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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

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

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ESTATE OF WINSTON CABELLO,  
et al.,

MIAMI, FLORIDA

6

Plaintiffs,

OCTOBER 10, 2003

7

v.

8

ARMANDO FERNANDEZ-LARIOS,

9

Defendant.

10

11

TRANSCRIPT OF JURY TRIAL PROCEEDINGS  
BEFORE THE HONORABLE JOAN A. LENARD,  
UNITED STATES DISTRICT JUDGE

12

13

14 APPEARANCES:

15

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1           THE CLERK: Estate of Winston Cabello, et al.,  
2 vs. Armando Fernandez-Larios, Case No. 99-528.

3           Good morning once again.

4           Counsel, state your appearances, please, for the  
5 record.

6           MR. CUNNINGHAM: Leo Cunningham, Bob Kerrigan and  
7 Nicole Healy for the plaintiffs. Good morning, Your Honor.

8           MR. DAVIS: Good morning, Your Honor. Steve  
9 Davis on behalf of Armando Fernandez, defendant.

10          THE COURT: Good morning.

11          First of all, the verdict form that I received in  
12 chambers yesterday afternoon is the stipulated verdict form  
13 between the parties; is that correct?

14          MR. DAVIS: Yes, Your Honor. I guess the  
15 question would be, and I raised this yesterday, we have  
16 multiple damage counts there, and so that would be the  
17 only -- that issue, but --

18          THE COURT: So is it the stipulated form or is it  
19 not the stipulated form?

20          MR. DAVIS: I would like there to be one damage  
21 for the Estate on Count 2, and then one for the remaining  
22 plaintiffs at the end of the verdict form. I brought the  
23 disks with me, Your Honor.

24          THE COURT: That's what I have.

25          Oh, that's on punitives.

4

1           MR. DAVIS: That was the only thing, Your Honor,  
2 in looking at the verdict form. I mean, I proposed it, the  
3 one that you have in front of you.

4           Upon reflection, I think it is better if we just  
5 have just one damage.

6           THE COURT: I thought the parties were going to  
7 discuss that yesterday.

8           MR. DAVIS: We did discuss it, Your Honor.

9           MR. KERRIGAN: I thought we agreed. I'm not sure  
10 what the disagreement is exactly.

11           THE COURT: What I have in front of me has  
12 Question 1, just a liability question. Question 2: What  
13 is the total amount of compensatory damages to the Estate?  
14 That's A. Total amount of compensatory damages to the  
15 individual plaintiffs, that's B. Then the torture claim.  
16 The total amount of compensatory damages.

17           MR. DAVIS: Your Honor, the only issue I have is  
18 they would be entitled to one damage award. The Estate  
19 would be entitled to a damage award. The other plaintiffs  
20 would be entitled to a damage award. I don't want there to  
21 be a situation where there would be one, plus two, plus  
22 three, plus four, plus five. That's all.

23           THE COURT: But this is the verdict form you  
24 proposed?

25           MR. DAVIS: That's the only verdict form I

5

1 submitted.

2           THE COURT: This verdict form that was submitted,  
3 does the plaintiff have any disagreement with this verdict  
4 form?

5           MR. KERRIGAN: No.

6           THE COURT: You can argue, Mr. Davis, when you go  
7 over the verdict form, you can indicate to them, explain to  
8 them in your argument how it is separated and how they may  
9 want to consider in totality if, in fact, they are going to  
10 be granting damages, how much they are going to be giving  
11 in totality. I don't have a problem with that.

12           As to the jury instructions, you've now received  
13 -- at least, I have two packets. Are they both the same?

14           There was an original package that was given to  
15 me by Lisa. There were some changes made, including  
16 because we are numbering. You should have gotten a second  
17 packet. Did both sides get a second packet from her this  
18 morning?

19           MR. DAVIS: Yes, Your Honor.

20           MR. KERRIGAN: Yes, Your Honor.

21           THE COURT: There were two issues that I wanted  
22 to bring up with you. One is in looking at the model that  
23 I was working off of yesterday's charge conference, the  
24 crimes against humanity did not reference the aiding and  
25 abetting and conspiracy theories. I put them into the

6

1 crimes against humanity. I thought that was an oversight  
2 based upon my rulings concerning the other claims; is that  
3 correct?

4 MS. HEALY: I believe that's correct, Your Honor,  
5 that it would mirror the other claims.

6 THE COURT: Do you agree with that, Mr. Davis? I  
7 know you don't agree with the instructions, but that it  
8 mirrors the other claims?

9 MR. DAVIS: I believe that what the Court is  
10 saying is that you have advised us that you have the  
11 cautionary language.

12 THE COURT: In the model that I had, it was not  
13 in the crimes against humanity. I instructed Lisa to  
14 insert it.

15 MR. DAVIS: I understand, Your Honor.

16 THE COURT: On the conspiracy charge, I was  
17 concerned about the second element, knowing at least one of  
18 the goals of the conspiracy. From where does that come  
19 from as far as conspiracy law?

20 It's my understanding that the person who joins a  
21 conspiracy has to know the unlawful purpose of the plan.  
22 That's based upon criminal conspiracy law.

23 But where does knowing of at least one of the  
24 goals of the conspiracy come from?

25 MS. HEALY: I think that also is based on

7

1 relatively standard criminal conspiracy law in the sense  
2 that a conspiracy can have multiple objectives and a  
3 defendant can agree to join a conspiracy to further at  
4 least one of those objectives, but doesn't necessarily have  
5 to agree to further every single one of the objectives.

6           So, for example, in this case, the defendant  
7 agrees to kill the prisoners in the various cities, he  
8 doesn't necessarily have to agree that the purpose is to  
9 remove opponents of the Pinochet regime or to cause the  
10 local commanders to become more involved in the coup. He  
11 can agree merely to kill the prisoners and that would be  
12 sufficient.

13           THE COURT: Do you agree with that, Mr. Davis?

14           MR. DAVIS: I have all sorts of problems with  
15 conspiracy, as you know, Your Honor.

16           THE COURT: Well, you didn't object to this  
17 particular provision yesterday.

18           MR. DAVIS: I thought I objected to everything  
19 about conspiracy.

20           THE COURT: You generally objected to the  
21 instruction, but not when we went through the elements.

22           MR. DAVIS: The standard instruction of knowing  
23 the unlawful purpose of the conspiracy, I would prefer  
24 that.

25           THE COURT: The Eleventh Circuit pattern for the

1 general conspiracy charge for a criminal conspiracy charge  
2 under Title 18, United States Code, 371, the second element  
3 is that the defendant, knowing the unlawful purpose of the  
4 plan, willfully joined in it.

5 MS. HEALY: That would be fine, Your Honor.

6 THE COURT: You agree with that?

7 MR. DAVIS: Yes, Your Honor.

8 THE COURT: So, Lisa.

9 MS. HEALY: Your Honor, we have a few points we  
10 would like to raise with respect to the instructions.

11 THE COURT: That's fine. That second element on  
12 number 18 on page 19, that would mirror the second element  
13 of page 126 out of the criminal charge.

14 Yes. What are your points?

15 MS. HEALY: Again, we recognize and very much  
16 appreciate all the Court's very hard work yesterday in  
17 helping the parties.

18 THE COURT: You are not going to revisit my  
19 rulings from yesterday, please.

20 MS. HEALY: I do at least want to put on the  
21 record our objection with respect to element 1 of the  
22 killing, torture and cruel and inhuman treatment  
23 instructions, which is also element 3 of the crimes against  
24 humanity instruction.

25 We are doing this primarily because I understand



1 we don't want to, or the Court doesn't want us to revisit  
2 the rulings of yesterday. But we feel we need to do this  
3 to preserve this issue for appeal.

4           We are very concerned that the formulation as  
5 currently drafted elevates one theory of liability, which  
6 is primary liability, above the other two theories of  
7 liability that the plaintiffs acceded and are permitted to  
8 prove.

9           What we would like to do, and we would like to  
10 suggest the Court would do, is reformulate the instructions  
11 so that it would say, for example, killing the defendant or  
12 some other person deliberately killed Winston Cabello,  
13 which would include in the element both the primary and  
14 secondary liability theories.

15           As an alternative, we would propose that the  
16 Court insert after the element as it's currently drafted  
17 the phrase "actively participated means by aiding and  
18 abetting a deliberate killing or conspiring to commit a  
19 deliberate killing." So with that we don't want to revisit  
20 these --

21           THE COURT: Well, you are revisiting it.

22           You can state your objections for the record. I  
23 will overrule these objections. I ruled on this yesterday.

24           The cautionary instructions on each one of these  
25 claims as to instruction 17 and 18, each instruction

10

1 relates to 17 and 18, which is the secondary aiding and  
2 betting conspiracy theories. And, in addition, I granted  
3 over the defendant's objection the initial introductory  
4 claims. There are now two introductory instructions  
5 concerning the claims. That is instruction number 9 and  
6 instruction number 10. And the second paragraph, which is  
7 at the request of the plaintiffs over objections of the  
8 defendant, was that plaintiffs allege that Mr. Fernandez is  
9 liable for each of the four -- it says difference, it  
10 should be different violations -- I am just going to take  
11 that as a typo -- and I will instruct the jurors to make  
12 that a T. I am not going to have her reprint everything.

13           Different violations because (1) he personally  
14 committed the violations; or (2) he aided and abetted some  
15 person or persons who committed the violations; or (3) he  
16 entered into a conspiracy with persons to commit the  
17 violations. Strike "with persons." "He entered into a  
18 conspiracy to commit the violations."

19           And that instruction was given at the request of  
20 the plaintiff to further explain the first element and the  
21 cautionary instructions. So I am not going to revisit it.

22           MS. HEALY: Thank you, Your Honor.

23           THE COURT: You can preserve your objection for  
24 the record.

25           MS. HEALY: Thank you.

11

1           One more. This is a minor note. There is  
2 actually a typo on the instruction with respect to crimes  
3 against humanity.

4           THE COURT: What number is that, please?

5           MS. HEALY: That one is now number -- I believe  
6 it's 16. I'm sorry. It's number 14. The fourth element.  
7 References widespread and --

8           THE COURT: That's right. That should be "or."  
9 I had changed that to or. Maybe it didn't get changed on  
10 all of them. Yes, on the fourth element. You are correct.

11           MS. HEALY: And then with respect to the torture  
12 claim, there was a great deal of discussion yesterday about  
13 constructive versus actual custody. And I recognize we  
14 didn't pick that up again after lunch, but I know the Court  
15 was leaning toward a discussion as to constructive custody.

16           So we would like, if possible, to include some  
17 language in the instruction that would explain to the jury  
18 that this affair didn't have to be in Mr. Fernandez'  
19 personal custody at the time.

20           So I would propose replacing --

21           THE COURT: What instruction number are you  
22 talking about?

23           MS. HEALY: Torture is now in instruction number  
24 12. With respect to the second element, I would propose  
25 "Winston Cabello was in the custody or physical control of

12

1 the person or persons who intentionally inflicted severe  
2 pain or suffering, whether physical or mental, on him."

3 THE COURT: Mr. Davis?

4 MR. DAVIS: Yesterday we were looking at the  
5 statute and tracking the language of the statute. So I  
6 would object to any change in this instruction off what  
7 Your Honor had determined yesterday. I thought you  
8 determined yesterday, based upon our reading of the  
9 statute, and this is directly taken from the statute.

10 I mean, you still have the cautionary subject to  
11 aiding and abetting and conspiracy.

12 THE COURT: I'm going to deny the request. Leave  
13 the instruction as is. It does have the cautionary  
14 instruction as to aiding and abetting and conspiracy.

15 If it comes back as a question from the jury, we  
16 can take it up then. But it is tracked from the statute,  
17 and I did rule that based upon the statute that the second  
18 element was a correct rendition of the statute and as  
19 alleged in the complaint.

20 So we are ready to proceed, I take it?

21 Who is proceeding with the closing?

22 Mr. Cunningham?

23 MR. CUNNINGHAM: I would begin, Your Honor.

24 THE COURT: Do you want any warnings?

25 MR. CUNNINGHAM: You mean time warnings?

13

1 THE COURT: How long is your initial closing?

2 MR. CUNNINGHAM: I suspect a little over an hour.

3 Not a lot more.

4 THE COURT: Do you want any warnings or not?

5 MR. CUNNINGHAM: No.

6 THE COURT: Okay.

7 MR. DAVIS: Your Honor, just for scheduling  
8 purposes, I have probably an hour and 15, an hour and 20  
9 minutes, maybe an hour-and-a-half, I don't know, but do you  
10 want me to start my closing when we break for lunch?

11 THE COURT: Probably what we are going to do --

12 MR. DAVIS: Or split mine up?

13 THE COURT: No, I am not going to split yours. I  
14 don't think that's right.

15 I think the day is going to go as this. We are  
16 now starting with the plaintiffs. It's about an hour, an  
17 hour and 15, give or take some minutes. We are going to  
18 proceed with the plaintiff's closing, break for lunch for  
19 an hour, proceed with the defendant's closing, have a break  
20 after that, proceed with the rebuttal.

21 At that time we are going to see what time it is.  
22 The jurors have already told Lisa that they don't want to  
23 be here past 5:00. If we are somewhere around the 4:00  
24 o'clock time period, I may very well tell them to come back  
25 on Tuesday morning for charge when they are fresh, when

14

1 they can listen to the law rather than at the end of the  
2 day after hearing all the arguments. But I am going to see  
3 how the time period goes. But that is my thinking at this  
4 point.

5           And then they would come in Tuesday morning at  
6 9:30, be charged, and start deliberating.

7           If it moves faster than that, if your estimations  
8 are overestimations, and we are much closer to let's say  
9 the 3:00 o'clock time for the end of the closings, I may  
10 charge them at that time.

11           We will play it by ear, depending on your time  
12 periods. But we will break for lunch even though it's a  
13 little bit early. I usually don't break that early for  
14 lunch, but I think otherwise it will bring us much too far  
15 in the afternoon.

16           So that's the way we will proceed. I'm sure they  
17 won't mind an early lunch.

18           Let's bring the jurors in and we can begin.

19           Lisa will be bringing the revised packet to you,  
20 the final draft, which will be three or four.

21           Instruction number 14 still needs to be changed.  
22 It still has the "and." She is going to change that now to  
23 "or" and give you a substitute page. Everything else has  
24 been changed.

25           So both counsel and the Court will just get a

15

1 substitute page and the packets have not yet been run for  
2 the jurors. And so she will change that page.

3 But I think all the other changes have been made,  
4 correct?

5 DEPUTY CLERK: Yes, Your Honor.

6 MS. HEALY: Yes, Your Honor, they have.

7 THE COURT: Mr. Davis?

8 MR. DAVIS: I believe so, yes.

9 THE COURT: So you know that, Mr. Cunningham?  
10 There is still a substitute page coming for that one?

11 MR. CUNNINGHAM: Yes.

12 THE COURT: You're ready?

13 MR. CUNNINGHAM: Yes.

14 THE COURT: Mr. Davis, you're ready?

15 MR. DAVIS: Yes, Your Honor.

16 THE COURT: Okay.

17 [The jury enters the courtroom at 10:25 a.m.].

18 THE COURT: Good morning. I'm sorry for the  
19 delay this morning. We've been working. I appreciate your  
20 patience. You may be seated.

21 Mr. Cunningham, you may proceed.

22 MR. CUNNINGHAM: May it please the Court, good  
23 morning, ladies and gentlemen.

24 Winston Cabello was killed off a deserted road in  
25 Northern Chile in the middle of the night, and now you know

16

1 how it happened.

2           Earlier that night, the helicopter landed in the  
3 Copiapo garrison. The helicopter brought them in from  
4 Santiago, and the men from Santiago had come to see to it  
5 that certain political prisoners were killed.

6           The defendant in this case, Armando Fernandez,  
7 was one of the men on that helicopter.

8           You heard testimony from Enrique Vidal about what  
9 happened as soon as the helicopter landed. Armando  
10 Fernandez got right to work. He was the lowest ranking  
11 officer and he had a lot to do that night so he didn't  
12 waste any time getting started.

13           Over the course of this trial, you've heard what  
14 happened during the rest of that night, and now it's time  
15 that Mr. Armando Fernandez be held responsible for what he  
16 did in Copiapo on the nights of October 16 to 17, 1973.

17           At the outset, let me thank you all again.  
18 Mr. Davis told you this was an important case for his  
19 client, I told you this is an important case for our  
20 client, and the fact of the matter this is an important  
21 case for a lot of people.

22           You people have been unbelievably conscientious  
23 as we have had scheduling delays and technical problems.  
24 And you paid terrific attention, and we all appreciate the  
25 accommodations you have made to your personal schedules in



17

1 order to be here and see this through, and the terrific  
2 attention you've been paying.

3           So, thank you very much now, and I'm sure we will  
4 thank you later for the tremendous service you are  
5 performing.

6           What we are going to do at this point is closing  
7 arguments. After I close and then Mr. Davis closes and  
8 then you will hear from Mr. Kerrigan again, the Judge is  
9 going to instruct you on the law. That may happen today,  
10 it may not happen until next week.

11           But you have heard a lot of evidence in this  
12 case, you have heard from a lot of different witnesses in a  
13 lot of different forms. You saw videotaped depositions,  
14 you heard letters rogatory, you heard other statements  
15 read, and now is the opportunity that I have to explain to  
16 you how that evidence satisfies the elements, meets the  
17 requirements of the law to establish that Mr. Fernandez is  
18 responsible for his role in killing Mr. Cabello.

19           We have put up in front of you a chart of all the  
20 witnesses that you heard in one form or another.  
21 Hopefully, that helps us keep the names straight a little  
22 bit, and helps you figure things out as we do what we do to  
23 the pronunciations. But you can see on that chart that  
24 we've identified who some of the people are who you saw via  
25 videotape; and then, of course, we have listed other

1 witnesses who testified live and who testified by letters  
2 rogatory.

3           What I am going to do is work through each of the  
4 claims and each of the theories of liability.

5           You may recall this chart, the one which looks an  
6 awful lot like it from my opening statement. What I am  
7 going to do is work through the three different theories of  
8 liability in this case and talk about how the evidence  
9 satisfies them and establish that Mr. Fernandez is  
10 responsible, is liable for each of the claims that the  
11 plaintiffs have brought here.

