

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

ESTATE OF WINSTON CABELLO, ET AL.,) Docket No.
) 99-0528-CV-

LENARD)
) Plaintiffs,)
))
) Miami, Fl. 33128
 v.))
) October 14, 2003
))
))
 ARMANDO FERNANDEZ-LARIOS,)
))
))
 Defendant.)

VOLUME 13

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

For the Plaintiffs: LEO P. CUNNINGHAM, ESQ.
NICOLE M. HEALY, ESQ,
JENNY L. DIXON, ESQ.
ROBERT KERRIGAN, ESQ.
For the Defendant: STEVEN W. DAVIS, ESQ.
Court Reporter: Richard A. Kaufman, CMRR

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PLAINTIFF

IN EVID.

DEFENDANT'S

1 (Open court. Jury not present.)
2 THE COURT: Estate of Winston Cabello, et al. vs.
3 Armando Fernandez-Larios, Case Number 99-0528.
4 Would counsel state their appearances.
5 (All parties present.)
6 THE COURT: All of the jurors are now here. One of
7 the jurors' car broke down. He had to get a relative to help
8 him out.
9 There was one more typo, page 12 instruction 11 in the
10 first element. Omitted in the "actively participated" portion
11 of that element was deliberate killing. I took the liberty of
12 adding that. I ordered it be added; let's put it that way.
13 Are you ready to proceed?
14 MR. DAVIS: There is an issue I would like to raise
15 first.
16 In yesterday's Miami Herald on Monday October 13,
17 2003, on the front page of the local section, I brought the
18 entire paper, there is a major headline which says Chilean
19 could be Pinochet witness.
20 Nobody couldn't help but see this headline. I don't
21 know if Your Honor has seen the article.
22 I would ask three things. I would ask the Court
23 inquire of the jurors whether anyone had been reading the
24 Herald on a daily basis and two, whether they have seen any
25 articles touching on this case, and three, to assure anything

1 that they saw in the paper is not evidence, to remind them,
2 anything they saw in the paper is not evidence, they are to
3 decide the case on the basis of what happens here.
4 Most of the other articles have been inside the paper
5 buried so the jury might have easily avoided that. This way,
6 there was no way one can avoid seeing the headline.
7 THE COURT: Any response?
8 MR. KERRIGAN: I think it is inappropriate to suggest
9 to the jury they violated the Court's order and instructions
10 and subject them to some kind of examination, number one.
11 Number two, Mr. Davis is quoted in this article and the article
12 suggested he supplied information to the Miami Herald. The
13 plaintiffs are not quoted, the plaintiffs' lawyers are not
14 quoted and we supplied no information to the Miami Herald. If
15 this problem has arisen, the Court has strictly instructed the
16 jury every day and anything other than that would seem to be
17 excessive.
18 MR. DAVIS: I am referred to in the paper, not quoted.
19 It is not as if I had a press conference to talk about
20 this.
21 The jury should be reminded and should be inquired
22 whether or not they saw this article.
23 THE COURT: What I will do when the jurors come in, I
24 will not make a specific inquiry whether or not any jurors have
25 been reading the Herald but I will make a general inquiry to

1 the jury as a whole, has anybody seen, heard, or read anything
 2 about the case outside of the courtroom. If somebody says yes,
 3 we will take that up individually. If there is a general no,
 4 or nobody acknowledges they have done so, I will remind the
 5 jurors they are to decide the case solely on the evidence
 6 presented in the courtroom and we will proceed with the jury
 7 instruction.
 8 MR. DAVIS: Could I ask you modify the question
 9 slightly to say read or seen anything about the case or the
 10 parties to the case, because this article really is not
 11 touching directly on the case, it is touching more on
 12 Mr. Fernandez personally?
 13 THE COURT: Yes.
 14 Bring the jurors in.
 15 (Jury present.)
 16 THE COURT: Ladies and gentlemen of the jury, before
 17 we begin with the Court's instructions to you, I want to ask if
 18 there is any member of the jury who has read, heard or seen
 19 anything about the case or the parties to the case outside of
 20 the courtroom?
 21 A JUROR: A headline.
 22 THE COURT: Has anybody else seen anything or read
 23 anything?
 24 Would the rest of you step into the juryroom and I
 25 will talk to juror number 5.

