty which the Yamashita versus  
Styer case

23 Supreme Court of the United States 327 U.S. 1 which we  
cited in  
24 our response papers to Your Honor, it goes against that  
in the  
25 sense in that case the Court noted that there is no  
liability

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1 for failure of an officer to take measures to prevent  
murder of  
2 an inhabitant of an occupied country committed in his  
presence  
3 unless he had the power to prevent it.

4 Again, it is maybe the flip side. It is their  
5 aggressive instruction from where I want the defensive  
6 instruction; but the fact is, Your Honor, that case and  
this  
7 case does not cry out for a deliberate ignorance  
instruction  
8 that they have sought here. It is another change of a  
theory  
9 of liability.

10 The jury is to be instructed what the law is.  
Your  
11 Honor has determined the law. Both sides have  
objected. You  
12 are saying here is what the law is. Now we have to put  
in this  
13 statement of what they want to argue about. I assume  
they will

14 argue that as part of their conspiracy claim, but for  
that to  
15 come in as an instruction, A, it is against the  
Yamashita case,  
16 B, against how they pled the case and C, it is not  
appropriate  
17 given you have told them what the law is and they could  
argue  
18 how they think the facts of this case should be applied  
given  
19 the law you instruct the jury on.

20 MS. HEALY: The defendant has tried to inject  
command  
21 responsibility into this case for quite some time. It  
has  
22 nothing to do with this. Deliberate ignorance is  
another way  
23 of explaining to the jury how they can find the  
defendant knew  
24 some particular fact or circumstance existed. That is  
why we  
25 propose to put it in here.

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1 THE COURT: Do you have any authority for  
deliberate  
2 ignorance in a civil context?

3 MS. HEALY: The Williams versus Obstfeld case  
refers  
4 to deliberate ignorance. Actually in that case the  
instruction

5 didn't appear to be appropriate under the facts of the  
case but  
6 the Court doesn't say it is not appropriate under the  
facts of  
7 every case.

8 THE COURT: What circuit is that?

9 MS. HEALY: The Eleventh Circuit. 314 F.3rd  
1270.

10 The defendant has testified he never took  
steps to ask  
11 questions about what was going on, he didn't ask Mr.  
Chiminelli  
12 when they were rooming together what was going on. His  
story  
13 is he didn't know what was happening.

14 Given all the facts and circumstances of the  
case, we  
15 feel it is appropriate to offer a deliberate ignorance  
16 instruction.

17 MR. DAVIS: It is like putting him in a duty  
to  
18 inquire. Besides conspiracy, they are claiming he had  
a duty  
19 to inquire. That is not the law, it is not the law in  
a civil  
20 context and they have not cited any case in a civil  
context.  
21 Williams was a summary judgment case. The fact is they  
have  
22 provided no authority in a civil conspiracy --

23 THE COURT: If I was going to give deliberate  
24 ignorance I would also give the instruction requested  
by the

25  
because that

defendant as to the following of military orders,

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1  
question as a

was the defendant's testimony, that he would not

2  
would not

military lieutenant, a lieutenant in the military, he

3  
want to

question the orders of a superior and if the plaintiffs

4  
the

typify that as deliberate ignorance, I would also give

5  
instruction as requested in the Saglietto case.

6  
MS. HEALY: In that case, we will withdraw the  
7  
deliberate ignorance instruction.

8  
THE COURT: Okay, it is withdrawn.

9  
Impeachment by prior inconsistencies?

10  
Your

MR. DAVIS: I thought it was already in there,

11  
Honor.

12  
credibility

MS. HEALY: There is an instruction on the

13  
of witnesses.

14  
THE COURT: I think it probably covers it.

15  
MS. HEALY: We additionally have --

16  
covered.

THE COURT: That is denied. I think it is

17  
already

Credibility of witness accomplice? Didn't I

18 give a credibility of witness?

19 MS. HEALY: Yes, but not relating to  
accomplice, per

20 se.

21 THE COURT: Who is the accomplice?

22 MS. HEALY: We have had testimony from Mr.  
Diaz who

23 has given various stories over the years. There are a  
number

24 of statements that are contradictory from witnesses  
including

25 Colonel Arredondo, all of these people are alleged to  
have been

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1 co-conspirators of Mr. Fernandez or co-conspirators.

2 THE COURT: But there is no evidence they  
received any

3 benefit or were promised anything?

4 MS. HEALY: We did not have evidence on that  
point.

5 THE COURT: I did allow the defendants on the  
one

6 witness who had a pending criminal charge, I did allow  
that

7 evidence to come in on the basis of bias.

8 I think the general credibility of witnesses  
covers

9 this. I will deny that instruction.

10 Consciousness of liability.

11 MS. HEALY: This is a modification of the  
12 consciousness of guilt instructions often given. This  
relates  
13 to fabricating a story, for example, I was a lowly  
Lieutenant,  
14 I was a bodyguard, I stayed in my room the whole time  
or I was  
15 with a flight attendant.

16 THE COURT: It is covered by credibility. It  
is  
17 denied.

18 Admissions?

19 MS. HEALY: We actually read all of these  
admissions  
20 which are answers to request for admissions or in one  
instance  
21 a paragraph from the complaint which was answered and  
admitted  
22 by the defendant.  
23 In a civil case, judicial admission comes in  
for the  
24 truth and without any further proof. We would like the  
jury to  
25 find they don't need to find any of these facts because  
they

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1 are established.

2 THE COURT: Any objection?

as an 3 MR. DAVIS: Yes. You read it in at the time

4 admission --

5 THE COURT: I didn't read it.

6 MR. DAVIS: My apologies, you didn't. They  
read it in

7 just like any other testimony in the case. I can't  
contest

8 what has been stipulated to, but it is just like you  
wouldn't

9 repeat in your instructions what a witness has  
testified to.