12           Bear in mind we do not have to prove that  
13 Mr. Fernandez directly killed Winston Cabello. There are  
14 these two doctrines that you have heard about before and  
15 you are going to be instructed on later called aiding and  
16 abetting and conspiracy. And under those doctrines, you  
17 can and you should, and, in fact, you must find  
18 Mr. Fernandez liable if we prove them by a preponderance of  
19 the evidence.

20           That's the standard in this case. This is a  
21 civil case and the burden of proof is by a preponderance of  
22 the evidence.

23           In a criminal case where people are at risk of  
24 going to jail, there is a much higher burden of proof. In  
25 a case like that, a criminal case, you have to prove doubt

1 beyond a reasonable doubt. You have to prove guilt beyond  
2 a reasonable doubt. But this is not a criminal case.

3           These are serious allegations, no doubt about  
4 that. But it's not a criminal case. It's a civil case.  
5 And in a civil case like this, the standard is by a  
6 preponderance of the evidence; that is, if the evidence  
7 establishes that more likely than not that it's true that  
8 Mr. Fernandez did what we've said he did, then you need to  
9 find him liable and hold him responsible.

10           So, we have put on the screen now the jury  
11 instruction concerning aiding and abetting. This is what  
12 the Judge is going to read to you later on, and you will  
13 have a set of the jury instructions when you go back to  
14 deliberate.

15           I direct your attention to the first line. The  
16 first line says "that the defendant may be found liable if  
17 you find that he aided and abetted others in acts committed  
18 against Winston Cabello."

19           So one of the ways in which we have proven and  
20 you can find Mr. Fernandez liable is based on an aiding and  
21 abetting theory.

22           If you break these elements down or combine them  
23 together, what they really amount to is if you help someone  
24 do something bad, and you know that's what you're doing,  
25 then you're responsible for it. It's a common sense

1 notion, and the law is consistent with common sense -- at  
2 least, on this point.

3           With respect to the first element, which is "that  
4 one or more of the wrongful acts that comprise the claim  
5 were committed," I don't think there is going to be any  
6 dispute about that one in this case.

7           Winston Cabello and twelve other men were  
8 brutally killed just outside Copiapo. That's the wrongful  
9 act we are talking about, and we're talking about some of  
10 the wrongful acts that immediately preceded that. I will  
11 talk in more detail about that in a minute. But I expect  
12 no real dispute about the first element.

13           The second element is "that the defendant  
14 substantially assisted some person or persons who  
15 personally committed or caused one or more of the wrongful  
16 acts that comprise the claim."

17           So, let's focus on that second element for a few  
18 minutes. Let's look at the evidence that Mr. Fernandez  
19 substantially assisted in the killing of Winston Cabello.

20           Think back to the evidence you've heard about  
21 what happened in Copiapo that night. When the helicopter  
22 landed, Mr. Fernandez got off and he was dressed for  
23 combat. You heard the witnesses describe that. In fact,  
24 he was dressed for more than combat. Remember Enrique  
25 Vidal. Enrique Vidal was Mr. Fernandez's classmate from

1 the military school, so he recognized him when he got off  
2 the helicopter. And Mr. Vidal told you that he had a  
3 conversation with Mr. Fernandez, and the conversation  
4 focused on two different things: One was that  
5 Mr. Fernandez came off the helicopter with this bizarre  
6 weapon. It was a mace or a flail, but it was described as  
7 a handle, a chain and a ball with spikes on it.

8           When Mr. Vidal and Mr. Fernandez had their  
9 conversation, Mr. Fernandez did exactly what you would  
10 expect him to do as the lowest-ranking officer on the  
11 helicopter. He immediately started to do his job. And his  
12 job that night was going to be select and round up those  
13 prisoners.

14           So what did he ask Mr. Vidal? He asked him how  
15 many prisoners are in the garrison, because he wanted to  
16 know what his night was going to look like. Mr. Vidal had  
17 some questions of his own for Mr. Fernandez. Mr. Vidal  
18 asked him, "Why are you guys here? What's up with this  
19 group in the helicopter? Why is there a general here?"

20           And I recall the testimony, you may as well,  
21 because it was sort of chilling. What Mr. Vidal said what  
22 Mr. Fernandez said was, "You will soon find out."

23           The conversation turned to the issue of this  
24 strange weapon. And Mr. Fernandez was asked by Mr. Vidal,  
25 "What's it for?" And at that point he made, you know,

1 maybe it was some sort of sick joke, he said it was "To  
2 caress the little pigeons." And Mr. Vidal gave us his  
3 interpretation of what that was if it wasn't obvious  
4 enough. It was to beat the prisoners.

5           After Enrique Vidal went back and alerted the  
6 colonel in charge of the garrison, Colonel Haag, that a  
7 general had arrived, there was an opportunity for a little  
8 bit more conversation as Mr. Fernandez and Mr. Vidal walked  
9 towards the officers. In that conversation, Mr. Fernandez  
10 told Mr. Vidal that he was the general, General Arellano,  
11 General Arellano's right-hand man, and that the general  
12 trusted him completely.

13           You heard from another witness, several other  
14 witnesses, but we heard from another witness who really  
15 picks up the story, and that witness was Dr. Ivan Murua,  
16 Ivan Murua Cevesich. Dr. Murua, an anesthesiologist,  
17 testified by videotape.

18           He was also being detained at the garrison at the  
19 time, and you will recall that he described how he was  
20 being interrogated. It sounded more like an interview, but  
21 it was an interrogation by someone else in the garrison.  
22 He was being interrogated by the Fiscal, by Carlos Brito,  
23 and that was interrupted by the arrival of General Arellano  
24 and two other men. One of the men he thought his name was  
25 Julio, and the other man was a thin man who he later

1 identified as Fernandez-Larios.

2           Well, Dr. Murua was sitting there, the general,  
3 with Armando Fernandez present, began going through the  
4 files. And you got to believe that Dr. Murua had an  
5 interest in what was going to happen next because he knew  
6 that his file was among the files that were being looked  
7 at. But you heard im, he was trying to be unobtrusive but  
8 he was paying attention.

9           And what was going on is the general was going  
10 through the files and he was putting red circles on certain  
11 of them. He was putting the red circles on the files of  
12 the prisoners that had to be eliminated.

13           We know that because that's what General Arellano  
14 said. He used the word eliminated, and Armando  
15 Fernandez-Larios was there when he said that.

16           You also heard from a corporal who worked in the  
17 Copiapo garrison. His name was Juan Morales. Corporal  
18 Morales himself saw Mr. Fernandez reading the file cards of  
19 the prisoners.

20           Corporal Morales also saw Fernandez interrogating  
21 the prisoners, and one of those interrogations got rough,  
22 and you heard Corporal Morales describe it. I am going to  
23 re-read what his testimony on that point was. The question  
24 was asked:

25           "Question: Who did Fernandez-Larios strike?

1           "Answer: Jamie Sierra. And he hit him later on  
2 again. Not with the rifle but with his foot. He hit him  
3 in the head with his rifle. When he hit him in the head  
4 with his rifle, the detainee Sierra fell to the ground with  
5 his forehead maybe 15 centimeters off the concrete, the  
6 pavement. Later on with his foot, with the boot, he hit  
7 him in the back of the head, on the nape of the neck, and  
8 that slammed his forehead into the concrete, and it sounded  
9 like a watermelon.

10           "Question: You earlier testified that  
11 Fernandez-Larios struck Sierra in the thorax; and in your  
12 explanation, you then said that he struck him in the head  
13 with his rifle butt.

14           "I want to be certain he was struck both in the  
15 thorax and in the head with the rifle?

16           "Answer: No, no, no, in the thorax with the  
17 rifle, with the rifle butt. And in the head with his foot,  
18 using the sole of his foot slammed his head down."

19           That's what Corporal Morales saw Armando  
20 Fernandez do that night in Copiapo.

21           What Corporal Morales saw likely explains what  
22 Enrique Vidal further testified to. You recall that  
23 Enrique Vidal saw Mr. Fernandez later that night when  
24 Mr. Fernandez was coming back from where the prisoners  
25 were.



1           And Mr. Vidal described on the videotape  
2 deposition how Mr. Fernandez appeared. What Mr. Vidal said  
3 was that he appeared to be on a high. He said he was upset  
4 and very nervous. That's exactly the kind of agitated  
5 state you would expect someone to be in after they just  
6 stomped someone's head into the pavement.

7           Another witness got mistreated by Mr. Fernandez  
8 that night in Copiapo. Ruben Herrera. You remember  
9 Mr. Herrera, he was the first videotape deposition we  
10 played in this case. He was also being detained in  
11 Copiapo, but he was being detained in the hospital. He  
12 described how a local soldier, a guy name Ojeda, came to  
13 his hospital room, and Ojeda was accompanied by another  
14 man. Mr. Herrera later identified that man as  
15 Mr. Fernandez.

16           He said that that man, Mr. Fernandez, had a  
17 Corvo, that curved knife that you saw depicted, and a  
18 rifle. And Mr. Fernandez ordered Mr. Herrera to get up and  
19 get dressed. But at that point a doctor, who was a major,  
20 apparently outranking Ojeda and Fernandez, came and  
21 interceded. He wouldn't let them take Mr. Herrera. So  
22 Mr. Fernandez left, telling the doctor that they would be  
23 back.

24           Now, you heard from one other detained person who  
25 may well have seen Mr. Fernandez that night. Remember our

1 first witness was Patricio Barrauto, Winston Cabello's  
2 brother-in-law.

3           Patricio testified that he was sleeping in the  
4 bunk room that night in Copiapo when the military men  
5 arrived to take Winston away, and they did take him away.

6           But the way they did it, you may recall, was that  
7 a particular military man who Patricio had never seen  
8 before and never saw later, came into the room, and he had  
9 a rifle. Patricio testified how he didn't look that man in  
10 the eyes, but what he remembered was the smile. He  
11 commented on the smile. And that comment was consistent  
12 with what other witnesses who did positively identify what  
13 Mr. Fernandez said.

14           You may recall what Mr. Herrera said on that  
15 point. He said, when questioned:

16           "You say that he seemed to be enjoying what he  
17 was doing. Why do you say that?

18           "Answer: The way he came in, the way he was  
19 looking, I can't say happiness, but it was an impression  
20 like he was winning the war, or something like that. I was  
21 unarmed, I was sick; and if he hit me, it gave him pleasure  
22 to do it."

23           And Enrique Vidal said that he seemed to be on  
24 some sort of high that night.

25           So you got to see four or five eyewitnesses who

1 saw Mr. Fernandez in Copiapo the night Winston Cabello was  
2 killed.

3           Mr. Fernandez seems to dispute at least some of  
4 what those witnesses said, but he's offered no explanation  
5 for why any of them would lie or why any of them would be  
6 mistaken.

7           So what Mr. Fernandez did that night  
8 substantially assisted the persons who caused Winston's  
9 death, or actually directly participated, committed the  
10 killing.

11           The prisoners were not going to be killed until  
12 their files were reviewed and the right prisoners were  
13 selected and they were interrogated and then they were put  
14 on the truck to be sent to their deaths. And that wasn't  
15 going to be the act of one man. That was going to take  
16 more than one man, and Mr. Fernandez was one of the men who  
17 helped do it. That's how he substantially assisted in the  
18 killing of Winston Cabello and those other twelve men in  
19 Copiapo.

20           Now, the final element for aiding and abetting is  
21 a knowledge requirement. I told you at the beginning if  
22 you do something bad and you know you are doing something  
23 bad, then you are responsible for it.

24           So, how do we know that Mr. Fernandez knew that  
25 he was assisting in wrongful conduct? Well, it seems

1 almost obvious in light of his own conduct, and don't  
2 overlook the obvious. You are here to apply your common  
3 sense to this evidence.

4           And it's obvious that when you are behaving the  
5 way he was behaving, stomping prisoners and hitting  
6 Mr. Herrera with his rifle and that kind of stuff, he knows  
7 what he's up to. But there is more evidence than that.

8           Mr. Fernandez himself admitted that he knew by  
9 the time he got to Copiapo that the squad was connected to  
10 killing the prisoners.

11           Mr. Fernandez was asked by Mr. Kerrigan:

12           "Question: When you went back to Santiago, you  
13 knew the people had been killed in Cauquenes and somebody  
14 associated with the helicopter had been involved. You  
15 agree with that?"

16           Mr. Fernandez said, "Yes."

17           So there is no dispute in this case that by the  
18 time the helicopter had gone from Cauquenes back to  
19 Santiago and then through La Serena to Copiapo,  
20 Mr. Fernandez knew what the squad was up to.

21           He was also there when General Arellano said that  
22 the prisoners had been to be eliminated, so there is no  
23 really serious way to dispute that he knew what he was  
24 doing, that he substantially assisted those killings.

25           I mentioned La Serena, and it's worth pausing on

1 some testimony we heard about La Serena.

2           One of the witnesses who appeared was Colonel  
3 Arredondo, and you may recall that Colonel Arredondo was  
4 one of the higher-ups on the squad. You only heard his  
5 testimony by letter rogatory, and the guy is a murdering  
6 member of the pack of men from Santiago. So give his  
7 testimony and give all the guys who were on the helicopter,  
8 give their testimony the weight it deserves, and that's for  
9 you to decide.

10           But Colonel Arredondo said that at the stop  
11 before Copiapo, Mr. Fernandez was directly involved in the  
12 killing. He was asked in his letter rogatory:

13           "Did Fernandez-Larios participate in killing  
14 those prisoners?

15           "Answer: Yes.

16           "Question: What did he do?

17           "Answer: I do not know how many, but in any  
18 case, he fired.

19           "Question: How do you know this?

20           "Answer: I saw it. I was present at it."

21           So the elements of aiding and abetting are  
22 satisfied here by what the witnesses have described  
23 happened in Copiapo and before Copiapo.

24           So let's now consider an alternative basis for  
25 liability, and that's conspiracy.

1           Again, if you start at the top of this  
2 instruction, it tells you the defendant, Mr. Fernandez, may  
3 be found liable if you find that he conspired with someone  
4 who committed acts against Winston Cabello or caused acts  
5 to be committed against Winston Cabello. So this is a  
6 second independent theory by which you can find  
7 Mr. Fernandez liable.

8           Consider the elements. The first element of a  
9 conspiracy is that there are two or more persons who agreed  
10 to commit a wrongful act. It is not the case you need a  
11 contract, a formal written document, anything like that in  
12 order to find the agreement necessary for a conspiracy.

13           You can infer the agreement based on the fact  
14 that these people were acting together. They were acting  
15 in concert.

16           The conspiracy here was among the men in the  
17 helicopter, and they brought in local officers, local  
18 members -- members of the local regiment as they traveled  
19 through this town. The object of this conspiracy, as you  
20 know from looking at what they did, was to kill certain  
21 political prisoners.

22           So how do we know that there was such an  
23 agreement?

24           Well, we have evidence of concerted activity.  
25 For example, Mr. Fernandez was acting with another local

1 Army officer, Ojeda, when he went to Mr. Herrera's room to  
2 try to extract Mr. Herrera from the hospital.

3           Mr. Fernandez was acting with General Arellano  
4 himself as they went through the files and marked the  
5 files, and Dr. Murua watched them do that up in the second  
6 floor office where Dr. Murua had been interrogated.

7           Mr. Fernandez was acting with others from either  
8 the helicopter or the local garrison when Corporal Morales  
9 saw them reviewing the files and interrogating the  
10 prisoners.

11           You heard testimony in the form of a statement  
12 that Mr. Davis read to you that came from Colonel Haag.  
13 Colonel Haag was the guy in charge of the local regiment in  
14 Copiapo. And I will re-read to you portions of that  
15 statement because it sort of gives a top down view on how  
16 the conspiracy was working that night in Copiapo.

17           And you guys did a great job putting up with the  
18 strange syntax as these things get translated into English,  
19 and I am going to suggest this is more of the same, so here  
20 we go:

21           Question to reply if, indeed, on October 16,  
22 1973, while in the adjutancy of the military headquarters,  
23 he gave the order to shoot the 13 arrested, using only  
24 officers.

25           He replied -- the "he" being Colonel Haag -- no,

1 it cannot be because I was always in the interior of the  
2 headquarters with General Arellano.

3           Question (By the Court): If and where he met  
4 General Arellano Stark after this person arrived in Copiapo  
5 on October 16, 1973?

6           He replies: "Indeed, we met at headquarters with  
7 General Arellano."

8           And it goes on, but I am going to skip some of  
9 it.

10           "General Arellano, Major Espinosa, Captain Carlos  
11 Brito Gutierrez, together with investigations functionaries  
12 and Carabineros in charge of intelligence whose names I do  
13 not remember worked at a table with the files and  
14 antecedents of the arrested," and antecedent, I suppose,  
15 are the records relating to the arrested.

16           "General Arellano asked questions from the  
17 audience. We answered.

18           "There was a file with all the data of the  
19 detained persons which contained their political  
20 affiliation and charges existing against them," and at this  
21 point I am going to skip some more of the statement.

22           "Arellano sent notes to the outside through any  
23 member of his retinue as they had his confidence. General  
24 Arellano, while in the office of the military headquarters,  
25 sent written messages presumably to members of his retinue.



1 I ignored their contents.

2           "At the end of the meeting, General Arellano  
3 delivered the list which he had received from the  
4 prosecutor's office with the names of all the arrested who  
5 were held at that moment in the regiment and the few in the  
6 local jail. Those were around 70. And he had marked the  
7 name of 13 prisoners ordering that they be shot as soon as  
8 possible. These people were executed with pending  
9 proceedings because the general's order could not be  
10 unfulfilled due to his high investiture."

11           So General Haag gives the top down view of what  
12 was going on with General Arellano. He was using his  
13 retinue to do what he needs done, to gather the  
14 information, to make the decision, to figure out who of the  
15 70 possible prisoners are going to be the 13 who were going  
16 to die that night.

17           So it's the members of the retinue who were doing  
18 his evil bidding. They are responsible for this tragedy,  
19 just like General Arellano is.

20           How do we know that the defendant knew of the  
21 unlawful purpose of the plan and willfully joined it?  
22 Well, we know that because the same reason we know that in  
23 connection with the aiding and abetting, that what he was  
24 doing was wrong. Based on his own conduct, based on what  
25 he heard from General Arellano, based on what he had done

1 in La Serena, based on what he has admitted he knew after  
2 the killings in Cauquenes, he knows what's going on, he  
3 knows what the plan is, he knows what the scheme is. He  
4 knows where the helicopter is going, where it is going.  
5 And you heard that when he goes back to Santiago after  
6 Cauquenes, he doesn't do a thing about it.