1 Do not discuss or read anything about the case while
 2 you are inside. I will be with you in just a moment.
 3 (Jury leaves room.)
 4 BY THE COURT:
 5 Q. Mr. Osman, what headline did you read, do you remember?
 6 A. Yes. This morning I saw a headline. I didn't read the
 7 article. I wasn't paying too much attention.
 8 Q. Do you remember what it said?
 9 A. It was in the Metro section.
 10 Q. Of the Herald?
 11 A. Yes.
 12 Q. Do you remember what it said?
 13 A. Something about Chilean --- I heard you say it, I might
 14 remember.
 15 Q. Do you understand, sir, you have to decide the case solely
 16 on the evidence presented in the courtroom?
 17 A. Yes.
 18 Q. Would you be able to put aside whatever --- know you are
 19 not remembering real clearly. That is fine.
 20 Would you be able to put aside whatever you have seen
 21 and decide the case solely on the evidence presented in the
 22 courtroom?
 23 A. Absolutely.
 24 Q. And not be influenced by any headlines you may have read?
 25 A. Yes.

1 THE COURT: Would you step into the juryroom for just
 2 a few moments and do not discuss this with any of the jurors?
 3 (Juror leaves room.)
 4 THE COURT: Any position either side wants to take?
 5 MR. DAVIS: My only question is anyone who would have
 6 seen the Herald -- if any of the other --
 7 THE COURT: This is the one person that responded yes.
 8 Mr. Osman responded yes which is the reason I sent everybody
 9 out and questioned him.
 10 My question to you, Mr. Davis, or Mr. Cunningham, or
 11 Mr. Kerrigan, or Ms. Healy; is there any position either side
 12 wants to take with regard to this juror wanting to deliberate
 13 as a juror?
 14 MR. DAVIS: We are satisfied.
 15 May I inquire with my client a moment?
 16 THE COURT: Sure. I will turn off the microphone.
 17 (Interruption.)
 18 MR. DAVIS: Your Honor, we remain concerned but based
 19 on the answers this juror gave, we have no objection to him
 20 deliberating.
 21 THE COURT: I will have the jurors brought back in. I
 22 will instruct the jurors they are to decide the case solely on
 23 the evidence presented in the courtroom and we will proceed
 24 with the Court's instructions to the jury.
 25 (Jury present.)

1 THE COURT: Ladies and gentlemen of the jury, I want
 2 to remind you, you are to decide the case solely on the
 3 evidence presented in the courtroom.
 4 Now, if you would turn to your packet of jury
 5 instructions, I will instruct you on the law in this case.
 6 Members of the jury, I will now explain to you the
 7 rules of law that you must follow and apply in deciding this
 8 case.
 9 By the way, these are your packet of jury instructions
 10 to utilize during your deliberations.
 11 When I have finished, you will go to the juryroom and
 12 begin your discussion, what we call your deliberations.
 13 You must make your decision only on the basis of the
 14 testimony and other evidence presented here during the trial,
 15 and you must not be influenced in any way by either sympathy or
 16 prejudice, for or against the defendant or the plaintiff.
 17 In deciding the case, you must follow and apply all of
 18 the law as I explain it to you, whether you agree with that law
 19 or not and you must not let your decision be influenced in any
 20 way by sympathy or by prejudice for or against anyone.
 21 In your deliberations you should consider only the
 22 evidence. That is, the testimony of the witnesses and exhibits
 23 that I have admitted in the record, but as you consider the
 24 evidence, both direct and circumstantial, you may make
 25 deductions and reach conclusions which reason and common sense

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 2 lead you to make. Direct evidence is the testimony of one who
 3 asserts actual knowledge of a fact, such as an eye witness.
 4 Circumstantial evidence is proof of a chain of facts and
 5 circumstances tending to prove or disprove any fact in dispute.
 6 The law makes no distinction between the weight you
 7 may give to either direct or circumstantial evidence.
 8 Remember, anything the lawyers say is not evidence in
 9 the case, and except for my instructions to you on the law, you
 10 should disregard anything I may have said during the trial in
 11 arriving at your decision concerning the facts. It is your own
 12 recollection and interpretation of the evidence that controls.
 13 Now, in saying you must consider all of the evidence,
 14 I do not mean that you must accept all of the evidence as true
 15 or accurate. You should decide whether you believe what each
 16 witness had to say, and how important that testimony was. In
 17 making that decision you may believe or disbelieve any witness
 18 in whole or in part. Also, the number of witnesses testifying
 19 concerning any particular dispute is not controlling.
 20 In deciding whether you believe or do not believe any
 21 witness, I suggest that you ask yourself a few questions. Did
 22 the witness impress you as one who was telling the truth? Did
 23 the witness have any particular reason not to tell the truth?
 24 Did the witness have a personal interest in the outcome of the
 25 case? Did the witness seem to have a good memory? Did the
 witness have the opportunity and ability to observe accurately