10 You are putting it in an instruction which has the  
11 imprimatur -- the direct Court's seal of approval to  
the jury

12 and it puts more importance on these statements than  
any other

13 statement.

14 THE COURT: I would agree with that. I don't  
find it

15 is appropriate at this juncture for the Court to be  
reading the

16 defendant's admission. In the presentation of evidence  
in the

17 case, the plaintiff chose certain admissions to read to  
the

18 jury and those were read as admitted by the defendant.  
You can

19 certainly make argument as to those admissions that  
were made,

20 but I don't find it is necessary or appropriate for the  
Court

21 to now be reading the defendant's admissions in toto.

22 That is denied.



23 Did I cover all the defendant's?

24 MR. DAVIS: I believe you did except for the  
statute  
25 of limitations which you have ruled on as a matter of  
law.

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1 THE COURT: Yes.

2 There were some supplementals, credibility of  
witness,  
3 I dealt with, consciousness of liability I dealt with  
that. I  
4 have dealt with everything now; right? We have  
completed the  
5 jury instructions?

6 MR. DAVIS: Yes, Your Honor.

7 Just for the record, I know you have ruled, we  
would  
8 proffer there still should be an instruction regarding  
the  
9 right of the defendant to obey a lawful order of a  
superior.

10 THE COURT: And I have ruled on that.

11 I am looking now for the verdict form.

12 MS. HEALY: Before we move off of the jury  
13 instructions. When would we have a complete packet of  
the  
14 instructions to review?

15 THE COURT: You will have it tomorrow morning.

I

16 don't think Lisa will have it done by five.

17 MS. HEALY: We would prefer to have it as soon  
as we  
18 can.

19 THE COURT: I am sure you would.

20 Is it all on disks including the verdict form?

21 MS. HEALY: The verdict perform was prepared  
by  
22 Mr. Davis.

23 THE COURT: Are the instructions on disk?

24 MS. HEALY: They are.

25 THE COURT: As soon as she has it available  
she will

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1 make it available to you.

2 MS. HEALY: Do you object to the use of an  
enlarged  
3 jury instruction in the closing argument?

4 THE COURT: I do not as long as it is an  
instruction.

5 There is one objection to number 9.

6 MR. DAVIS: Which would be appropriate in  
light of  
7 your ruling. That is in the statute of limitations.

8 In looking at this I thought we ought to  
reformat it

9 slightly different and I don't know the plaintiff's  
will have a  
10 real problem with this. That is, to just have the  
liability  
11 questions 1 through 4 be answered, then have at the end  
5,  
12 damages questions reflecting all of the various claims  
at the  
13 end. That would be my suggestion. I had prepared this  
14 originally but as opposed to having cumulative damages  
on each  
15 count, I think the fact is they are entitled to one  
damage  
16 award based on whatever liability findings.

17 THE COURT: Why don't you get together this  
afternoon  
18 and reformulate it.

19 You are withdrawing number 9 based upon my  
ruling?

20 MR. DAVIS: I believe you ruled against it.

21 THE COURT: So 9 is struck.

22 If you want to reformulate it, get together  
with the  
23 plaintiffs. The simpler you can make it for the jury  
the  
24 better it is, but I will leave that to you.

25 MS. HEALY: One more question with respect to  
closing

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1 arguments. Will we be permitted to use excerpts of the  
2 videotaped depositions in the closing? Can we use  
excerpts or  
3 small clips or read testimony?

4 THE COURT: Any objection?

5 MR. DAVIS: I don't like the playing of clips.  
6 Reading of testimony is okay.

7 THE COURT: I will allow the reading of  
testimony or  
8 letters rogatory by both sides.

9 The instructions won't be done until tomorrow  
morning  
10 some time.

11 You will have to get with Lisa on the way out  
to see  
12 when they will be done.

13 MR. DAVIS: We will work on the verdict form.  
Should  
14 we put it in a form and have it be mailed, and  
delivered? How  
15 do we get it over here.

16 THE COURT: Hand delivered. Whatever form is  
the  
17 final form you all agree on.

18 I will normally include the note taking  
instruction  
19 from the pattern jury instruction from the criminal  
which  
20 simply -- maybe there is one in civil, I don't know.

21 We need a duty to deliberate; correct?

22 MR. DAVIS: Yes.

23 MS. HEALY: Yes.

24 THE COURT: That would be 7.1 of the pattern.  
And we

25 need election of a foreperson and explanation of  
verdict form,

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1 and that would be 8.

2 MR. DAVIS: Right.

3 THE COURT: Those two are added. I will  
utilize the

4 note taking, which is pattern jury instruction number  
5,

5 special instruction number 5 from the criminal  
instructions.

6 It basically informs the jury they will have their  
notes

7 available but it is not entitled to any greater weight  
-- you

8 will have your notes available to you during  
deliberations you

9 should make use of them only as an aid to your memory.  
In

10 other words, you should not give your notes any  
precedence over

11 your independent recollection of the evidence, neither  
should

12 you be unduly influenced by the notes of other jurors.  
I tell

13 them notes are not entitled to any greater weight than  
the

14 testimony or impression of any juror.

15  
come by

We are in recess until 9:30. You may want to

16  
instruction is.

at 9:15 or so and see what the status of the

17

We are in recess.

18

oOo

19

20

I certify that the foregoing is a correct

21

transcript from the record of proceedings

22

in the above-entitled matter.

23

24

\_\_\_\_\_

\_\_\_\_\_

25

Date

Official Court Reporter

RICHARD A. KAUFMAN, CMRR