7           So he's a willful member of this conspiracy.

8           And the final element is no doubt the easier:  
9 "One or more of the violations was committed by someone who  
10 was a member of the conspiracy and acted in furtherance,"  
11 and, of course, these men were killed that night.

12           While the evidence of aiding and abetting and  
13 conspiracy is really overwhelming in this case, there is  
14 another basis on which you could find Mr. Fernandez liable  
15 for Mr. Cabello's death. You could conclude that he  
16 actually personally did it himself.

17           And what's the evidence on that? Well, you may  
18 recall that Mr. Fernandez had a Corvo, and he said he  
19 didn't lend it to anyone, and his response to  
20 Mr. Kerrigan's question was, in essence, that he had the  
21 only Corvo in Copiapo.

22           Enrique Vidal confirmed that Mr. Fernandez had  
23 that Corvo, and that no one else in the regiment did. And  
24 Mr. Patricio Lapostal, who testified by videotape,  
25 described how the Corvo could be used to slash a throat.

1 Victor Bravo was the man who described  
2 fingerprinting the bodies at the cemetery. So he had a  
3 chance to see them not long after they had been killed.  
4 And he described that Winston Cabello's throat had been  
5 slashed.

6 Let me read to you what his testimony was. He  
7 said -- he described several of the men and how they  
8 appeared after they had been killed.

9 "I remember that Jamie Sierra had deep green eyes  
10 and one was missing. I could tell that they had removed it  
11 with a Corvo, plus other ones. Leonelo Vincenti was in a  
12 deplorable state. He had open gaping wounds all over his  
13 body. I have never told the relatives this," and I will  
14 explain to you why later on.

15 "There was another young man, Larravide, I  
16 believe, small, slightly built. I think if they had to  
17 kill them, why didn't they just kill them and not do it  
18 that way. The way they did it, so bloody, so much hatred.  
19 They didn't even know them personally."

20 He was asked:

21 "Were the bodies that you examined, the 13  
22 bodies, were they all similarly massacred, or were there  
23 some of the bodies that were just executed, just by  
24 execution?"

25 He answered:

1            "No, not one was just shot to death by execution.  
2 Some were in a worse state than others. Winston had a cut  
3 on his ear. If I remember correctly, he had a gash, a  
4 wound from his ear down to his throat."

5            So there is evidence from which you could  
6 conclude that this defendant is directly responsible, not  
7 via aiding and abetting, not via conspiracy, he is directly  
8 responsible for what happened to Mr. Cabello that night.  
9 But you don't have to find that. You only have to find in  
10 order to hold him responsible by a preponderance of the  
11 evidence that he aided and abetted or was part of the  
12 conspiracy that did what we said happened here.

13           Let's now look at the elements of the four  
14 categories of claims that we have in this case.

15           So you should have in front of you on the screen  
16 the instruction regarding the claim for extrajudicial  
17 killing.

18           Let me start at the bottom of this one. The last  
19 line is that "You may consider instruction 17 and 18 to  
20 determine whether or not the plaintiffs have proven the  
21 elements above by a preponderance of the evidence."

22           What are instruction 17 and 18? That is aiding  
23 and abetting, and that's conspiracy. Make no mistake about  
24 it: That's our primary argument in this case is that is  
25 why Mr. Fernandez is responsible.

1           So you can consider those two doctrines as you  
2 work through the elements of each of these claims.

3           So, what's the first element? It said "The  
4 defendant deliberately killed or actively participated in  
5 the killing of Winston Cabello." Actively participated.  
6 What does that mean? In this case, that means that he  
7 actively participated by aiding and abetting, or he  
8 actively participated by conspiring in the conspiracy that  
9 resulted in that death.

10           And the jury instructions for each of these  
11 claims has the same structure. You get to consider aiding  
12 and abetting; and when you look and think about active  
13 participation, you apply the instructions regarding aiding  
14 and abetting. And if you think that Mr. Fernandez did it  
15 directly or he aided and abetted or he conspired to do it,  
16 then that's sufficient for you to conclude that he actively  
17 participated and you've got to hold him responsible.

18           So, let's look at the evidence that satisfies  
19 each of these elements.

20           How do we know that Winston Cabello was  
21 deliberately killed? Well, there is really no doubt about  
22 that. Remember Dr. Miranda, she came up from Chile. She  
23 was the forensic pathologist. She, in essence, narrated  
24 some videotape about the exhumation from the mass grave,  
25 and she works through the autopsy reports describing how

1 each of these men had been killed.

2           You know, it's funny. You sit here and you  
3 listen to that evidence. It's so sterile, you know, it's  
4 thoracic trauma and this and that. You almost have no  
5 inkling of what she's talking about.

6           But what she's talking about is she is talking  
7 about a massacre. And Victor Bravo brings that home a  
8 little more clearly when he describes how the bodies looked  
9 the next day.

10           But that's what Dr. Miranda's testimony  
11 established, and that's the kind of evidence you can  
12 consider when you try to figure out whether or not these  
13 killings were deliberate -- of course, they were.

14           You also know that the killings were deliberate  
15 because they were pursuant to General Arellano's order.  
16 Colonel Haag made that perfectly clear, if there was any  
17 doubt about it, and as did other witnesses as well.

18           So there is no question that this was a  
19 deliberate killing.

20           The second element is also easily met, and the  
21 question there is "whether or not the defendant acted under  
22 actual or apparent authority or color of law of a foreign  
23 nation."

24           Mr. Fernandez was indisputably a second  
25 lieutenant in the Chilean Army at that time. So he was

1 acting under color of his authority as a second lieutenant.  
2 He said it himself. What can I do? I'm a second  
3 lieutenant. There is no question he is a second  
4 lieutenant, and that is sufficient to satisfy the second  
5 element.

6           If there is any doubt about it, think about how  
7 this operation worked. What you did is you had men coming  
8 down from Santiago, from headquarters, coming out to the  
9 local garrisons. It's all military, though. So everything  
10 that is going on in each of these towns as these killings  
11 happen happens under color of law and under apparent  
12 authority.

13           The third element is that the killing of Winston  
14 Cabello was not previously authorized by a judgment of a  
15 regularly constituted court affording all of the judicial  
16 guarantees which are recognized as indispensable by  
17 civilized people. That's what makes it extrajudicial. It  
18 is outside of the court process.

19           If what had gone on here had been, you know, set  
20 for the trial and then a death penalty imposed and then the  
21 death penalty executed, that wouldn't be an extrajudicial  
22 killing. But that's not what happened here.

23           You heard Winston's sister, Zita, testify, you  
24 heard Winston's brother-in-law, Pato, testify. They both  
25 said that he was never even charged with a crime, that he

40

1 was being held, and it was while he was being held he was  
2 killed.

3           If this had not been an extrajudicial killing,  
4 was there any reason for the government to lie about it?  
5 You will recall that a day or two after the killings, they  
6 put out this phony cover story. The government said that  
7 these men had been killed while they were trying to escape,  
8 while the truck was driving from Copiapo to La Serena.  
9 What a bunch of nonsense. No one is contending that that's  
10 what happened here.

11           But if these had been lawful killings, there was  
12 no reason for the government to put out a cover story like  
13 that.

14           So there is no issue as to whether or not these  
15 were extrajudicial killings.

16           The next claim is for torture. Again, you get to  
17 apply the aiding and abetting and conspiracy instruction as  
18 you consider whether or not this defendant actively  
19 participated in the torture.

20           The first element is that what was inflicted was  
21 severe pain or suffering, whether physical or mental.  
22 Let's consider what actually happened to Winston Cabello  
23 that night.

24           He is sleeping in a bunkhouse. He is in his  
25 pajamas. Military men enter the room. At least one of



1 them comes into the middle of the room with a machinegun.  
2 He is ordered to get up, to get dressed, and he doesn't  
3 even have time to properly dress. He pulls his pants on  
4 over his pajamas. That is what Pato remembered. And if  
5 you look at the autopsy report for Mr. Cabello, which is  
6 Exhibit 23, and you will have all the exhibits, it reflects  
7 that he had pajamas. There is still evidence of pajamas in  
8 the autopsy report.

9           Mr. Cabello was loaded into a truck. Now, think  
10 about what is going on when these 13 men are loaded into  
11 that truck in the middle of the night. What must they have  
12 been imagining what's going on? What must they have  
13 thought was about to happen to them?

14           Think of that terror. It would be like being on  
15 an airplane when the pilot tells you "It's going down." It  
16 would be that kind of horrific agony. As you wonder, but  
17 you know what is going to happen next.

18           And if that isn't bad enough, you know that one  
19 of the men in the truck with you, Jamie Sierra, has had his  
20 face stomped. He's had his head smashed in. So you got  
21 this writhing man in this truck with you. So if there it  
22 is any doubt about what is going to happen with the rest of  
23 you, it is certainly eliminated by that.

24           They drive out. They drive out to Questa  
25 Cardonas. Pato told you that's near the middle of nowhere.

1 And that's where they are killed.

2           We don't know whether Winston Cabello was the  
3 first one killed or the last one killed. This is not like  
4 CSI. We don't have some sort of photo re-creation of what  
5 happened that night. You have got to use your common  
6 sense. You have got to draw the reasonable inferences. We  
7 can't close the gap on that. We can't tell you whether he  
8 was the first to die or the last to die. But if he was the  
9 last to die, then it only gets worse, as he experienced his  
10 friends, his friends from this small town, being massacred.  
11 And if he wasn't the last to die, well, then all that  
12 happened to him was he had his throat slashed and he got  
13 shot or however else they killed him.

14           So Mr. Cabello was subjected to severe pain or  
15 suffering, mental and physical, that night before he died.

16           The second element is that Winston Cabello had to  
17 be in the defendant's custody or physical control. Again,  
18 you get to apply the aiding and abetting and conspiracy  
19 analysis as you consider each of these elements. That's  
20 what the instructions tell you at the bottom.

21           And we never put Winston Cabello in the  
22 defendant's hands. We just didn't do that. So how do you  
23 meet that element? The way you meet that element is you  
24 apply some of the jury instruction from conspiracy.

25           In a conspiracy, every member of the conspiracy

1 is liable for the acts of their co-conspirators. It's a  
2 legal doctrine that the Judge is going to instruct you on.  
3 It makes sense to those of us who have discussed the  
4 conspiracy a lot. It amounts to the idea that you can't  
5 join an illegal operation and then say, "Oh, but I'm not  
6 responsible for the bad stuff that happened because I  
7 didn't do it myself."

8           The law is to prevent people from entering into  
9 these relationships from which bad things happen.

10           So, you can consider the fact that one of the  
11 other conspirators actually had control of Mr. Cabello that  
12 night. There is no question he was in somebody's custody.  
13 There is just no question about that. He was in custody at  
14 the garrison, he was in custody when he got in the truck,  
15 he was in custody up to the moment of his death.

16           So it takes a little bit of legal analysis here  
17 to understand exactly why Mr. Fernandez is responsible for  
18 that custody. But, again, you apply the jury instruction  
19 18 as to conspiracy and the aiding and abetting instruction  
20 and that's how you conclude that he was in the defendant's  
21 custody.

22           The next element is that the infliction of the  
23 pain has to be done under color of law, or apparent  
24 authority again. A no brainer. It is the same analysis  
25 for the prior claim.

1           Then the final element is that the pain and  
2 suffering had to be inflicted for the purpose of  
3 intimidation, punishment or any discriminatory purpose.

4           I think the best way to understand how we know  
5 that is to consider who the victims were that night. So if  
6 you look at the chart in front of you, you've got a list of  
7 the men who were killed in Copiapo.

8           We all know what happened here. These were  
9 political prisoners, potential opponents of Allende, and  
10 they got killed that night by the Pinochet government.  
11 That's what happened here.

12           So, the way we know that that happened here,  
13 aside from other witnesses saying it slightly more  
14 directly, is that if you look at who these people were.  
15 Start at the bottom. Leonelo Vincenti. He was a civics  
16 professor. So was Pedro Perez, another civics professor.  
17 These are the intellectuals, these are leaders in the  
18 community.

19           Ricardo Mancilla, he was the leader of a local  
20 trade school. Pato told us that.

21           Leopoldo Larravide. He was a college student,  
22 but he was also the president of the student body at the  
23 University. Remember, he was the guy whose son was born  
24 the night he was killed. He was a student leader. And he  
25 was the only student leader.

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1           Manuel Gortazar, he was a high school student.  
2 He was the student body president, and they killed the high  
3 school student body president.

4           Alfonso Gamboa, who was he? He was the guy who  
5 ran the radio station. So he was an important communicator  
6 in town.

7           Fernando Carvajal, he worked for a Congressman.

8           And Agapito Carvajal, that was his brother.

9           And then, of course, there was Winston Cabello.  
10 Winston Cabello was appointed to his position as an  
11 economic or as regional planner in the Atacama-Coquimbo  
12 region, and he was appointed by President Allende.

13           So he, too, as you heard him described as one of  
14 the service chiefs in the area. He was also a leader, and  
15 he was also a member of the Allende government.

16           So if you look at who these men were, you will  
17 understand what the process was that was going on earlier  
18 as these files were being reviewed and these people were  
19 selected. And that's how you know that this was a  
20 political operation and that these men were tortured and  
21 they were killed for the discriminatory purpose of being on  
22 the wrong side of that government.

23           Let's look at the next jury instruction. I won't  
24 spend a lot of time on the next claim, which is the cruel,  
25 inhuman, or degrading treatment, because it's what we call

1 a lesser included offense of torture.

2           If you are comfortable, as you should be, that  
3 the evidence establishes by a preponderance that the  
4 torture claim is met, then you also -- you automatically  
5 need to conclude that this claim has been established,  
6 because it does not require a couple of the things that are  
7 required by torture.

8           It doesn't require proof of this improper  
9 purpose. That's the principal difference.

10           So, the cruel and inhuman and degrading treatment  
11 claim is really proven by the exact same evidence that  
12 proves the torture claim.

13           Now, let's look at the last claim, which is  
14 crimes against humanity. Again, the same instruction:  
15 Consider aiding and abetting and conspiracy when it comes  
16 to considering whether or not this defendant actively  
17 participated. And then consider the elements that are  
18 identified.

19           The first is that one or more individuals  
20 committed any of the following acts, and the acts include  
21 murder, they include torture, and they include outrageous  
22 against personal dignity. And that element is obviously  
23 met. We have the murder torture and outrageous against  
24 Winston Cabello and the twelve other men in Copiapo.

25           And there were 59 other victims. There were the

1 victims in Cauquenes, La Serena and Antofagasta, Calama.  
2 And this element is met because we know that the second  
3 element is met; that is, whether this was widespread or  
4 systematic and against the civilian population. That's met  
5 because we know that the nature of the victims in Copiapo  
6 and elsewhere, they were civilians.

7           We also have to prove that the conduct was part  
8 of widespread or systematic conduct against civilians.  
9 Well, how do we know it was systematic? Unfortunately, you  
10 heard the system. The system was the men in the helicopter  
11 arrived. The men in the helicopter reviewed the files.  
12 The men in the helicopter decided who would get killed.  
13 The men in the helicopter interrogated the people, the  
14 victims. The men in the helicopter extracted them and they  
15 sent them to their death, and that's what they did in at  
16 least these five cities.

17           So that's the system. And how do you know it was  
18 widespread? Well, there were 72 people killed. There were  
19 13 people killed in Copiapo. That's widespread enough.  
20 And if you have any doubt about it, if you look at the map,  
21 you know, this conduct, just focusing on the cities that we  
22 have identified covers hundreds of miles of Chile in which  
23 these atrocities occurred.

24           The third element is the element that  
25 Mr. Fernandez has to have participated, actively

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1 participated, again aiding and abetting and conspiracy are  
2 sufficient for that.

3           And the fourth element is that the defendant knew  
4 or should have known that the killing was widespread or  
5 systematic.

6           And, again, the knowledge is proven in all of  
7 these claims by the same set of evidence. Primarily by his  
8 own conduct. It's obvious he knew what he was doing, but  
9 he was also hearing what was going on, he admitted he knew  
10 what had gone on, and he was doing these killings.

11           Let me take you to Colonel Arredondo's testimony  
12 because Colonel Arredondo also described what Mr. Fernandez  
13 did in the towns of Antofagasta and Calama which occurred  
14 after Copiapo.

15           With respect to Antofagasta, the question was  
16 put:

17           "Did Fernandez-Larios participate in killing  
18 those prisoners?"

19           "Answer: Yes.

20           "Question: What did he do?"

21           "Answer: He formed a part of one of the  
22 execution groups.

23           "Question: How do you know this?"

24           "Answer: Because I witnessed it."

25           He was asked about Calama:



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1           "Question: Did Fernandez-Larios participate in  
2 killing those prisoners?

3           "Answer: Not in all of them, but he did  
4 participate, yes.

5           "Question: What did he do?

6           "Answer: He executed some prisoners.

7           "Question: How do you know this?

8           "Answer: I witnessed it."

9           So Mr. Fernandez was a knowing participant in  
10 crimes against humanity for what he did in Copiapo standing  
11 alone, and for what he did in the other cities as well.

12           So now let's consider what Mr. Fernandez said in  
13 this trial and what his response is to this.

14           One of the things he said, it was as if he was  
15 trying to justify these killings by claiming that Chile was  
16 at war at the time, and I'm going to read a question and  
17 answer between Mr. Kerrigan and Fernandez-Larios.

18           The question was put by Mr. Kerrigan:

19           "Question: Did you talk to a priest about it,  
20 what you'd seen or felt had happened?"

21           He was asking about what had happened in  
22 Cauquenes.

23           "Answer: I told you, sir, for me at that moment,  
24 unfortunately, unfortunately in our mind, we thought there  
25 was a war, and this was a war, and what my superiors do, I

1 thought in that minute they were doing the correct thing  
2 because that moment the government was the law, and I  
3 thought -- I cannot thought in that minute my superiors are  
4 doing something bad. If you ask me now at this moment, of  
5 course, I know they were doing something not correct."

6           Now, you are going to hear Judge Lenard's  
7 instruction and you are not going to hear certain  
8 instructions because they are not the law in this case. It  
9 is not the law in this case that if you think you were at  
10 war, it was okay for you to help people kill unarmed  
11 civilians. That's not the law.