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 2 the things he or she testified about? Did the witness appear
 3 to understand the questions clearly and answer them directly?
 4 Did the witness' testimony differ from other testimony or other
 5 evidence?
 6 You should also ask yourself whether there was
 7 evidence tending to prove that the witness testified falsely
 8 concerning some important fact, or whether there was evidence
 9 that at some other time the witness said or did something or
 10 failed to say or do something which was different from the
 11 testimony the witness gave before you during the trial.
 12 You should keep in mind, of course, a simple mistake
 13 by a witness does not necessarily mean that the witness was not
 14 telling the truth as he or she remembers it; because people
 15 naturally tend to forget some things or remember other things
 16 inaccurately.
 17 So, if a witness has made a misstatement, you need to
 18 consider whether that misstatement was simply an innocent lapse
 19 of memory or an intentional falsehood and the significance of
 20 that may depend on whether it has to do with an important fact
 21 or only an unimportant detail.
 22 In this case, it is the responsibility of the
 23 plaintiff to prove every essential part of their claim by a
 24 preponderance of the evidence. This is sometimes called the
 25 burden of proof or the burden of persuasion. A preponderance
 of the evidence simply means an amount of evidence that is

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 2 enough to persuade you that the plaintiffs' claims are more
 3 likely true than not true.
 4 In deciding whether any fact has been proved by a
 5 preponderance of the evidence, you may consider the testimony
 6 of all of the witnesses regardless of who may have called them,
 7 and of all of the exhibits received in evidence regardless who
 8 may have produced them.
 9 If the proof fails to establish any essential part of
 10 plaintiffs' claim by a preponderance of the evidence, you
 11 should find for the defendant as to that claim.
 12 The Court has determined this case involved United
 13 States law even though the events occurred in another country.
 14 Certain testimony has been presented to you through
 15 deposition. A deposition is the sworn, recorded answers to
 16 questions asked of a witness in advance of the trial. Under
 17 some circumstances, if a witness cannot be present to testify
 18 from the witness stand, that witness' testimony may be
 19 presented under oath. In the form of a deposition. Some time
 20 before this trial attorneys representing the parties in this
 21 case questioned this witness under oath. A court reporter was
 22 present and recorded the testimony. You have heard the
 23 questions and the answers. This deposition testimony is
 24 entitled to the same consideration and is to be judged by you
 25 as to credibility as if the witness had been present and had
 testified from the witness stand in Court.

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 2 Certain testimony has been presented to you through
 3 responses to a letter rogatory. A letter rogatory is a formal
 4 request from a United States Court to the Court of a foreign
 5 nation asking the foreign court's assistance in obtaining
 6 evidence for use in the United States Courts. In this case the
 7 parties asked this Court to issue a letter rogatory to the
 8 Supreme Court of the Government of the Republic of Chile,
 9 asking it to assist this Court in obtaining evidence, including
 10 testimony from Chilean citizens who live in Chile. The parties
 11 submitted questions to these Chilean witnesses and the Chilean
 12 Court asked these witnesses to answer the questions. Those
 13 answers were made under oath. And you have heard the questions
 14 and the answers. These witnesses' testimony in the form of
 15 answers to the letter rogatory is entitled to the same
 16 consideration and is to be judged by you as to credibility as
 17 if the witness had been present and had testified from the
 18 witness stand in Court.
 19 This case involved several claims against the
 20 defendant. The plaintiffs are pursuing claims based on the
 21 allegation that Winston Cabello was a victim of four different
 22 violations, extra judicial killing, torture, cruel and inhuman
 23 and degrading punishment and treatment and crimes against
 24 humanity; and that the defendant Armando Fernandez Larios is
 25 liable for those violations.
 Let me review each of the claims with you. The estate

1 of Winston Cabello through its representative, Zita Cabello
 2 Barrueto, brings claims against the defendant Armando Fernandez
 3 Larios for torture, extra judicial killing, cruel, inhuman and
 4 degrading treatment and crimes against humanity against the
 5 defendant Fernandez Larios. The family of Winston Cabello,
 6 Elsa Cabello, Aldo Cabello, Zita Cabello Barrueto and Karin
 7 Cabello Moriarty brings claims against the defendant for the
 8 extra judicial killing of Winston Cabello Bravo.
 9 The plaintiffs have alleged the defendant
 10 Mr. Fernandez should be held liable for four different
 11 violations. One, extra judicial killing. Two, torture.
 12 Three, cruel, inhuman and degrading punishment or treatment and
 13 four, crimes against humanity.
 14 In a moment I will tell you what the plaintiffs must
 15 prove in order for you to find those violations happened.
 16 Plaintiffs allege Mr. Fernandez is liable for each of the four
 17 different violations because one, he personally committed the
 18 violations, or 2, he aided and abetted some person or persons
 19 that committed the violations, or three, he entered into a
 20 conspiracy to commit the violations.
 21 On the plaintiffs' extra judicial killing claim, the
 22 plaintiffs have the burden of proving each of the following
 23 elements by a preponderance of the evidence. First, the
 24 defendant deliberately killed or actively participated in the
 25 deliberate killing of Winston Cabello.

1 Second. The defendant acted under actual or apparent
 2 authority or color of law of a foreign nation.
 3 Third. The killing of Winston Cabello was not
 4 previously authorized by a judgment of a regularly constituted
 5 Court affording all the judicial guarantees which are
 6 recognized as indispensable by civilized people.
 7 You may consider instructions 17 and 18 to determine
 8 whether or not the plaintiffs have proven the elements above by
 9 a preponderance of the evidence.
 10 On their claim for torture, the plaintiffs have the
 11 burden of proving each of the following elements by a
 12 preponderance of the evidence. First. The defendant
 13 intentionally inflicted severe pain or suffering, whether
 14 physical or mental on Winston Cabello or actively participated
 15 in the intentional infliction of severe pain or suffering,
 16 whether physical or mental on Winston Cabello.
 17 Second. Winston Cabello was in the defendant's
 18 physical custody or control.
 19 Third. The infliction of severe pain and suffering on
 20 Winston Cabello was done while acting under the actual or
 21 apparent authority or color of law of a foreign nation.
 22 Fourth. The severe pain or suffering was inflicted
 23 for the purpose of intimidation, punishment or any
 24 discriminatory purpose.
 25 You may consider instructions 17 and 18 to determine

1 whether or not the plaintiffs have proven the elements above by
 2 a preponderance of the evidence.
 3 On the plaintiffs' cruel and inhuman or degrading
 4 treatment or punishment claims, the plaintiffs have the burden
 5 of proving each of the following elements by a preponderance of
 6 the evidence. First. The defendant inflicted mental or
 7 physical suffering, anguish, humiliation, fear or debasement on
 8 Winston Cabello, or the defendant actively participated in
 9 inflicting mental or physical suffering, anguish, humiliation,
 10 fear or debasement on Winston Cabello, and second, the
 11 defendant acted under color of law.
 12 You may consider instructions 17 and 18 to determine
 13 whether or not the plaintiffs have proven the elements above by
 14 a preponderance of the evidence.
 15 On the plaintiffs' crimes against humanity claims, the
 16 plaintiff's have the burden of proving each of the following
 17 elements by a preponderance of the evidence. First. One or
 18 more individuals committed any of the following acts: Murder,
 19 extermination, enslavement, deportation, imprisonment,
 20 mutilation, torture, persecution, and political, racial or
 21 religious ground and other outrages against personal dignity.
 22 Second. Winston Cabello's killing was part of
 23 widespread or systematic violations directed against the
 24 civilian population.
 25 Third. The defendant personally killed Winston