12           And it's also not the law in this case that if  
13 your superiors told you to do something, any part of  
14 something as horrible as this, that's okay. It's not okay.  
15 And Judge Lenard isn't going to tell you anything about how  
16 it's okay to follow orders like that. That's not the law  
17 in this case. So don't let what Mr. Fernandez said to  
18 Mr. Kerrigan distract you on that point.

19           One of the other things Mr. Fernandez said was --  
20 he picked up one of the old themes that had been used by  
21 the government 30 years before. He tried to blame the  
22 victims. Remember after the killings happened, the  
23 Government at the time tried to blame the victims. They  
24 said, "These guys had to die because they were escaping and  
25 we yelled stop and they didn't stop, so we shot them."

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1           Now, complete nonsense, but that was the story at  
2 the time. Blame the victims, they were responsible for  
3 their own death because they had the temerity to try to  
4 escape. It's utter nonsense.

5           So what does Mr. Fernandez do now 30 years later?  
6 The question was put by Mr. Kerrigan.

7           "Question: The war you are describing is the  
8 government against the people who were opposed to the  
9 current government; is that correct? And the government at  
10 the time was the dictatorship of Pinochet.

11           "Answer: Yes.

12           "Question: The people who were opposed to  
13 Pinochet were the enemy, correct?

14           "Answer: The other part, gentlemen. Let me put  
15 it this way: In Colombia is a war.

16           "Mr. Kerrigan: The foricks are the gorillas  
17 fighting the government? These are unarmed civilians in a  
18 jail?

19           "Answer: No. A lot of these people have  
20 weapons; and if you remember one of the statements of the  
21 persons that I hear in this court, he declared that he had  
22 a weapon hiding.

23           "Mr. Kerrigan: That was Herrera. He had been  
24 sentenced and he was a criminal?

25           "Answer: I don't know.

1           "Question: Who were you saying had a weapon?

2           "Answer: I don't know. Somebody give the  
3 statement here. He said he was interrogated, and he denied  
4 were his friends.

5           "And where was the weapon, and he said if you had  
6 a weapon, and he said yes.

7           "Question: If these people had weapons and they  
8 were enemies, it was justified to kill them?

9           "Answer: I don't know. It was not my job to say  
10 who must be killed or not killed."

11           What a bunch of nonsense. These were unarmed  
12 civilians taken out of a bunkhouse in a garrison in the  
13 middle of the night in their pajamas. They didn't have  
14 weapons. They were defenseless, they were killed, and  
15 that's the man who helped do it.

16           It's outrageous that he tried to blame those  
17 victims for their death that night.

18           Mr. Fernandez had more to say, not directly, but  
19 in the course of this case, some alibis were floated. One  
20 of the alibis was presented when Mr. Fernandez's attorney  
21 read the testimony of General Arellano and the testimony of  
22 Colonel Arredondo, two of the murderers on the helicopter,  
23 and they said they weren't in Copiapo, we didn't get there.  
24 These killings happened before us.

25           Now, that is not an issue in this case. That is

1 not an issue in this case because Mr. Fernandez has  
2 admitted that he was there in Copiapo that night, and he's  
3 admitted that General Arellano gave the order that got  
4 these men put on the truck that led to their death.

5           I am going to read to you two requests for  
6 admissions that I read to you earlier in the case. I'm  
7 re-reading them because I suspect that it's a little hard  
8 to hang on to some of what the lawyers were reading to you  
9 as the case went on, but one of the questions that I read  
10 was:

11           "Admit that you accompanied General Arellano's  
12 delegation to Copiapo on or about the eve of October 16,  
13 1973?"

14           The response: "Defendant admits request for  
15 admission number 34."

16           Next: "Admit on or about October 17, 1973,  
17 General Arellano ordered that 13 Copiapo prisoners be  
18 ordered onto a truck and driven away?"

19           The response: "The defendant admits request for  
20 admission number 35."

21           So, you still heard this curious testimony that's  
22 an alibi read to you by Mr. Fernandez's attorney as he  
23 presented testimony of Arellano and Arredondo. I don't  
24 know why he did that. Is it to confuse you or distract  
25 you? I don't know.

1           But it is not an issue in this case. There is no  
2 alibi possible here. It's just not alive any more because  
3 the defendant admitted in these requests for admissions he  
4 was there and Arellano gave the order. And that's before  
5 the prisoners got killed.

6           One of the things that Mr. Fernandez did say  
7 regarding the witnesses who ID'd him, who identified him  
8 that night in Copiapo, was that Dr. Murua misidentified  
9 him. So, what I would like to do is show you a little  
10 chart that speaks to the issue of how the identification  
11 worked.

12           So Dr. Murua eyeballed Fernandez that night, and  
13 he was shown -- down at his deposition -- he was shown a  
14 photograph. It's this photograph, these cadets all lined  
15 up. They all look alike to me. But if you knew them, you  
16 can distinguish them; or if you saw them closer in time,  
17 you might be able to distinguish them.

18           Dr. Murua did an amazing thing. He was able to  
19 go through that line of cadets and he was able to narrow it  
20 down to two people. He narrowed it down to two people by  
21 putting Xs on them. And if you look at Exhibit 20, you  
22 will see the picture with the X's. So that there are two  
23 people left.

24           And did Dr. Murua get it right? Yeah, he did get  
25 it right, because Enrique Vidal testified that one of the

1 men who didn't have the X on him, the man with the cast on  
2 his hand, that was the defendant, Armando Fernandez-Larios.

3           You may recall Enrique Vidal was very excited to  
4 see that photograph. He hadn't seen it in ages, and it was  
5 a picture from their military class days. So there is no  
6 doubt about that.

7           And then Mr. Fernandez admitted that that is, in  
8 fact, he in that photograph.

9           So Dr. Murua did a remarkable job. He picked out  
10 Fernandez-Larios from that picture that is from '68 or '69.

11           There was another photograph that was used with  
12 the witnesses in this case. That's Armando Fernandez in  
13 that white suit, and you've got that and you will have it  
14 as Exhibit 11. Dr. Murua also identified Armando Fernandez  
15 in that picture.

16           Other witnesses used that picture to identify him  
17 as well. Corporal Morales and Ruben Herrera, they also  
18 used that photograph to make the ID's. So did Jorge Ortiz  
19 who talked about Fernandez's role in abducting David  
20 Silverman.

21           The identification issue in this case is also a  
22 red herring. People who knew Fernandez, Enrique Vidal,  
23 clinched the ID after people like Dr. Murua, who only saw  
24 him for a limited period of time, had narrowed it down and  
25 made the call.

1           Another thing that Mr. Fernandez did in his  
2 testimony was he repudiated something that I had pointed  
3 out in the opening statement. I gave him too much credit  
4 in my opening statement. I told you how Mr. Fernandez had  
5 talked about having a guilty conscience, and he was asked  
6 about that again. The question from Mr. Kerrigan was:

7           "Question: What was in the cities that we talked  
8 about where these people were all killed that caused you to  
9 have a guilty conscience, if you had a guilty conscience?

10           "Answer: I don't have a guilty conscience for  
11 what happened there. I am not guilty for what happened  
12 there."

13           So Mr. Kerrigan read him the deposition  
14 testimony.

15           Question, page 346, line 11, if you would look at  
16 your deposition, the question was asked:

17           "Question: What was it with being a member of  
18 Arellano's comitiva that weighed on your conscience?

19           "Answer: I think you know the answer. Any  
20 normal person would answer the question. Now I realized,  
21 or in that moment I realized, that they would kill a lot of  
22 persons, and now I was part of the committee, that  
23 committee."

24           So Mr. Kerrigan asked Mr. Fernandez here in court  
25 whether that was true. Mr. Fernandez responded: "Yes,



1 sir, I answered that.

2 "Question: (From Mr. Kerrigan) Would you agree  
3 with me today that people who died in those cities died as  
4 the result of some conduct by some members of the  
5 helicopter squad, that they had some involvement in those  
6 killings? Would you agree with that today?

7 "Answer: I cannot say I am agreeing with that.  
8 What I am saying, of course, when you put part and part,  
9 you see, General Arellano was in charge of this committee,  
10 and he order or somebody ordered to do this. Of course, I  
11 must feel bad because I was being part of that helicopter.  
12 Only to be named in this is bad."

13 He went on. Mr. Kerrigan asked him:

14 "Question: Why were you concerned about being a  
15 member of the helicopter squad if you hadn't done anything  
16 wrong?

17 "Answer: Because my name was in the newspaper,  
18 and the newspaper said that General Arellano went to Calama  
19 and with all this committee, and I was parked there and  
20 they put my name."

21 Mr. Fernandez doesn't feel bad about what  
22 happened to these people. Mr. Fernandez feels bad that his  
23 name was in the paper. When you think about names in the  
24 paper, look at Exhibit 4.1.

25 Mr. Fernandez's attorney in opening statement

1 said to the effect that Mr. Diaz has confessed to this  
2 crime, so let me talk for a moment about Mr. Diaz's  
3 testimony.

4           First, who is Captain Diaz? Well, he is an  
5 admitted mass murderer, for starters. From there, he is a  
6 liar because you heard that he, when initially asked in a  
7 Chilean judicial proceeding whether or not he could testify  
8 about the events in Copiapo, he said he didn't remember  
9 anything about it. He later changed his story on that, and  
10 apparently gave statement after statement, giving more  
11 information each time. But initially he lied in Chile in a  
12 judicial proceeding about what he remembered about Copiapo.

13           When you look at his testimony, he describes a  
14 military execution. The testimony that Mr. Davis read as  
15 he was reading a number of statements, he made it sound  
16 like this was a military execution.

17           But maybe at one point, says Captain Diaz, "maybe  
18 at one point his machine gun burst a couple of times"; that  
19 is, fired more than one round.

20           Maybe his machine gun burst a little bit? That's  
21 not what Victor Bravo saw when he saw those bodies after  
22 they had been massacred. These were people who had been  
23 slaughtered. This was not a military execution. It was  
24 far worse than that.

25           So when you think about Captain Diaz's testimony,

1 think about what that lying, murdering guy who got it so  
2 wrong, think about how much weight you want to give his  
3 testimony.

4           But you know what? You can give his testimony  
5 weight if you want because it doesn't really matter in this  
6 case.

7           We don't have to prove that Mr. Fernandez is the  
8 guy who used the Corvo. We don't have to prove that he's  
9 the guy who fired the gun. It's enough if he was part of  
10 the process, if he substantially assisted, if he was a  
11 member of the conspiracy that led to the death. That's  
12 enough.

13           So, if Captain Diaz wants to take credit for  
14 finishing the job, let him have it. Let Captain Diaz have  
15 that credit because it doesn't take Mr. Fernandez off the  
16 hook.

17           72 people got killed in these cities as the  
18 Caravan of Death traveled throughout Northern Chile. There  
19 is a lot of blame to go around. The guys on the squad,  
20 Arellano, Arredondo, all these guys, they are good for  
21 this, they are all responsible for it. If they were here,  
22 you could find them liable. They are not here. Does that  
23 mean you don't find Mr. Fernandez responsible? Absolutely  
24 not. There is enough blame to go around.

25           So the fact that other people may be as or more

1 responsible than Mr. Fernandez, it doesn't matter, and you  
2 shouldn't consider it.

3           Let me talk for a moment about the damages in  
4 this case. The Court is going to instruct you that you  
5 have to consider two kinds of damages: Compensatory  
6 damages and punitive damages.

7           With respect to compensatory damages, you know,  
8 it is find for you to consider that this family didn't  
9 bring this case for the money. They didn't. It's not  
10 about money. The case is about accountability. That's  
11 what we told you in the opening statement, and that's why  
12 we are here.

13           We want you to find Mr. Fernandez responsible for  
14 what he did in Copiapo. You didn't hear evidence about the  
15 financial consequences to the mother and the brother and  
16 the father or the widow and the children. We didn't  
17 present that evidence.

18           But it is the case that Mr. Fernandez's estate is  
19 represented in this case, and you can consider the  
20 compensatory damages that would appropriately be awarded  
21 for what happened to Mr. Cabello 30 years ago.

22           You are also going to be instructed on punitive  
23 damages. Now, punitive damages exist for a reason. They  
24 exist so that you can make an example out of a defendant's  
25 conduct. They are intended to send a message, and we are

1 asking you to send a message.

2           We want you to send a message that in a civilized  
3 society like ours, we are not going to stand for this. We  
4 are not going to stand for people that come to the United  
5 States having committed atrocities in Chile or anywhere  
6 else, no matter when, you can't come here. You can't come  
7 here and live in peace and run from your past. That's the  
8 message that we want you to send.

9           Mr. Fernandez's conduct here was reprehensible.  
10 Did you ever hear him express remorse? Did he apologize?  
11 Did his lawyer present a letter of apology that he wrote to  
12 any of the families? A lot of families were affected here.  
13 You have only heard about one of them.

14           Did he send a letter to any of them? Did he pick  
15 up the phone? It's 30 years ago. Did he pick up the  
16 phone? No, no.

17           Mr. Fernandez doesn't get it. And there are  
18 other people out there like Mr. Fernandez who don't get it,  
19 and that's why we have trials like this, so that someone  
20 like Mr. Fernandez is subjected to cross examination,  
21 confronted with the evidence against him, and reasonable  
22 people like you get to decide what the just result is.

23           And the punitive damages award is a way for you  
24 to reflect how you feel about the evidence that you have  
25 heard in this case, and Mr. Fernandez and others like

1 Mr. Fernandez who may be out there.

2           So, I want to leave you with two points, one  
3 thought, before I turn it over to Mr. Fernandez's lawyer;  
4 and then after Mr. Fernandez's lawyer talks, you are going  
5 to hear from Mr. Kerrigan.

6           If Mr. Fernandez's lawyer were to get up here and  
7 suggest to you that there is no evidence connecting  
8 Mr. Fernandez to Winston Cabello, I want you to invite two  
9 things: First, so what? So what? To be liable as an  
10 aider and abetter, there doesn't have to be any personal  
11 contact. To be liable for conspiracy, there doesn't have  
12 to be any personal contact. So, so what if there is no  
13 evidence that Mr. Fernandez and Mr. Cabello came into  
14 contact that night?

15           I want you to think about a second thing.  
16 Because that argument that there was no contact that night,  
17 it's a sad and it's a cynical argument. Think about who  
18 the witnesses who would be for that contact. Mr. Fernandez  
19 would be one of those witnesses. He denies it. He admits  
20 that in another judicial proceeding he lied. And he won't  
21 admit now that he had contact with Mr. Cabello.

22           There would be another witness. The other  
23 witness would be Winston Cabello. But Mr. Fernandez  
24 silenced Mr. Cabello 30 years ago. So think about that.  
25 If his lawyer argues that there is no evidence of contact

1 between Mr. Fernandez and Mr. Cabello.

2 Thank you.

3 THE COURT: Ladies and gentlemen, in order not to  
4 interrupt the various closing arguments, we are going to  
5 break for lunch. I know it's a bit early, but this will  
6 then allow Mr. Davis to proceed with his closing argument  
7 in toto after lunch.

8 So we are going to break for lunch at this time  
9 for an hour -- let's say an hour and five minutes, quarter  
10 to 1:00.

11 Do not discuss this case either amongst  
12 yourselves or with anyone else. Have no contact whatsoever  
13 with anyone associated with the trial. Do not read, listen  
14 or see anything touching on this matter in any way. If  
15 anyone should try to talk to you about this case, you  
16 should immediately instruct them to stop and report it to  
17 my staff.

18 Remember that until such time that you have heard  
19 all of the closing arguments and I have instructed you on  
20 the law, you simply are not to talk about this case.

21 You may leave your notebooks in your chairs. Be  
22 back in the jury room at quarter to 1:00.

23 Have a nice lunch.

24 [The jury leaves the courtroom at 11:33 a.m.].

25 THE COURT: We will be in recess until quarter to

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1 1:00. Have a nice lunch.

2 [Lunch recess taken at 11:33 a.m.].

3

4 AFTERNOON SESSION

5 12:42 p.m.

6 THE COURT: We are back on the Estate of Winston  
7 Cabello, et al., vs. Armando Fernandez-Larios, Case No.

8 99-528. Good afternoon.

9 Counsel, please state your appearances for the  
10 record.

11 MR. CUNNINGHAM: Leo Cunningham, Bob Kerrigan and  
12 Nicole Healy for the plaintiffs. Good afternoon.

13 MR. DAVIS: Steve Davis for the defendant,  
14 Mr. Fernandez. Good afternoon.

15 THE COURT: Good afternoon. Let's bring them in.

16 [The jury enters the courtroom at 12:43 p.m.].

17 THE COURT: You may proceed, Mr. Davis.

18 MR. DAVIS: Good afternoon. I'm Steve Davis. As  
19 you know, I'm representing Armando Fernandez-Larios in this  
20 case.

21 There is no mystery about what happened to  
22 Mr. Cabello. You know who the people were that killed him.  
23 You know who the person was, Colonel Haag, who ordered his  
24 killing, and you know that General Arellano ordered that  
25 killing.



1           There has been no evidence in this case, no  
2 evidence in this case, saying that Armando Fernandez had  
3 anything to do with the death of Winston Cabello.

4           I told you at the beginning of this case I want  
5 you to look at the details of the evidence, the details of  
6 the evidence. That is the important things in this case.  
7 The testimony that you heard, not what the lawyers say, but  
8 what the testimony actually was.

9           That testimony confirms that Armando Fernandez  
10 had nothing to do with the death of Mr. Cabello.

11           Now, before I get into discussing the evidence in  
12 this case, we, too, want to thank you. I know this has  
13 been a burden on all of you to come here every day, to take  
14 time out of your lives.

15           As the Judge told you at the beginning of this  
16 case, jury service is one of the most important things that  
17 a citizen can do. We appreciate you being here. But today  
18 is the day for Armando Fernandez to defend himself against  
19 these charges, to defend himself to you, to present the  
20 evidence to you for you to consider.

21           He does not want to be held responsible for this  
22 because he is not responsible for this. You know who  
23 caused the death of Mr. Cabello, and it was not Armando  
24 Fernandez.

25           Now, you hear a lot of what Mr. Cunningham would

1 say to you or Mr. Kerrigan would say to you or what I would  
2 say to you, and that's lawyer talk.

3           And at this part of the case when a lawyer is  
4 talking about addressing the jury at the end of the case,  
5 you wonder what is it that I'm going to say that is going  
6 to convince the jury or what is it I am not going to say  
7 that is going to convince the jury.

8           Here, I don't have to rely on what I am going to  
9 say. I have to rely on what the evidence was in this case.  
10 That is what Mr. Fernandez relies on. That's what Armando  
11 relies on. He is not responsible. The evidence does not  
12 show it. The evidence shows a hundred percent who did  
13 this, who is responsible.

14           This is the only time I'll get to speak to you.  
15 Mr. Kerrigan will speak to you at the end, I believe will  
16 be summing up. I don't know what he is going to say to  
17 you, but I want you to think no matter what he says to you,  
18 I want you to think about what the evidence is, what was  
19 the testimony, what was presented to you.

20           Let's start with the end first, and then we will  
21 go through the details.

22           I prepared a little chart here summarizing what  
23 the testimony was in this case.

24           You all heard a helicopter got in Copiapo around  
25 7:00 or 8:00 o'clock on the night of October 16, 1973. I

1 don't think that is disputed by anyone in this lawsuit.

2           You heard because we presented the evidence to  
3 you from Colonel Haag that there was a meeting between  
4 General Arellano and Lieutenant Colonel Haag between  
5 approximately 10:00 o'clock and midnight on the night of  
6 the 16th of 1973, and Colonel Haag identified who was  
7 present at that meeting.

8           He identified members of the police, Carlos  
9 Brito, who was the local prosecutor, the local Copiapo  
10 prosecutor. You heard his name over and over again. An  
11 attorney called Rojas Hidalgo. Attorney Rojas, members of  
12 the police, General Arellano.

13           They also identify Major Enriotti being present,  
14 and they also identify Lieutenant Colonel Arredondo, who  
15 was on the helicopter, as being present.

16           Those are the people who were present at the  
17 meeting where the prisoners were selected. How do you know  
18 that's the case? Because Colonel Haag told you. He is the  
19 one witness in this case that they haven't challenged one  
20 thing that he says.

21           Colonel Haag said, I met with General Arellano, I  
22 met with Lieutenant Colonel Arredondo, and I had these  
23 representatives from my local garrison and local police  
24 force, and we went over the prisoners' files. That's what  
25 he said. I read that to you.

1           What the last thing that we presented on  
2 Wednesday, that was the last piece of evidence I read to  
3 you, sworn testimony from Colonel Haag, which they don't  
4 challenge -- I have not heard them challenge one scintilla  
5 of that evidence.

6           Colonel Haag does not anywhere, anywhere,  
7 anywhere, mention that Armando Fernandez was there, does  
8 not mention that Armando Fernandez had anything to do with  
9 the meeting, the selection, the whole process.

10           Why would Colonel Haag admit this? He has passed  
11 away, according to the testimony, late in his life. He  
12 said what was happening. He would have no reason not to  
13 identify Armando Fernandez if Armando Fernandez was there.  
14 No reason at all.

15           So what did he tell you that happened? He told  
16 you that they went through the prisoner files. General  
17 Arellano was asking questions, making decisions, making  
18 marks. He said he didn't know what color pencil he was  
19 using. But he gave you the details that not only are  
20 logical of how this thing would have happened, but  
21 consistent with what would happen.

22           A general came there on orders from General  
23 Pinochet, and the general would be the person in charge of  
24 the colonel, and the colonel was answering to him. That's  
25 what was presented to you. That's what happened with the

1 selection of the prisoners who went through these horrible  
2 acts that took place.

3           Now, we have testimony from Captain Diaz. Now,  
4 granted, Captain Diaz is a confessed murderer. Granted,  
5 the first time he was asked about this in the testimony  
6 that they read to you from 1998, he said, "Oh, I didn't  
7 have anything to do with this."

8           But I read to you four other sworn statements  
9 that he gave in Chilean courts in which he said, "Yes, I  
10 did it." He admitted and confessed to murder. He  
11 identified who gave him the order. He said "Colonel Haag  
12 gave me the order." Again, he says because Colonel Haag  
13 was ordered by General Arellano. He said, "Colonel Haag  
14 gave me the order."

15           He also then identifies the people that go with  
16 him to pick up the prisoners. He says, "I got the order."  
17 He says, "Major Enriotti was present," and he says when I  
18 got the order. And he says -- he testified to, that "I  
19 took Captain Yanes, Captain Marcelo Morambio and Second  
20 Lieutenant Waldo Ojeda."

21           And, again, I apologize for not pronouncing these  
22 names very well, but I think you know who these people are  
23 and who the testimony says they are.

24           An interesting thing: One of the details Captain  
25 Diaz gave you in the testimony is that four prisoners were

1 at the garrison and he had to go away to the city jail,  
2 which was ten blocks away, to pick up the other nine. That  
3 was in what Captain Diaz said.

4           That's exactly what Mr. Barrueto said to you, and  
5 I'm botching his name and my apologies to him, at the  
6 beginning of this trial. He said that they called out  
7 names and Winston and other prisoners left.

8           So, how would Captain Diaz know that detail if he  
9 wasn't the one doing it? He had his squad of men who were  
10 doing this, and he took these prisoners in his control.

11           Next, we got around 12:30 at night Captain Diaz  
12 picks up the prisoners. He is transporting the prisoners.  
13 Again, consistent with the first testimony we heard in this  
14 case. Prisoners were picked up, they were sleeping. I  
15 think two prisoners, I think is what he said, came out.

16           And then the prisoners were taken away. They are  
17 taken away 20 kilometers away. How far is 20 kilometers?  
18 If you are a runner of a 10K race, it is 6.2 miles, so  
19 that's about twelve miles. Twelve miles away the base.

20           These prisoners are taken away and they are  
21 executed. And Captain Diaz admits they are executed. He  
22 doesn't give all the gruesome details. All I can tell you  
23 is this is the evidence that we have that we got through  
24 the processes allowed by the Court.

25           But he says that he killed these people, and he

1 slaughtered these people. And, again, we won't belittle  
2 what happened. What happened was awful. But Captain Diaz  
3 and his men are the ones who did it.

4           Now, going back just a moment. After the  
5 selection of prisoners, General Arellano goes with  
6 Lieutenant Colonel Haag, Lieutenant Colonel Arredondo and  
7 Attorney Rojas to have dinner or a late snack, is how they  
8 described it in their testimony. No Armando Fernandez with  
9 them.

10           We know the executions occurred. We know the  
11 next day around 10:00 to 12:00 o'clock in the afternoon,  
12 the helicopter left and went on to other cities.

13           We know from the testimony of Captain Diaz and  
14 the testimony of Juan Morales and maybe from Victor Bravo  
15 that the next night, I'm not a hundred percent clear, but  
16 the next night, the night of the 17th, they took the bodies  
17 and buried them in the Copiapo cemetery.

18           And that's what happened to these prisoners in  
19 Copiapo.

20           Captain Diaz nowhere identifies Armando Fernandez  
21 as having anything to do with the deaths of Mr. Cabello and  
22 the prisoners.

23           Just reviewing the details of the meeting: We  
24 have General Arellano, Lieutenant Colonel Sergio Arredondo  
25 from the helicopter, and the people from Copiapo ordered to

1 execute the prisoners, directed from Lieutenant Colonel  
2 Haag to Captain Diaz in the presence of Major Enriotti,  
3 with Captain Yanes, Captain Morambio, Second lieutenant  
4 Ojeda helping him do this. That's what happened to these  
5 prisoners.

6           Now, there isn't a serious controversy about  
7 that. As I said, Colonel Haag's testimony is unrebutted.  
8 Captain Diaz has admitted it four times after initially  
9 denying it. And that's what happened. That's what I told  
10 you in the opening the would show, that's what the evidence  
11 does show here.

12           So, what is the case that has been presented to  
13 you by the plaintiffs here? What is the case that they  
14 have presented to you after 30 years of this happening.  
15 This happened in 1973. They filed this case in 1999.  
16 After gathering evidence for as long as they could with as  
17 many lawyers and as many people they had working on this,  
18 what is the evidence that they are able to bring you?

19           They bring you evidence from three or four or  
20 five people who say they were there, who were there, and as  
21 I think I'll show you in a moment, I don't believe their  
22 testimony as it relates to Armando is reliable and can be  
23 used to hold someone responsible for murder.

24           Now, the Judge is going to instruct you at the  
25 end of this case on the law. Mr. Cunningham went over some



1 of the law with you. I want you, and he implored you and I  
2 implore you, to use your common sense. Use your common  
3 sense in evaluating what happened at the time. Who was in  
4 charge? Who was responsible? Who was assigned duties?  
5 Who was assigned responsibilities? And then use your  
6 common sense about what the witnesses testified to and what  
7 they could testify to and what they could remember.

8           The law of aiding and abetting requires  
9 substantial assistance. What is substantial assistance? I  
10 was looking up substantial in the dictionary. It says  
11 considerable importance, valued degree, amount or extent.

12           Nothing of the evidence in this case would show  
13 any considerable value or significant extent of anything  
14 Armando Fernandez did in connection with this.

15           Ask yourself what difference would it make  
16 whether Mr. Fernandez was there or not. The same thing  
17 would happen. General Arellano would have ordered the  
18 executions, Colonel Haag would have followed the order,  
19 Captain Diaz would have followed the order, and the  
20 executions would have occurred. That's what would have  
21 happened.

22           Further consider the situation that we are in.  
23 They make light of the position that civilians, what they  
24 call Armando's position, civilians were being targeted as a  
25 war. But Armando Fernandez is a 24-year-old second

1 lieutenant in Chile in 1973, is told by his superiors, his  
2 military officers, that he's in war. And the testimony in  
3 this case is clear and unequivocal that at no time did they  
4 give you any evidence that Armando Fernandez was given an  
5 order to do anything to these prisoners, and at no time, at  
6 no time, was Armando Fernandez in any contact with Winston  
7 Cabello.

8           And Mr. Cunningham said, well, that's what we are  
9 going to say, he knows that's what we are going to say  
10 because he knows that's the evidence that they have after  
11 30 years. They don't have any evidence of any contact.

12           Wouldn't you think after 30 years with the  
13 military people that they would have been able to get  
14 somebody to say that Armando Fernandez did something in  
15 connection with Winston Cabello? No, they couldn't.

16           Not one person.

17           They attacked the fact that I read letters  
18 rogatory, again lawyer talk. They read letters rogatory  
19 from General Arellano, and I read the cross-designation of  
20 General Arellano's testimony about what happened in  
21 Copiapo. General Arellano's story is he wasn't there.

22           And I read the letters rogatory of every witness  
23 from the helicopter as to what they said about what  
24 happened in Copiapo because you needed to know that. You  
25 needed to know that information. And not one of them at

1 any time said Armando Fernandez gave an order, gave a  
2 direction, had any participation with the prisoners. Not  
3 one of them.

4           Captain Diaz, who confessed to it, he doesn't say  
5 it. Colonel Haag, who gave the order, he doesn't say it.

6           So let's look at the details, some other details  
7 of the evidence that was presented in this case to you by  
8 the various witnesses.

9           Let's start with the first witness who testified  
10 by deposition, Mr. Herrera. Mr. Herrera, you will  
11 remember, they had played a videotape of his testimony, and  
12 then I had to read it into evidence cross-designations.

13           But Mr. Herrera, I think, confirms precisely what  
14 we are saying to you. He confirms how bad the people were  
15 in Copiapo. I'm sure you remember because it is seldom  
16 anyone hears this testimony about torture, about electrodes  
17 being applied to this man, and all of that happened to  
18 Mr. Herrera long before the helicopter, the days before the  
19 helicopter got there.

20           And yet he identifies Mr. Fernandez. He says  
21 he's not a hundred percent sure. He admits that. He's not  
22 a hundred percent sure, but he identifies Mr. Fernandez.  
23 He admits he is not a hundred percent sure.

24           But look at the situation that he had been in.  
25 He had described that he had been arrested. He had

1 described at one point that Captain Diaz had put a gun to  
2 his head and was pretending to kill him or threatening to  
3 kill him, but he didn't kill him. This is all before the  
4 helicopter got to Copiapo. He then gives you the details  
5 of the fact that he was tortured for several days. He was  
6 tortured so badly that he had to be in the hospital as of  
7 October 15th of 1973.

8           He tells you that he had received a blood  
9 transfusion. He testified that the person he saw in the  
10 room -- page 140 of the trial testimony, Richard, who is  
11 not here today, but he was kind enough to give us a  
12 transcript of what was testified to in this case --  
13 testified, he said:

14           "Two military came in, Ojeda, who you knew?"

15           The answer was: "That was the only one I knew."

16           "And the other person.

17           "What did the other person look like?

18           "Had a uniform, sort of like a battle type  
19 uniform with a black beret, face painted with camouflage  
20 equipment."   Face painted.

21           He also testifies that the people were dressed in  
22 camouflage.

23           The testimony in this case is, and it is from  
24 Mr. Vidal, who was Armando Fernandez's classmate, who was  
25 at Copiapo, that Armando Fernandez was wearing the fatigue

1 uniform, and Mr. Vidal testified that that's the same  
2 uniform everyone was wearing in Copiapo. That's what his  
3 testimony is.

4           Yet, this is the only person who testifies that  
5 it was with camouflage and a face painted.

6           Again, the details of the evidence. It wasn't  
7 Armando Fernandez.

8           He also testifies that Lieutenant Ojeda had a  
9 Corvo. Again, the details. I think that Corvo stuff is  
10 all a red herring. No one said that Armando Fernandez had  
11 anything to do, was not present when the executions  
12 occurred. There is no testimony of that.

13           But the fact is Ojeda had a Corvo, and he was at  
14 the executions.

15           Another interesting thing about Mr. Herrera. He  
16 talked about the torture that he had. And at page 159 of  
17 the trial transcript, he identifies the people who tortured  
18 him. I know you remember the torture with the electrodes.  
19 That was graphic testimony.

20           I said, "Did you recognize any of the voices?"

21           "Answer: Yes.

22           "Whose voices did you recognize?"

23           "Juan Morales I recognized, the voice of Juan  
24 Morales" -- the same Juan Morales that is the star witness  
25 of the plaintiffs in this case.

1            "Sergeant Garrido, Sergeant Bernal and Major  
2 Brito," and they are the ones administering the torture to  
3 Mr. Herrera.

4            Mr. Herrera further testified he lost  
5 consciousness many times. All of this is what happened by  
6 the local regiment in Copiapo.

7            Just two last things with Mr. Herrera: He also  
8 said he was being injected with drugs. He says in the  
9 Chilean regular schedule of 8, 12, 4, 8, 12, 4, as he  
10 testified at page 295 of the transcript. And then finally  
11 he is asked the question:

12           "Question: After that time when was the first  
13 time you believe that this person was Armando Fernandez?"

14           The answer that he gave under oath: "I didn't  
15 reach that conclusion. Somebody informed me. Somebody  
16 from the Army gave the version, provided the version that I  
17 gave."

18           That's his testimony. That's the details of the  
19 testimony of what Mr. Herrera gave you. That's what the  
20 evidence is in this case. That's what you have to base  
21 your decision on, the evidence. Not what I say, but what  
22 the witnesses said.

23           So do I believe Mr. Herrera was lying? No. Do I  
24 believe he was mistaken? Yes, I do. He testified he ID's  
25 him from maybe looking at him in the newspaper, somebody

1 told him, but think about it. All the things this witness  
2 had been through, and yet he describes a person whose face  
3 was painted, who he sees for just a few minutes, and who he  
4 sees many, many years later, and he is told that this is  
5 the person?

6           You naturally would want whoever did that to you  
7 to be accountable. But the fact is that's just not a  
8 reliable evidence as far as the identification goes, and  
9 that's what the evidence is.

10           Let's go to what Mr. Vidal testified to. As I  
11 told you, he testified that Mr. Fernandez arrived by  
12 helicopter he says about 8:00 o'clock in the evening. He  
13 might have said 7:00 or 8:00 o'clock, but it was getting  
14 dark.

15           Page 408 of the transcript, he is asked this  
16 question:

17           "Did the Army officers that were at Copiapo  
18 before General Arellano came, were they dressed in the same  
19 kind of clothes as those men that came with General  
20 Arellano?"

21           His answer, under oath: "Yes." I think he said  
22 that the point, the second in command at the regiment.

23           And that's a question given to him by  
24 Mr. Kerrigan in his deposition.

25           And then yes, he says things about Armando.

1           I don't know why he said those things about  
2 Armando, but he identifies Armando as having this -- you  
3 heard the mango, the spike, this is a unique weapon. This  
4 is something that would stand out in anyone's mind. Not a  
5 single witness anywhere in this case has told you that  
6 another person, that Armando had this mango.

7           Where did he come up with that? Where did he  
8 come up with that? I don't know why he's coming up with  
9 that, but it's not credible. No one, no one, no one, has  
10 said that Armando had a mango, whatever that thing is.

11           Now, I want you to think about that, think about  
12 that testimony. Maybe he feels guilty about what happened  
13 at Copiapo. Maybe he feels guilty that they let these Diaz  
14 and these other people run amuck. But even with all that,  
15 what does he really testify that Armando does? What does  
16 he see Armando do?

17           He testifies he sees Armando walking in the  
18 regiment. That's what he testified to. He doesn't say he  
19 was with any prisoners, he doesn't say -- he doesn't  
20 identify him ever, ever, next to any single prisoner, he  
21 doesn't identify him next to anyone. He just sees him  
22 walking around in various places at the regiment.

23           Now, you heard plaintiff's theory of that. We  
24 will talk about the two witnesses left at Copiapo and why  
25 their testimony is not reliable.



1           That brings us to Mr. Morales, the plaintiff's  
2 star witness. Mr. Morales testifies he sees Armando  
3 Fernandez with General Arellano and that Armando Fernandez  
4 is in charge of the group -- in charge of the group, the  
5 lead singer, the head guy. You know that's not correct.  
6 It's not true.

7           This is Juan Morales, the torturer, the witness  
8 who tortured Mr. Herrera. He said that -- he's asked a  
9 question. He says Armando is interrogating prisoners.  
10 Mr. Kerrigan asked him these questions. It says -- this is  
11 at page 351 of the trial transcript:

12           "Question: How long did the interrogation of the  
13 prisoners take?

14           "Answer: Approximately a half hour, 20 minutes,  
15 40 minutes.

16           "Question: For each prisoner?

17           "Answer: Yes."