1 Cabello or actively participated in the killing of Winston
 2 Cabello.
 3 Fourth. The defendant knew or should have known that
 4 the killing of Winston Cabello was part of widespread or
 5 systematic conduct directed against the civilian population.
 6 You may consider instructions 17 and 18 to determine
 7 whether or not the plaintiffs have proven the elements above by
 8 a preponderance of the evidence.
 9 Acts are done under color of law when a person acts or
 10 purports to act in the performance of official duties under any
 11 law, ordinance or regulation.
 12 Mental pain or suffering refers to prolonged mental
 13 harm caused by or resulting from the intentional infliction or
 14 threatened infliction of severe physical pain or suffering, the
 15 threat of imminent death or the threat that another individual
 16 will imminently be subjected to death or severe physical pain
 17 or suffering.
 18 The defendant may be found liable if you find that he
 19 aided and abetted others in acts committed against Winston
 20 Cabello. In order to prove the defendant liable for aiding and
 21 abetting any of the violations against Winston Cabello, the
 22 plaintiffs must prove the following by a preponderance of the
 23 evidence. First. One or more of the wrongful acts that
 24 comprise the claim were committed.
 25 Second. The defendant substantially assisted some

1 person or person who personally committed one or more of the
 2 wrongful acts that comprise the claim.
 3 Third. The defendant knew that his actions would
 4 assist in the illegal or wrongful activity at the time he
 5 provided the assistance.
 6 The defendant may be found liable if you find that he
 7 conspired with someone who committed acts against Winston
 8 Cabello or caused acts to be committed against Winston Cabello.
 9 A conspiracy is an agreement of two or more persons to
 10 commit one or more wrongful acts. To prove the defendant
 11 liable for conspiring to commit any of the acts committed
 12 against Winston Cabello, the plaintiffs must prove by a
 13 preponderance of the evidence, first, two or more persons
 14 agreed to commit a wrongful act.
 15 Second, that the defendant knowing the unlawful
 16 purpose of the plan willfully joined in it.
 17 Third. One or more of the violations was committed by
 18 someone who was a member of the conspiracy and acted in
 19 furtherance of the conspiracy.
 20 For a conspiracy to have existed, it is not necessary
 21 that the conspirators made a formal agreement or that they
 22 agreed on every detail of the conspiracy. Each member of the
 23 conspiracy is liable for the actions of the other conspirators
 24 performed during the course and in furtherance of the
 25 conspiracy.

1 During the course of the trial, as you know from the
 2 instructions I gave you then, you heard evidence of acts of the
 3 defendant which may be similar to those alleged in the
 4 complaint, but which were committed on other occasions. You
 5 must not consider any of this evidence in deciding if the
 6 defendant committed the acts alleged in the complaint.
 7 However, you may consider this evidence for other very
 8 limited purposes.
 9 If you find by a preponderance of the evidence from
 10 other evidence in this case that the defendant did commit the
 11 acts alleged in the complaint, then you may consider evidence
 12 of a similar act allegedly committed on other occasions to
 13 determine whether the defendant had the state of mind or intent
 14 necessary to commit the acts alleged in the complaint, or
 15 whether the defendant had a motive to commit the acts alleged
 16 in the complaint, or whether the defendant acted according to a
 17 plan.
 18 The purpose of the law of damages is to award as far
 19 as possible just and fair compensation for the actual losses or
 20 injuries if any that resulted from the defendant's conduct.
 21 You must award the plaintiffs such sum of money as you believe
 22 will fairly and justly compensate the plaintiffs for any loss
 23 or injury you believe was actually sustained as a direct
 24 consequence of the defendant's conduct. These are known as
 25 compensatory damages. Compensatory damages seek to compensate

1 the plaintiff for the injuries that they sustained. The
 2 plaintiffs are entitled to compensatory damages for any
 3 physical injury, pain and suffering, mental anguish and shock
 4 that they suffered because of the defendant's conduct.
 5 The damages you award must be fair and reasonable.
 6 Neither inadequate nor excessive. You should not award
 7 compensatory damages for speculative injuries, but only those
 8 injuries which the plaintiff actually suffered.
 9 Compensatory damages may be awarded to cover both the
 10 mental and physical aspect of injury, tangible and intangible.
 11 Thus, no evidence of the value of such intangible things as
 12 emotional pain and mental anguish has been or need be
 13 introduced. In that respect it is not value you are trying to
 14 determine, but an amount that will fairly compensate the
 15 plaintiffs for those claims of damage. There is no contact
 16 standard to be applied. Any such award should be fair and just
 17 in the light of the evidence.
 18 You should consider the following elements of damage
 19 to the extent you find them proved by a preponderance of the
 20 evidence. One. The plaintiffs' physical and emotional pain,
 21 suffering and mental anguish and two, the plaintiffs' physical
 22 and mental injury.
 23 In addition to compensatory damages, you have the
 24 discretion to award punitive damages. Unlike compensatory
 25 damages which are imposed to reimburse the plaintiffs for their