18           Again, these are Mr. Kerrigan's questions.

19           "Question: How many people were interrogated by  
20 the people?" This is at page 353.

21           "Answer: I think it would be more than 35."

22           So Mr. Fernandez -- this witness testified that  
23 Mr. Fernandez interviewed 35 prisoners for 20 to 40 minutes  
24 each. That's what this witness's sworn testimony was,  
25 elicited by Mr. Kerrigan.

1           In doing the math, that's about nine or ten  
2 hours. It's just not correct.

3           But think about it another way. He is saying  
4 this happened at the garrison. 35 prisoners. Look in this  
5 courtroom. You take all these people and yourselves and go  
6 across almost the entire courtroom. That is a little bit  
7 more than 35 people.

8           Where were these people wandering around the  
9 regiment in Copiapo? There is not a single witness who  
10 testified we had 35 prisoners going around the garrison in  
11 Copiapo. Where is the evidence of that? There should have  
12 been one witness that would have said that, one. Not even  
13 Dr. Murua said that. Not five, not six. 35 prisoners. 35  
14 prisoners.

15           But look at the further details of his testimony.  
16 By the way, Lieutenant Vidal, who was there, doesn't say he  
17 saw 35 prisoners being herded up and down stairs and around  
18 or wherever they would have been.

19           No one told you about any interrogations.  
20 Mr. Barrueto, again, apologies for the pronunciation,  
21 doesn't tell you that they were taken out for interrogation  
22 that night. He doesn't say that.

23           Again, it's the details of the testimony. The  
24 details of the testimony.

25           We know that the people who were with General

1 Arellano would have been either Lieutenant Colonel  
2 Arredondo or his adjutant, Major Chiminelli. Those were  
3 the two people, the two people that were really with  
4 General Arellano.

5           At best, this witness is mistaken because Armando  
6 Fernandez would never have been in charge of the group.

7           Think about it. Look at all of the officers that  
8 were involved. He would have been the lowest ranking. He  
9 would not have been giving orders to the people.

10           But, again, he is asked, "Why do you identify  
11 Armando Fernandez?" at page 353. He says, "Because I've  
12 seen him on the news." That's what his testimony is.

13           I don't accept it from a torturer, I don't accept  
14 it from someone who gives testimony that is not credible.

15           At best, he's mistaken. At best, he's mistaken.

16           Now, that gets us to Dr. Murua, M-u-r-u-a. And  
17 again, look at the details, his details of his testimony,  
18 page 365 of the trial transcript. He identifies Armando.

19           "Question: Where was he in relation to General  
20 Arellano in the room?

21           "Answer: He was to his right with a briefcase.  
22 He wasn't armed because there was another one who was armed  
23 which could have been this Julio person I mentioned."

24           Well, he's the only person that testified that  
25 Armando wasn't armed.

1           They have gone out of their way to talk about  
2 Armando being armed to the teeth in this case. You have  
3 heard that from day one. But Dr. Murua says he doesn't  
4 have any weapons. He's not armed. The details of the  
5 testimony. The details of the testimony.

6           Finally, at page 378, he was asked how he learned  
7 about Mr. Fernandez's name. He says --

8           "Answer: I learned of his name through Vidal,  
9 and also the name of General Arellano Stark because  
10 otherwise I would never have known their names."

11           So he learns from Lieutenant Vidal.

12           So those are the plaintiffs' witnesses. Those  
13 are plaintiffs' witnesses.

14           And Dr. Murua says that he, too, saw Armando's  
15 picture in the paper 20 years later and identifies him.

16           It is not the testimony that Mr. Fernandez is  
17 accused of murder here, not the testimony that a person  
18 should be held responsible for, being we are in a civil  
19 context, held responsible for a murder.

20           You heard a lot of other testimony in the case.  
21 We put in testimony from the people in the helicopter.  
22 Without exception, every one of them said Armando gave no  
23 orders, had no power in the decision-making.

24           So let's talk a little bit about these claims in  
25 which plaintiffs not seriously contending that

1 Mr. Fernandez personally did this, but they are trying to  
2 hold him responsible under the aiding and abetting and  
3 conspiracy theories that Mr. Cunningham told you about.

4           If you take that testimony away, what is the  
5 evidence they have about Armando Fernandez? They have the  
6 evidence that Mr. Fernandez was there in Copiapo at the  
7 base. That's all the evidence they have. That is the only  
8 evidence they have.

9           And in looking at this, Mr. Fernandez was given  
10 orders by his superiors to report to the helicopter.  
11 Undisputed. Mr. Fernandez told you, he took the stand and  
12 he explained to you. He went to the helicopter, reported  
13 as ordered. He told you he wasn't in the room, he didn't  
14 hear orders to execute. He wasn't given an order to  
15 execute. He wasn't asked to pass on an order to execute.

16           What did Mr. Fernandez do to aid and abet them?

17           They talk about a conspiracy instruction.

18           And the Judge will give you the copies of these  
19 at the end of the case, so you don't have to memorize them  
20 now. It says a person has to knowingly commit to the  
21 conspiracy.

22           Mr. Fernandez didn't knowingly do anything  
23 relative to what happened to these prisoners.

24 Mr. Fernandez is ordered to appear at a helicopter. He  
25 travels on the helicopter to various places. He learns

1 that deaths occur. He doesn't know the details of them.

2 His rank doesn't give him any of the power to stop

3 anything, but he didn't know to stop anything, anyway.

4 He was present at these locations. But General

5 Arellano is the one who was in charge of this. General

6 Arellano, apparently on directions from Pinochet, the head

7 of the country, to carry out this. That Armando

8 Fernandez -- did Armando Fernandez ride on the helicopter?

9 Yes. But is that order to report to a helicopter enough?

10 Now, they did give you the testimony of

11 Lieutenant Colonel Arredondo, and they tell you don't put a

12 lot of credibility in it. But I really think you should

13 consider it a lot where Lieutenant Colonel Arredondo said

14 that Armando shot people in three cities. I read to you an

15 earlier statement that he gave, and said the Chilean

16 judicial authorities, or he said no, it didn't happen. He

17 is not telling the truth. He is charged. His butt is on

18 the line. So he is trying to blame whoever.

19 So look back at the details of the evidence.

20 What have the plaintiffs showed you? Plaintiffs have

21 showed you that horrible things happened in Copiapo by

22 these folks -- soldiers that are on this chart right here

23 in front of you, and witnesses who were testifying against

24 their interests.

25 Lieutenant Colonel Haag saying "I passed on an

1 order to kill people." It could not have been a pleasant  
2 thing for him to say that, but he doesn't identify Armando  
3 Fernandez.

4           Captain Diaz admitted four times he never  
5 identified Armando Fernandez as having done anything like  
6 this. Nor has anyone else on the helicopter. And they  
7 might have every reason to blame Armando. Armando left the  
8 Chilean Army in 1987, has no friends there, has no ties  
9 there, hasn't been to Chile.

10           There is no reason for any of these people, any  
11 of these people, to protect Armando Fernandez.

12           Look at what the dynamic was. Look at what  
13 existed back in 1973. You have a young officer, and now he  
14 is sitting here alone 30 years later because he's in Miami,  
15 not because of any other reason. That's why he is sued,  
16 because he is here.

17           The families want someone to be held accountable  
18 for this. The people to be held accountable for this are  
19 on this chart. That's who should be held accountable for  
20 this. Maybe you could add General Pinochet's name to that,  
21 too. But the fact is Armando Fernandez should not be held  
22 accountable for this.

23           You are going to be given a verdict form at the  
24 end of this case. That's where you are going to fill out  
25 what your decision is in this case, and you are going to be

1 asked a series of questions, whether or not the plaintiffs  
2 have proved their case, whether they proved their case  
3 whether Armando was guilty of extrajudicial killing,  
4 torture, crimes against humanity.

5 Armando is not legally responsible for what  
6 happened. He had no control over Winston Cabello at any  
7 time. The testimony is that Mr. Cabello was arrested by  
8 Colonel Haag. The testimony was that Colonel Haag is the  
9 one who gave the order to the local regiment to execute  
10 Mr. Cabello and others.

11 Now, I grant you, you don't have an easy job,  
12 because it's not easy to look at a family that lost a loved  
13 one and say this person is not responsible. It's not easy.

14 But in this system, in our system, you are  
15 entitled to a trial by jury and you are entitled to  
16 witnesses coming to a witness stand and testify. You've  
17 got to base your testimony on the evidence, on the  
18 evidence. And look at the details of the evidence, I  
19 implore you.

20 The evidence said Armando Fernandez is not  
21 legally responsible for the death of Mr. Cabello, and I  
22 urge you to return that verdict.

23 Thank you.

24 THE COURT: Is the plaintiff ready to proceed?

25 MR. KERRIGAN: Yes, Your Honor.



1           I would like to add my thank you for your jury  
2 service in the United States Federal Court. I hope it has  
3 been interesting and a valuable experience for you. It has  
4 been for us and for the lawyers that participate and have  
5 the privilege of practicing law in the United States  
6 Federal Court.

7           Mr. Davis has made a great effort in his  
8 statements to you to implore you to attend to the details,  
9 and that is our position as well, because we have proved  
10 our case with the evidence or we have not.

11           But I start by making just a couple of  
12 observations. One is that Mr. Davis told you that  
13 Mr. Diaz, Captain Diaz, admitted slaughtering these men.  
14 He never did. That is not supported by the evidence.

15           The details of the evidence reflect that Captain  
16 Diaz said he executed them, and then explained that he had  
17 two short machinegun blasts to explain apparently  
18 additional wounds to the bodies.

19           There is no admission of a slaughter by anybody  
20 thus far.

21           Mr. Davis asked you to listen to a quote from the  
22 record, and I, too, will quote from the record and I will  
23 tell you the page numbers of everything that I say that we  
24 think supports our case. You can ask to have that re-read.  
25 You can ask the Court, "We want to read this again. We

1 want to know exactly what happened." And that combined  
2 with your notes gives you a pretty good picture of things.

3           He started off by saying that this identification  
4 of Herrera in the hospital revealed that Herrera said that  
5 Mr. Fernandez was dressed in camouflage, or that the person  
6 there was dressed in camouflage which he says was not  
7 Mr. Fernandez, and here is what he quoted, here is what he  
8 said:

9           "Had a uniform sort of like a battle-type uniform  
10 with a black beret, face painted with camouflage." That is  
11 exactly what Mr. Davis just read to you. Now I want to  
12 read to you the what the details are.

13           "Had a uniform sort of like a battle-type uniform  
14 with a black beret, face painted, with camouflage  
15 equipment. I noticed how exaggeratedly armed he was. They  
16 had me identify myself."

17           Herrera never said, never said, that the man that  
18 was standing there trying to take him out of that hospital  
19 room was dressed in camouflage. There was camouflage  
20 equipment. There is no explanation exactly what that  
21 camouflage equipment was.

22           There is a telling interchange with Herrera, a  
23 telling interchange, and it is this: Herrera is in a  
24 hospital bed, and this man that comes in dressed in these  
25 fatigues who is different from the rest of the military who

1 Herrera says, and I will point to that in just a second,  
2 which is at page 145 of the record, that "he is 99 percent  
3 sure that it's Fernandez-Larios." Mr. Davis said he wasn't  
4 a hundred percent sure. That's correct. He said he was 99  
5 percent sure.

6           But at page 142 this very interesting exchange  
7 occurs. He says that "The man who is trying to take him  
8 out dressed in the fatigues is dressed differently than the  
9 other military people."

10           The doctor comes in, who is a major, because in  
11 the Chilean system a doctor becomes a major at the time of  
12 war, and this officer who is trying to take Herrera out  
13 confronts the doctor, who is a major, and the doctor says,  
14 "You're not taking him out." And this person who is trying  
15 to take him out is subordinate to that major, meaning he  
16 has a lower rank. And he came from the helicopter. And  
17 there is nobody with a lower rank that came from the  
18 helicopter other than Fernandez-Larios below major.  
19 Everybody is a major or above.

20           So this interchange that they have with the  
21 doctor where the man says to the doctor, "Major, I will be  
22 back," in subordination of that directive from the doctor.  
23 He never does come back. That person could only be  
24 Fernandez-Larios. It could be nobody else. If he was  
25 dressed differently and he was there and he was armed this

1 way, it had to be Fernandez-Larios. It could not be  
2 anybody else. It couldn't have been anybody with a  
3 superior rank to major.

4           At page 143 of the record, Mr. Herrera saw other  
5 people in the hall described like this man, and he said  
6 that the man that he saw also had a Corvo.

7           At page 145 he said he's 99 percent sure it was  
8 Fernandez-Larios, and listen to this chilling quote:

9           "That look, even when I sleep, I feel it. His  
10 gaze most scared me, his look." Page 146. "That is why I  
11 am sure it is him. I wish it wasn't."

12           Mr. Davis quoted from another portion of the  
13 transcript, and it deals with an identification at page  
14 296, question at line 15:

15           "Question: If I am understanding you, the first  
16 time you believe the man you believe to be Armando  
17 Fernandez was in 1988 or 1989 when you saw his photograph  
18 on television; is that correct?

19           "Answer: No, that was not the first time.

20           "Question: Would you correct me on that, please?

21           "Answer: Being still in jail, and I did not  
22 remember the date, I saw behind the general. I don't know  
23 whether Pinochet or somebody else, and I told Lincoln  
24 Cepeda that is the man I saw.

25           "Question: How long after October 17 was that?

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1 "Answer: I can't remember.

2 "Question: Was it?"

3 Going to page 297.

4 "Answer: I didn't pay any attention.

5 "Question: Was it a matter of years?

6 "Answer: No, because I was only two years and  
7 eight months in jail.

8 "Question: Could it have been a matter of  
9 months?

10 "Answer: It could be.

11 "Question: At the time you saw this person  
12 behind Pinochet, did that person have any facial hair?

13 "Answer: I don't remember. I mainly paid  
14 attention to his eyes and his eyebrows.

15 "Question: After that time when is the first  
16 time you believed this person was Armando Fernandez?"

17 And here is the quote Mr. Davis read:

18 "Answer: I didn't reach that conclusion.  
19 Somebody informed me. Somebody from the army gave me the  
20 version, provided the version that I gave."

21 It is at that point that he is given the name of  
22 the person, not somebody telling him to identify that  
23 person. It is at that point that he understands who this  
24 person is.

25 Page 353 of the transcript Mr. Davis referred to.

1 He's quoting Juan Morales, and he read this part of the  
2 details:

3 "Because I have seen him on the news."

4 And that's all Mr. Davis read. Now, I would like  
5 to give the rest of the details, as Paul Harvey would say.

6 "Because I have seen him on the news" --

7 MR. DAVIS: Objection, Your Honor. I need to  
8 come up.

9 THE COURT: Come on up.

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1 [Proceedings at side-bar follow]:

2 MR. KERRIGAN: I think we resolved that.

3 MR. DAVIS: There is an error in the transcript.

4 That's why I object. I apologize for interrupting him.

5 MR. KERRIGAN: We are settling that. No issue.

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1 [Proceedings in open court follow]:

2 THE COURT: Go ahead.

3 MR. KERRIGAN: The quote, "Because I have seen  
4 him on the news." That is what Mr. Davis read.

5 The full quote is, "Because I have seen him on  
6 the news because I saw him inside my office."

7 I'd like to briefly, and you have been so patient  
8 listening to the lawyers talk and I don't think this is a  
9 time for speeches and for opinions, I would like to just go  
10 through the record, and I would like to give you some page  
11 references in the record for any of you who feel that these  
12 matters that we have raised need additional explanation or  
13 you would like to have it read back. The purpose of this  
14 is to assist you by giving you page references.

15 I would like to start with Victor Bravo. This  
16 will just be a few quotes from each portions of the  
17 testimony.

18 Page 325, Victor Bravo said that officers that he  
19 didn't recognize who had fatigues on were there in Copiapo.  
20 Victor Bravo, as you will recall, is the gentleman with the  
21 big mustache, who identified the terrible state of the  
22 bodies, indicating that they had bags over their heads and  
23 that they had been doused with water, page 326.

24 Page 327, he identifies a friend of his,  
25 Mr. Gamboa, who has had his entire face blown off.



1           Page 328, he talks about Jamie Sierra who had  
2 deep green eyes, he said. One removed with a Corvo.

3           He said Mr. Vincenti's body was in a horrible  
4 state, at page 328.

5           Finally at 328, he said, "Why was it so bloody?  
6 Why so much hatred?"

7           At page 328 as well, they talk about  
8 Mr. Palleras. He happened to know his father who just  
9 recently they had lost a grandson to drowning, which  
10 demonstrates at the time the totality of the horror that  
11 Victor Bravo was observing.

12           Page 329, he was asked about execution-type  
13 deaths. He said none of these people were shot by  
14 execution. Some were in worse states than others. And he  
15 described Winston Cabello's injury, which you have already  
16 heard about his throat being cut.

17           He went on to talk about wounds in people's feet  
18 and in their hands as they put up defensive measures to the  
19 shooting.

20           At page 333, he describes a tall thin man in  
21 combat fatigues who had a Corvo attached to his leg.

22           Juan Morales's testimony begins in the three  
23 hundreds. He said that his job was in security on the  
24 second floor of the garrison where these other  
25 interrogations took place. His job was keeping records of

1 prisoners in his office. That's at 344 and 345.

2           Page 346, he describes this horrendous situation  
3 with Jaime Sierra where his head is caved in by first  
4 hitting him in the thorax and dropping him to his knees and  
5 then fifteen centimeters off the ground having the back of  
6 his head pushed into the pavement.

7           At page 347, he describes the incident that I  
8 just discussed in more detail.

9           348, he identifies the picture of  
10 Fernandez-Larios, and says he's heavier in this picture,  
11 and that's the picture you have with the suit where he is  
12 heavier.

13           Page 350, he describes how Jamie Sierra begs to  
14 die, begs to be killed because of the magnitude of the  
15 beatings and injuries that he sustained.

16           Page 351, he talks about no lawyers present at  
17 any time in behalf of the prisoners. He said at that page  
18 also that Fernandez-Larios stayed in the interrogation  
19 office the whole time he observed.

20           Page 352, he said he acted like the head of the  
21 people conducting the investigation in those little groups.

22           Page 353, he describes the certainty of his  
23 identification of Fernandez-Larios.

24           Page 355, he said no prisoners were executed  
25 before he arrived.

1           Ivan Murua, Dr. Murua, is an anesthesiologist and  
2 before that he was a pediatrician and worked at the Mine  
3 Hospital in Chile. He was interrogated, at page 362, on  
4 October 16th.

5           On page 363, he describes the interior of the  
6 interrogation area where he was seated with Carlos Brito  
7 who was what they called the fiscal or the prosecutor.

8           Page 364, he talks about the nervousness of  
9 Carlos Brito when these people with the military uniforms,  
10 the fatigues, come in, which he later identifies as  
11 Fernandez-Larios.

12           Page 365, he says Fernandez-Larios is in the room  
13 with a briefcase.

14           At 367, he hears an alarming point, an alarming  
15 statement, and the irony of this statement is it is  
16 precisely what this hoodlum Arredondo said, the same word,  
17 and it is this. He says he hears Arellano, who is the  
18 general, say, with Fernandez-Larios present, "These people  
19 have to be eliminated," at page 367.

20           That word eliminated is exactly the word that  
21 Arredondo uses in the letters rogatory. "These people have  
22 to be eliminated," he says, and I will get to that in a  
23 minute. He says, "Our mission was to eliminate these  
24 people."

25           At 370, Dr. Murua, like the other prisoners, said

1 they had good relationships with the guards.

2           371 and 372, he talks about his identification of  
3 Fernandez-Larios and that he saw his picture in 1990. He  
4 also said at page 379 that he saw an entire report on  
5 Chilean television which showed Fernandez-Larios as a young  
6 man in the presence of General Arellano, and he recognized  
7 him there again.

8           And then what I think can be described as one of  
9 the most interesting things in this trial, in our  
10 preparation. At page 379 and 380 -- really, through 385 --  
11 there is a description in the deposition of Dr. Murua where  
12 Mr. Davis gave a picture, the lineup picture that you all  
13 have seen, and he said, "Identify, if you can,  
14 Fernandez-Larios in this picture," and Dr. Murua said, you  
15 know, "It had been 20 years." He had seen him on  
16 television, but it had been so long, and he was hesitant.

17           And Mr. Davis said, at page 380, "I'm not saying  
18 he is in this photograph."

19           So here is Dr. Murua and he is not sure what's  
20 going on. He is looking at this photograph. And he was  
21 reluctant to do it, and I insisted that he make his best  
22 effort, which he did, and I said, "Draw an X on everybody  
23 who it's not and let's see who is left." And we are left  
24 with two people.

25           One of them in the back of the line, just behind

1 Enrique Vidal, is Fernandez-Larios.

2           So Dr. Murua had it close. It was one of these  
3 two. And according to Dr. Murua, he hadn't seen  
4 Fernandez-Larios since or before. And Mr. Fernandez said  
5 the same thing.

6           That photographic identification of Dr. Murua  
7 preceded the deposition of Enrique Vidal; and when Enrique  
8 Vidal had testified, I asked him, and I went and got the  
9 photograph and I laid it down in the front, and I said, "Do  
10 you see him anywhere in this picture?" There are no Xs on  
11 that one, and you have that in evidence, too. He said,  
12 "Here he is," and he drew a circle around his name. I  
13 said, "How do you know?" And he said, "Because I'm in  
14 front of him in the line. That's in 1969."

15           Then he looked up in a moment of great  
16 spontaneity and said, "Can I have this picture? Can I have  
17 a copy of this picture," because he had never seen it  
18 before.

19           And that identification by Dr. Murua, by a  
20 pediatrician and an anesthesiologist, who has absolutely no  
21 reason or incentive or anything else to not tell the truth  
22 is a telling identification.

23           And, of course, with Enrique Vidal, there is no  
24 question that the lineup photograph that was sent to Chile,  
25 you can reasonably infer it was sent to Chile to get

1 somebody to misidentify Fernandez-Larios, and it didn't  
2 work, because the witnesses did, in fact, identify him.

3 Enrique Vidal, page 406, he was the assistant to  
4 Oscar Haag. Oscar Haag was a colonel who was in charge of  
5 the Copiapo regiment. Mr. Vidal said that Fernandez-Larios  
6 was the first one out of the helicopter. There was some  
7 dispute about that, but it's probably not a material issue,  
8 at 407.

9 At 408, Oscar Haag was contacted by Mr. Vidal who  
10 said, "You've got to come out right away," and when he came  
11 out he was in his just normal military uniform, and General  
12 Arellano really got after him because he wasn't dressed  
13 appropriately for a "war".

14 That's at 408.

15 At 409 is the description of the ball with the  
16 spikes.

17 At 410, he says he saw Fernandez-Larios later  
18 after that initial identification when he had the  
19 conversation -- I will talk about that in just a minute --  
20 from 10:30 to 11:00.

21 At this time I would like to put up Mr. Davis's  
22 chart which I have taken the liberty of making some marks  
23 on. The marks that I have made, and you can slide it over,  
24 is a red line around a period of time there.

25 And the point is this: In this entire period

1 incorporated with the red line, Mr. Davis's client's  
2 statement is this:

3           Although there was a meeting between 10:00 and  
4 12:00 involving General Arellano and all of these important  
5 people on the issue of the prisoners and their plight,  
6 their future, he went to sleep at 10:30. He went to sleep  
7 in Copiapo at 10:30 at night when his general is in a  
8 meeting dealing with this critical issue of the disposition  
9 of these prisoners in Copiapo.

10           Then he said he was asleep all night. Where was  
11 he? I mean, is it logical that this man was asleep when  
12 these kinds of decisions are being made? You can infer  
13 from that that he was some place else, not necessarily  
14 asleep, leaving his general that he is the bodyguard for.

15           The point of this is I've drawn a little circle  
16 in the upper left-hand corner because Mr. Davis didn't have  
17 a connecting line. The connecting line is Arellano is  
18 giving the order. Arellano is giving the order that these  
19 men are going to die. That's the connection to Oscar Haag,  
20 who is a colonel, who will give that order on to his people  
21 to participate in this killing.

22           And what they did at every one of these stops is  
23 they brought the local regiment in. They had the trucks,  
24 they had the logistics, and they had the way to do it, and  
25 they brought them in.

1           And if you look at the vertical line down, and  
2 you will see in these answers here that come along, the  
3 vertical line down is that while this meeting is going on,  
4 Arellano is sending notes out to his retinue, which is his  
5 group, which is Chiminelli and Espinosa and  
6 Fernandez-Larios, telling him about the decisions that he  
7 is making during this activity.

8           Now, how does all of this culminate in the end?  
9 It culminates in the end by General Arellano's people who  
10 take direct orders from him, and he is giving an order to  
11 kill these men, he is giving the order to kill these men to  
12 his men. Haag is giving his orders to Diaz and the rest of  
13 these people to participate, however they are instructed to  
14 participate. And it is this joint venture that results in  
15 the death of all these people, and I will get to Captain  
16 Diaz in a minute.

17           But just a quick comment about Diaz. This is an  
18 amazing situation. Diaz is an admitted liar and perjurer.  
19 And by the way, in just a moment I will read where Diaz is  
20 the one that submits a false statement in behalf of this  
21 group of people that is the official explanation for the  
22 escape. Diaz is the author of that. He's the one that  
23 comes up with it. Now, who actually participates in it, he  
24 writes it, Diaz writes the letter to Oscar Haag.

25           But we go back to this: Where is



1 Fernandez-Larios? We know this. They had a dinner; and in  
2 Chilean society, I never realized this before, and I guess  
3 this may be true in other countries, but they eat late.  
4 And a lot of times they have these banquets and all, and  
5 this is at 12:00 o'clock at night, and they are eating.

6           But if you will notice, even in Mr. Davis's chart  
7 there is no explanation for where Fernandez-Larios is.  
8 They are having a dinner at 12:00 o'clock at night. His  
9 client is not there. No one sees Mr. Fernandez until some  
10 time the next today.

11           Enrique Vidal testified that there was calm and  
12 peace in Copiapo before this. This was not -- you know,  
13 Mr. Fernandez suggesting that this was like the FARC  
14 gorillas fighting in Colombia against the Government, I  
15 think you can summarily reject.

16           These were unarmed civilians in jail, and the  
17 idea that they were going to be -- that they were in this  
18 fierce opposition to the government, the new government  
19 came into effect on September 11th, and most of these  
20 people were immediately arrested. It was a preventive  
21 arrest for anybody who might offer any opposition to the  
22 government. Many of those people were released.

23           Why they killed these 72 we'll never know fully.  
24 But they killed these 72. But this was not a situation in  
25 which these people had been arrested, they had arms, they

1 were gorillas, they were captured. That's nonsense.

2           These people were preventatively detained, and  
3 that's what they called them, detainees, with no charges  
4 against them when Oscar Haag takes the order from Arellano  
5 to get his people involved in the killing of these  
6 prisoners.

7           When Vidal says, "What are you doing here?" This  
8 is at page 414. He says -- Fernandez says, "I am his  
9 right-hand man. He trusts me totally."

10           427, Vidal says he sees him holding a machinegun  
11 or has a machinegun over his shoulder.

12           Vidal said as the structure of the military goes,  
13 from the moment that Arellano came with his troops, he  
14 could direct anyone there. That's Vidal at 428 saying --  
15 now, remember, he is the assistant to Oscar Haag. So he  
16 says, "When Arellano comes with these superior orders, he  
17 can give anybody a direct order. He is in charge of that  
18 regiment."

19           429 is the story about the pigeons beating the  
20 prisoners.

21           430 and 431, of course, he makes a positive ID of  
22 Fernandez-Larios without reservation.

23           Going to Colonel Lapostal. This is now to Calama  
24 in the north of Chile where 26 people were killed there.  
25 He describes in some detail at 436 how you can have a slow

1 death from a Corvo.

2           He also says he knows Fernandez-Larios, and he  
3 also describes how one would slice one's throat or  
4 someone's throat with that.

5           And he makes this telling observation at 439.  
6 Several gunshot wounds of these people in Calama, these 26  
7 people. He sees these bodies. By the way, these bodies  
8 have not been recovered. The families still don't know  
9 where they are. He said the bodies were absolutely  
10 destroyed.

11           This is a military person. He is saying it at  
12 his base in Calama. These bodies were absolutely  
13 destroyed. And he said there are knife stab wounds in  
14 these bodies as well.

15           He said he thought they were going to come and  
16 have a military execution. That's not what he said it  
17 ended up being that way.

18           441 is the statement, "The bodies have still not  
19 been discovered and given to the families."

20           And at 442, Inspector Ortiz, and some of you have  
21 to probably be saying, "What does David Silverman have to  
22 do with this?" Well, it occurred about a year later.  
23 Fernandez-Larios goes into the prison. David Silverman was  
24 a very well-known prisoner, maybe one of the most  
25 well-known in Chile at the time.

1           He was forcibly -- not forcibly, he was taken by  
2 orders from the jail, and he was taken by Fernandez-Larios  
3 under an assumed name, Alejandro Quinteros. That occurred  
4 in October of 1974. One full year later Mr. Fernandez is  
5 operating then under assumed names taking people out of the  
6 jail, somebody as well known and famous as David Silverman.

7           Ortiz identifies Fernandez-Larios at page 475.  
8 He said he was with him 45 minutes, and he knows it's him.

9           At page 477, the question was asked, "Are you  
10 certain?" He said, "Exactly." Exactly certain it was  
11 Fernandez-Larios.

12           I want to move along quickly because I know you  
13 are probably wearing weary of this, but the case is in the  
14 details, and these are the details.

15           Page 423. Arellano Stark, General Stark,  
16 selected by Mr. Pinochet, General Pinochet, to head this  
17 mission up, was asked in letters rogatory "What was  
18 Mr. Fernandez's role? He's the head of the mission. He  
19 had no special responsibilities," at 523.

20           Now, this business about Diaz first raises its  
21 head early on, and here's how it happened, and this is  
22 revealed at 527 to 529.

23           Arellano Stark, Moren Brito, Espinosa, all of  
24 these thugs, their original story is they weren't even in  
25 Copiapo. Arellano Stark said, "We weren't there yet." At

1 523, 524, "We weren't there. We didn't get there until  
2 after the killings."

3           Why, you think, why would they be so adamant  
4 about Copiapo?

5           Here is the situation in Copiapo: Copiapo is the  
6 most documented, as you saw in this trial, forensic  
7 evaluated site of any of these killings. So they went in  
8 and they know exactly what happened to these people. You  
9 heard great detail.

10           And by the way, for the medical people on the  
11 jury, if I didn't do the medical, pronounce the medical  
12 terms right, we did the best we could. And for the  
13 Spanish-speaking people on the jury, we did the best we  
14 could with our Spanish language, although we are not  
15 proficient in either one.

16           But the evidence that came from Dr. Miranda was  
17 very well documented, scientific, forensic evidence on how  
18 these people died.

19           So everybody who said, "Oh, yeah, I was on the  
20 caravan." They all want to run from it because they know  
21 that the evidence in Copiapo is it is an absolute  
22 slaughter, overwhelming evidence of the slaughter in  
23 Copiapo.

24           So, where does Diaz's name first come up? This  
25 is very interesting, if can make that observation. Diaz's

1 name comes up from Arellano Stark when he is explaining  
2 they were never there. He said, "We were never there. Our  
3 people weren't there."

4           Espinosa -- somebody says that they were in  
5 Santiago. You got all these explanations for where they  
6 are. No one really owns up to being in Copiapo.

7           That's when Arellano Stark says, at 529, "It was  
8 Diaz that did it. None of our people. We weren't even  
9 there." That's when Diaz's name first came up.

10           How did he know about Diaz? Because he got Diaz  
11 to right this ridiculous story. When I say ridiculous, I  
12 mean, it's the most offensive story you could write that  
13 these men caused their own death by trying to run and they  
14 were escaping.

15           So they know Diaz was in the game. Well, I don't  
16 think there is any doubt that Diaz participated in some  
17 respect in these killings. I mean, it looks like he did.  
18 But to say this Diaz guy is sort of operating by himself,  
19 independent, independent, a man like Arellano Stark, is  
20 there taking over this entire regiment? Impossible.

21           Moren Brito, he testified by letters rogatory.  
22 He was asked at 531: "What was Fernandez-Larios's role?"  
23 He has no idea.

24           Listen to what Moren Brito says. He's one of the  
25 helicopter guys. He said, by the way, he was visiting

1 family on October 17th when all of these terrible things  
2 happened, although he was one of the helicopter people,  
3 too.

4           He said his job was to witness executions at each  
5 one of these sites, at 531. At Antofagasta and Calama, La  
6 Serena, his job is he just watched people get killed.

7           And he said -- he goes on to say some other  
8 things. 532, he claims all the officers, including  
9 Fernandez-Larios, were witnesses to the killing. All of  
10 the officers, at 532.

11           At 536, he denied Fernandez-Larios traveled to  
12 Cauquenes. What? That's been admitted forever. But he  
13 says, "No, no, he didn't go to Cauquenes." Now, why they  
14 are trying to keep Fernandez-Larios out of Cauquenes, other  
15 than Moren Brito saying, "I didn't go to Cauquenes, either,  
16 where these people were killed."

17           This is an interesting comment by Moren Brito, at  
18 537. He says he does not know how these people were  
19 killed, but he's a witness. This is particularly  
20 Cauquenes. He doesn't know. He can't explain how they  
21 were killed. But yet he was supposed to be the official  
22 witness with the helicopter contingency.

23           In Copiapo, what is it Moren Brito said? They  
24 arrived after the killings. "When we arrived at 4:39 -- at  
25 5:30 and 5:40, when we arrived, everything had been carried

1 out. All the killings were over."

2           Then we go to Chiminelli. 542, Chiminelli was an  
3 immediate supervisor or superior to Fernandez and he knew  
4 him.

5           He was asked, "Well, what did Fernandez do?"  
6 Page 542. He had no idea what Fernandez-Larios was doing  
7 there. Chiminelli says, "I'm in charge of the security,"  
8 at 543. The generals, not Fernandez.

9           This is really offensive, 590, Moren Brito says,  
10 "They were all in Santiago when this happened. They were  
11 in a hotel sleeping in Santiago. Their entire group were  
12 in the hotel sleeping," 590 and 591. A complete lie. Not  
13 true. Moren Brito was right there and was involved, just  
14 like the rest of these men.

15           You know, there is a request for admissions that  
16 Mr. Cunningham read to you that is very important in our  
17 case, and it's this: They admitted early in this case  
18 before this Diaz thing got full-blown, early in the case  
19 they admitted that Arellano Stark gave the order to load  
20 these prisoners in Copiapo into a truck which led to their  
21 deaths. That is admitted in this case.

22           If I stood up here and said it was admitted in  
23 this United States Federal District Court and it was not  
24 admitted, I would be stopped by this Judge.

25           It is admitted in this case. Arellano Stark gave



1 that order to load these prisoners in the truck. And who  
2 do you think he gave that order to? To some abstract, some  
3 random people in the regiment?

4           He only had four or five people with him. He  
5 gave it to his own people. They loaded these men into  
6 this truck. This defendant loaded these men into this  
7 truck, and we don't know fully how he did it in terms of  
8 the killing of these people, but he participated, certainly  
9 to the point of loading them into the truck that was going  
10 to go to their deaths.

11           Arredondo, admittedly a perjurer and a killer,  
12 too, he is on the helicopter with these people.

13           You get the sense of the character of this  
14 regiment that was on the helicopter. He was in charge of  
15 discharging orders, Arredondo says. Ask about  
16 Fernandez-Larios's role, he said, "He's a member of the  
17 mission." At page 598.

18           At 599 is where Arredondo says, "At La Serena the  
19 mission was to eliminate the prisoners, to kill them."  
20 Mr. Cunningham read you, and I will not go through a lot of  
21 this now about Arredondo saying that Fernandez-Larios  
22 killed people at several other sites. Whether you accept  
23 it or not, we are at this point they don't have their  
24 stories together. They are blaming each other. And only  
25 after trying to blame Diaz doesn't really get off the

1 ground to the point that it's even colorable or believable.

2           603, he says Fernandez-Larios killed prisoners.

3           604, this is the way they worked the local  
4 regiments. He said, "The order to the local regiment was  
5 to transport because they had the trucks." That's why they  
6 used these local regiment people, and it has been said  
7 repeatedly in this trial.

8           They wanted these people in the outskirts of  
9 Chile to feel that they were involved in this war, this  
10 reconstruction of the society of Chile.