1 injuries, punitive damages are designed to make an example of
 2 the defendant's conduct so others will not engage in similar
 3 practices. You may award punitive damages to the plaintiffs if
 4 they have proven that the defendant's conduct was wanton and
 5 reckless, not merely unreasonable. An act is wanton and
 6 reckless if it is done in such a manner and under such
 7 circumstances as to reflect utter disregard for the potential
 8 consequences of the act on the safety and rights of others.
 9 The purpose of punitive damages is to punish the
 10 defendant for shocking conduct in order to deter him and others
 11 from committing similar acts in the future.
 12 Punitive damages are intended to protect the community
 13 and to express the jury's indignation at a defendant's
 14 misconduct. The award of punitive damages is within your
 15 discretion. You are not required to award them. Punitive
 16 damages are appropriate only for specially shocking and
 17 offensive misconduct. If you decide to award punitive damages,
 18 you must use sound reason in setting the amount. It must not
 19 reflect bias, prejudice or sympathy towards any party, but the
 20 amount can be as large as you believe is necessary to fulfill
 21 the purpose of punitive damages. There is no exact standard
 22 for fixing the amount of punitive damages. Any award you make
 23 should be fair in light of the evidence.
 24 Should you award punitive damages to the plaintiffs in
 25 fixing the amount, you must consider what is reasonably

1 required to accomplish the goal of punishing the defendant and
 2 deterring others from committing similar acts.
 3 You should also consider the degree of
 4 reprehensibility of defendant's conduct towards the plaintiff
 5 and the relationship between the harm suffered by the
 6 plaintiffs and the amount of punitive damage also you are
 7 considering.
 8 In sum, in computing punitive damages, you should
 9 award the amount you find appropriate to punish the defendant
 10 for the injuries to the plaintiffs in this lawsuit and to set
 11 an example to others that will deter them from engaging in
 12 similar conduct.
 13 Finally, you may consider the financial resources of
 14 the defendant in fixing an amount of punitive damages.
 15 However, I instruct you that the burden is on the defendant to
 16 show his financial circumstances warrant a limitation of any
 17 award.
 18 In this case you have been permitted to take notes
 19 during the course of the trial and most of you, perhaps all of
 20 you, have taken advantage of that opportunity and have made
 21 notes from time to time. You will have your notes available to
 22 you during your deliberations, but you should make use of them
 23 only as an aid to your memory. In other words, you should not
 24 give your notes any precedence over your independent
 25 recollection of the evidence or the lack of evidence, and

1 neither should you be unduly influenced by the notes of other
 2 jurors. I emphasize notes are not entitled to any greater
 3 weight than the memory or impression of each juror what the
 4 testimony may have been.
 5 The fact I have given you instructions concerning the
 6 issue of plaintiffs' damages should not be interpreted in any
 7 way as an indication that I believe the plaintiffs should or
 8 should not prevail in this case. Any verdict you reach in the
 9 juryroom must be unanimous. In other words, to return a
 10 verdict you must all agree. Your deliberations should be
 11 secret. You will never have to explain your verdict to anyone.
 12 It is your duty as jurors to discuss the case with one another
 13 in an effort to reach agreement if you can do so. Each of you
 14 must decide the case for yourself, but only after full
 15 consideration of the evidence with the other members of the
 16 jury. While you are discussing the case, do not hesitate to
 17 re-examine your own opinion and change your mind if you become
 18 convinced you were wrong.
 19 Do not give up your honest belief solely because the
 20 others think differently or merely to get the case over with.
 21 Remember, in a very real way you are judges, judges of the
 22 facts. Your only interest is to seek the truth from the
 23 evidence in this case.
 24 When you go to the juryroom you should first select
 25 one of your members to act as your foreperson. The foreperson