11           And whether you like Pinochet or not is really  
12 irrelevant in this case in this case. Because what was  
13 going on was they were trying to get these local military  
14 people who really were sort of passive about this, because  
15 they were so far away from Santiago where this was going on  
16 to get them involved in the bloody aspect of this war. So  
17 they used these regiment people.

18           We have no doubt as to Diaz. As I say no doubt.  
19 Who knows for sure, but there is little doubt that Diaz had  
20 some involvement in this. I mean, he had to have some  
21 involvement. He is up here talking about it.

22           But when he admits it the way he has done now in  
23 Chile, and we don't know all the subtleties about why all  
24 that is going on, but it has the effect of sort of saying,  
25 well, everybody on the helicopter wasn't really involved in

1 this terrible slaughter of these human beings at Copiapo,  
2 which is so inconsistent with common sense, with the  
3 overwhelming, detailed evidence that we have is to be  
4 rejected out of hand.

5           And Arredondo says "No involvement at Copiapo" at  
6 617 and 618. "We got there after the killings had taken  
7 place." Everybody is running from Copiapo, because it is  
8 the most well-documented site of a war atrocity, an active  
9 atrocity under the color of war, however you want to  
10 describe it, the most well-documented site. They are all  
11 running from that because everybody now knows how bad it  
12 was there.

13           I want to make a few brief comments about  
14 Mr. Fernandez's testimony, and I will give you some page  
15 references to that.

16           He agrees at page 625 that many people were  
17 killed in Chile during each helicopter stop there in these  
18 cities.

19           At 626, he agrees that some of the people on the  
20 helicopter were responsible for these deaths, but he says  
21 not him.

22           And then that discourse at 626 after he makes  
23 that statement, he backtracks and backtracks to where he  
24 finally concludes or says he's not sure who was involved or  
25 who's responsible.

1           These men having been involved in these  
2 horrendous acts, at page 632, it is admitted that they go  
3 to a cocktail party 30 days after the slaughters at General  
4 Arellano's home. They all go and have a party. The people  
5 on the helicopter.

6           Mr. Fernandez says, "Oh, somebody else was  
7 there," but he couldn't give us anybody else's name. He  
8 did say that the people on the helicopter were all at  
9 Arellano's home. Says he could never approach superior  
10 officers under any circumstances.

11           And at 634, he admitted that he was in the room  
12 together in a bunk with Chiminelli at Antofagasta.

13           He says at 636 when he got back to Santiago from  
14 going to Cauquenes, he knew that someone associated with  
15 this helicopter had been involved in these killings.  
16 Again, he said he didn't know anything about it, but he  
17 knew somebody there had.

18           644, he admits he's never been trained to use a  
19 Corvo. He says it's an ornament.

20           At 648, he says he's not political. He could  
21 have supported the left, the far left, the far right. He  
22 said, "I'm not political." In fact, I think he  
23 acknowledged his father was a friend of Allende's. He  
24 wasn't political. It was just whatever in the military  
25 they wanted. So this wasn't an anti-communist fight. This

1 wasn't a commitment for cause. This had nothing to do with  
2 that.

3           654 and 655, he says he wants to make the local  
4 regiments feel like they were part of the war. Well, the  
5 only way you would make somebody feel like they were part  
6 of a war is they have to discharge their weapons.

7           656, when he shows up to the helicopter, General  
8 Arellano says, "Are you a commander or paratrooper?" You  
9 think about why would General Arellano ask him that? Well,  
10 it's not certain, but it might be because he had this beret  
11 and this outfit that he had, that Monterare, the pilot,  
12 said he looked like --

13           MR. DAVIS: Objection, Your Honor. That witness  
14 never testified in this case.

15           THE COURT: Sustained.

16           MR. KERRIGAN: Page 659, he said "I was the guy  
17 going to be at his side if he needs me." He said, "He  
18 don't need me because we are inside the regiment." That's  
19 at 659.

20           At 658, he says, "If General Arellano need me,  
21 but he never need me, of course, he would say `Lieutenant  
22 Fernandez, come here.'" "

23           663, he acknowledges that Arredondo is giving him  
24 orders as was Chiminelli, connecting this chain of command  
25 to General Arellano. Now, I realize General Arellano,

1 Arredondo is difficult. Arredondo is subordinate, Arellano  
2 is the general. The general is giving orders to Arredondo  
3 and Chiminelli. He says those orders are coming down to  
4 him. That's at page 663.

5           And then he acknowledges that maybe all the  
6 general needed was he wanted me to carry his briefcase, at  
7 665, and he says, "Maybe I do," although he denies having  
8 the briefcase in his hand as seen by Dr. Murua.

9           The second helicopter trip is fascinating. At  
10 675, listen to this. He said, "I assumed I'd have the same  
11 duties. I assumed I'd have the same duties." He doesn't  
12 even have an order. He is just told to go, and there is  
13 nobody saying this time you are going to be the bodyguard.  
14 Let me just address this bodyguard business quickly.

15           Really, this is clever in a way. What  
16 Mr. Fernandez wants you to think is I was the worse  
17 bodyguard you could ever pick. I was not trained to be a  
18 bodyguard. I didn't know what I was doing, I didn't get  
19 any orders. In other words, I was so terrible at this I  
20 just basically went along in the helicopter, hung around  
21 the old club, and went to bed. That's all I did. So I  
22 can't be found guilty of anything.

23           If he is truly a bodyguard and his right-hand  
24 man, as he told Vidal, and if the general trusted him  
25 totally, he is an aider and abetter. If he is a bodyguard

1 of the general and he is taking care of these orders, and  
2 he is loading these prisoners and he is helping get the  
3 files up and he's doing all these things, and being by his  
4 side, he is guilty of aiding and abetting.

5           So what did he say in this case? "I was really  
6 the worst bodyguard you could ever hope to find. I am just  
7 completely a goofus. I didn't know what I was doing.  
8 Nobody asked me to do anything. I went to bed early. I  
9 mean, I never" --

10           Hey, if you're a bodyguard, you're a bodyguard.

11           So you take him at his word, he's a bodyguard.  
12 He's an aider and abetter, and he is guilty.

13           Three different witnesses identified this person  
14 with the fatigues on, with all of this paraphernalia and  
15 the Corvo, tall and thin. His nickname in the military  
16 service was Flaco, which I am told, because I don't speak  
17 Spanish, means skinny or gaunt. Flaco was his nickname.

18           At 693 he admits that Diaz wrote the document to  
19 Haag with the cover story, and he says this: He knows that  
20 Diaz signed a statement that was an absolute lie about what  
21 happened.

22           So, now, here, as Mr. Davis says, is the star  
23 witness, here is our only witness that might extricate him  
24 from that, and that is Mr. Diaz who has committed perjury.  
25 And here he files a false statement about this escape which

1 crushes these families for 17 or more years.

2           He doesn't remember, at page 696, about the  
3 dinner. And the reason he doesn't remember about the  
4 dinner is because he was not there. According to him, he  
5 was asleep while all of this horrendous stuff was going on.

6           On the diary, you might wonder why I kept  
7 hammering about the diary. It's because all of this time  
8 that started coming up in Chile in 1981 or '82, whenever it  
9 was, he said, I think '82, he had a diary, and in his  
10 comment about his diary, which I will give you the page  
11 reference, 726. "I never wrote about my past."

12           Well, all of those things were occurring at that  
13 time. He was being accused of being involved in the  
14 killings at Calama. And that's when he went to Arellano  
15 and said, "You have to cover for me. I mean, I was a  
16 subordinate. I'm taking all the heat in the press about  
17 this." Arellano refused to do it.

18           At 732 he said in his testimony that he had a  
19 scrapbook of pictures. Never been produced in this case,  
20 although we asked him to produce all of his pictures. The  
21 only one he produced was his driver's license.

22           MR. DAVIS: Objection, Your Honor. That is  
23 inappropriate argument to the jury.

24           THE COURT: Sustained.

25           MR. KERRIGAN: The only thing that he testified



1 that he produced to us in this trial was his driver's  
2 license and said he didn't have any passport photos.

3           He said, at page 733, that he has no military  
4 pictures of himself from '73 to '87. His dad was a career  
5 military man, and we're supposed to believe that he doesn't  
6 have any pictures of himself any place in military uniform,  
7 which then could have been shown to witnesses for a  
8 absolutely certain identification across the board. He  
9 said they don't exist from '73 to '87. That's at page 733.

10           739, he says that "Dr. Murua has confused me with  
11 another person." He doesn't tell us who that other person  
12 might be.

13           He admitted at page 740 that he didn't go to  
14 Chile when we took these depositions where he could have  
15 been seated there and the witnesses could have said yes,  
16 that's him; or, no, that's not him. He didn't show up.

17           Well, you all have taken copious notes in the  
18 course of this trial. You should rely, as the Court will  
19 tell you, I think the Court has an instruction about notes.  
20 I'm not exactly sure what that instruction is, but it tells  
21 you about using your notes and, hopefully, it will be  
22 helpful to you and you can ask for any kind of testimony to  
23 be repeated.

24           I just have a couple of closing comments and then  
25 I'll sit down.

1           This is not, if I can analogize to baseball,  
2 which is so popular now here, especially this year, we  
3 don't have to pitch a perfect game. We don't have to pitch  
4 a no hitter. We don't have to pitch a shutout. We have to  
5 win by one run. And that's called a preponderance of the  
6 evidence or the greater weight of the evidence.

7           In other words, if you say, well, we think about  
8 40 percent of this evidence supports some of the positions  
9 Mr. Davis said. And we have 60 percent, we win. We only  
10 need 51 percent of the evidence to support our case.  
11 That's the law in a civil case.

12           This is not a criminal case. He is not going to  
13 go to jail as a result of this. If you find for the  
14 plaintiffs, you will award a monetary judgment. That's it.

15           I would comment quickly about the Estate. The  
16 Estate survivors are his widow, Veronica, Marcella and  
17 Susan, his daughters, and then there's --

18           MR. DAVIS: Objection, beyond the scope of the  
19 arguments that were made.

20           THE COURT: Sustained.

21           MR. KERRIGAN: The rest of the damages line  
22 are for --

23           MR. DAVIS: Objection, also beyond the scope of  
24 the arguments that were made, Your Honor.

25           THE COURT: Overruled.

1           MR. KERRIGAN: The other four are the siblings on  
2 the verdict form. I am just explaining the verdict form.

3           I just want to talk to you about punitive  
4 damages, and then I will sit down. I promise you I will.

5           MR. DAVIS: Objection, Your Honor, also not  
6 discussed in defense argument.

7           THE COURT: Overruled.

8           MR. KERRIGAN: The purpose of punitive damages,  
9 and the Court is going to read you this language, is that  
10 in an award of punitive damages, or what they call  
11 punishment damages, a jury's verdict in a case like this,  
12 which is so important, it sends a message, it is designed  
13 to send a message.

14           Your verdict should send a message. It should be  
15 an amount of money that announces this to people in similar  
16 situations, wherever they are, maybe for their past conduct  
17 or as they consider conduct today. When you engage in this  
18 kind of conduct, in whatever country you are from, wherever  
19 you live, and you pack your bags and you come to the United  
20 States, when you unpack your bags, you reveal your past.  
21 You don't leave it in Chile. You don't leave in El  
22 Salvador. You don't leave it any place else. You bring it  
23 here, and we get to look at it; and if it's conduct that's  
24 unacceptable to a U.S. jury, then a U.S. jury will award  
25 damages accordingly.

1           And you send that message to anybody any place  
2 else that might be in this situation or might have engaged  
3 in conduct like this.

4           They wanted to send a message in Chile. The  
5 message they wanted to send by sending this helicopter out  
6 was, don't mess with us. Don't mess with this government,  
7 because we're going to kill people who oppose us. And they  
8 used a message of violence, they used a method of violence  
9 to communicate this message.

10           In a civilized society which we live in and you  
11 all are participating in and helping us today with, we send  
12 messages with verdicts. We don't permit people to  
13 self-help. We don't permit families to go after people and  
14 commit violent acts. We do it in a civilized fashion. We  
15 do it in a courtroom, and we do it with a judge who watches  
16 the law and makes sure the lawyers don't step over the line  
17 too much.

18           And when the judge sustains an objection, it's  
19 just like a referee. She keeps the game as fair as the  
20 Court can so that you can reach a fair and just verdict.

21           So I hope any time that the Court has sustained  
22 an objection on something I've said or Mr. Davis said, or  
23 whatever, I hope you won't hold that against us and only  
24 decide this case solely on the evidence.

25           And to know that this verdict that you render

1 here has enormous ramifications, not only for this family,  
2 but all of the other people who will see this verdict and  
3 understand what has happened in this court.

4           Thank you.

5           THE COURT: Counsel, please approach.

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1 [Proceedings at side-bar follow]:

2 THE COURT: After Mr. Kerrigan's closing, we did  
3 not include a 404(b) instruction in the final packet.  
4 There was an instruction given during the trial.

5 I had Lisa add it in as the new 19. It's  
6 identical to what I read other than it refers to the  
7 evidence that was introduced at trial. So she is now --  
8 she will give you copies of it, and she is running off the  
9 new packets.

10 I had thought that I would give them the choice  
11 as to whether they want to hear the instructions on the law  
12 now or whether they wanted to hear them Tuesday morning the  
13 first thing. It's been a long day. They have to absorb a  
14 lot of information from you all. I thought the closings  
15 were all excellent. It is Friday. It's been a long week.  
16 Is there any objection to that?

17 MR. DAVIS: Giving them the choice is okay with  
18 me. I would be inclined to start fresh on Tuesday.

19 THE COURT: That is my inclination. But if they  
20 want to hear it now -- I expect they will say Tuesday  
21 morning. I think they will be fresh.

22 It also gives them the incentive not to really  
23 discuss the case or to start making determinations on the  
24 case until they have heard the charge.

25 MR. KERRIGAN: If you start sending them home,

1 they will be in the middle of deliberations.

2 THE COURT: That always happens.

3 MR. KERRIGAN: Three days is a long time.

4 THE COURT: Originally I had planned this  
5 schedule because we had the pressure of the jurors leaving,  
6 but we don't have that pressure.

7 Did you all decide what we wanted to do with  
8 juror number 5? Did you want him to stay?

9 MR. KERRIGAN: We will take care of it.

10 THE COURT: I was going to have him come back on  
11 Tuesday, anyhow.

12 I will ask them whether they want to hear the  
13 charge now or Tuesday morning. I suspect it will be  
14 Tuesday morning.

15 Okay. Thank you.

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1 [Proceedings in open court follow]:

2 THE COURT: Ladies and gentlemen of the jury,  
3 that concludes the closing arguments. The next step in the  
4 trial process is for the Court to officially charge the  
5 jury with the law that you must follow in your  
6 deliberations.

7 I want to give you the choice. It's been a long  
8 day and it's the end of a long week. If you want me to  
9 give you your instructions now and charge the jury now, I  
10 will do so. If you want to come back Tuesday morning and  
11 start fresh on Tuesday with the instructions on the law, I  
12 will do that.

13 Anybody have any opinions or any consensus? You  
14 want to go forward or do you want to start fresh on  
15 Tuesday? It will take at least an hour.

16 I think it might be better to start on Tuesday  
17 fresh. It's all the law that you must follow and apply to  
18 the facts of the case. I think it might be helpful if you  
19 started out fresh in the morning rather than at the end of  
20 the day. I don't think that even if you were to -- I don't  
21 think the case would conclude today for you. It might, but  
22 I don't think it would. And probably I would send you home  
23 after hearing the jury charge. And that you need to come  
24 back on Tuesday, anyhow. And I think everybody is ready to  
25 come back on Tuesday.



1           So if you are asking me my suggestion, which I  
2 don't know if you are but I am going to give it to you, and  
3 that is that we wait until Tuesday morning to charge you.

4           We will start at 9:30. And then the way that day  
5 would proceed is that you will come in, you are going to  
6 receive a packet of the jury instructions, I am going to  
7 charge, read the law to you, instruct you on the law. You  
8 will have your packets to go over as I read them to read  
9 along with me, and then you will proceed to deliberate.

10           But I think it might be helpful at this juncture  
11 to start fresh on Tuesday, the first thing in the morning.

12           It's a very important part of the case, as is  
13 every part of the case, but it's a very important part of  
14 the case. It takes time and attention to understand what  
15 the law is. It's going to be really the first time that  
16 you are going to hear in totality what the law is that you  
17 must apply to the facts. And I think it might be helpful  
18 if we started out after a long weekend Tuesday morning,  
19 9:30. It will take about an hour.

20           I read both the instructions to you and the  
21 verdict form, and then you proceed with your deliberations.

22           Does everybody agree that that's a good idea? It  
23 sounds good?

24           Then we are going to recess at this time for the  
25 week. Do not discuss this case either amongst yourselves

1 or with anyone else. Have no contact with anyone  
2 associated with the trial. Do not read, listen or see  
3 anything touching on this matter in any way. If anyone  
4 should try to talk to you about this case, you should  
5 immediately instruct them to stop and report it to my  
6 staff.

7           Until such time as you have heard the  
8 instructions on the law as given by the Court, you simply  
9 are not to talk about this case either amongst yourselves  
10 or with anyone else.

11           You may give your notebooks to the Court Security  
12 Officer. Remember that Monday is a Federal holiday, so we  
13 all get a nice long three-day weekend.

14           And I will see you Tuesday morning at 9:30.

15           Enjoy your weekend.

16           [The jury leaves the courtroom at 2:30 p.m.].

17           THE COURT: Lisa will give you the additional  
18 404(b) instruction that was not included in the final  
19 instruction packet and should be included and the  
20 renumbering. It is now the new instruction 19.

21           I usually do not number instructions specifically  
22 so I do not drive Lisa crazy. I have certainly not kept  
23 with that golden rule in this trial, but I believe that  
24 should be it.

25           So we are going to recess until 9:30 on Monday

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1 morning.

2 MR. DAVIS: Tuesday.

3 THE COURT: Tuesday morning. Thank you. 9:30.

4 Enjoy your weekend.

5 [Proceedings adjourned at 3:40 p.m.]

6 C E R T I F I C A T E

7 I hereby certify that the foregoing is an accurate  
8 transcription of proceedings in the above-entitled matter.

9

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DATE

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LARRY HERR, RPR-CM-FCRR-AE  
Official Federal Court Reporter  
301 North Miami Avenue, Room 340  
Miami, FL 33128 - 305/523-5598

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