1 will preside over your deliberations and will speak for you
 2 here in Court.
 3 A form of verdict has been prepared for your
 4 convenience. I will read it to you now.
 5 (Verdict form read.)
 6 You will take the verdict form to the juryroom and
 7 when you have reached unanimous agreement, you will have your
 8 foreperson fill in the verdict form, date and sign it in pen
 9 then return to the courtroom.
 10 If you should desire to communicate with me at any
 11 time, please write down your message or question and pass the
 12 note to the marshal, who will bring it to my attention and if
 13 you would write down any note in pen, date and sign it with the
 14 time, please. I will then respond as promptly as possible,
 15 either in writing or by having you return to the courtroom so I
 16 could address you orally.
 17 I caution you, however, with regard to any message you
 18 might send, you should not tell me your numerical division.
 19 At this time the jury may proceed with your notebooks
 20 and jury instruction packet and begin your deliberations. I
 21 will be sending into the juryroom the verdict form and the
 22 exhibits in this case.
 23 You may proceed to begin your deliberations.
 24 (At 10:35 a.m., the jury began its deliberations.)
 25 THE COURT: Are there any objections to the

1 instructions as given?
 2 MR. CUNNINGHAM: Not other than what has been
 3 previously discussed.
 4 MR. DAVIS: No objections other than previously
 5 raised.
 6 THE COURT: Did I omit any instructions I indicated I
 7 would give?
 8 MR. CUNNINGHAM: No, Your Honor.
 9 MR. DAVIS: No.
 10 THE COURT: What is the parties' position as far as
 11 sending in the complaint and the answer?
 12 MR. CUNNINGHAM: We would object.
 13 MR. DAVIS: We agree.
 14 THE COURT: I understand you have notebooks for each
 15 of the jurors that you have gone through?
 16 MR. DAVIS: Actually there will be one set of
 17 exhibits.
 18 THE COURT: Have you gone over them with the lawyers?
 19 THE CLERK: Yes.
 20 THE COURT: Regardless of the outcome of the case,
 21 this is an important case for the parties and our community and
 22 I want to commend each side for an excellent job, sometimes
 23 under difficult circumstances in both the preparation and the
 24 execution of the trial in this case. It was an excellent job
 25 by both sides.

1 You are all on ten minute standby. I think Lisa will
 2 probably give them lunch menus now because it takes a while for
 3 lunch to be delivered.
 4 Make sure she has cellphones, beepers, any mode of
 5 communication, if we need to get in touch with you and you are
 6 all on ten minute standby, and we are in recess.
 7 (Thereupon a recess was taken, after which the
 8 following proceedings were had.)
 9 (Open court. Jury not present.)
 10 THE COURT: Estate of Winston Cabello, et al. vs.
 11 Armando Fernandez-Larios, Case Number 99-0528.
 12 Would counsel state their appearances.
 13 (All parties present.)
 14 THE COURT: Yes. There was a problem?
 15 MR. KERRIGAN: Your Honor, we attempted and have tried
 16 to solve the problem and we have an impasse with Mr. Davis on
 17 one aspects of this.
 18 THE COURT: The note has already gone in since you
 19 both initialed it.
 20 MR. KERRIGAN: It is the example -- if you analyze
 21 this example in light of the jury instruction, I think an
 22 ambiguity has been created that isn't entirely evidenced by the
 23 question. It is this.
 24 When the jury instructions were given, there was an
 25 indication on many of the instructions that you may consider

1 instructions 17 and 18. I think this example has the jury
 2 confused in this respect. They believe all elements of 17 and
 3 18 have to be established. In other words, aiding and abetting
 4 and conspiracy have to be established, because the way they
 5 have done this example, they have referred to page 17 and 18
 6 and I think we all agree it is instruction 17 and 18. It says
 7 first, second and third --
 8 THE COURT: What is first, second and third?
 9 MR. KERRIGAN: It appears to be the elements of an
 10 instruction, aiding and abetting. However, because they have
 11 done 17 and 18, it may be because the way the instruction was
 12 worded they may consider 17 and 18 or 18, the defendant would
 13 have to prove both.
 14 We ask you to consider sending this note to the jury,
 15 that in further answer to your question, the plaintiffs must
 16 establish by a preponderance of the evidence all the elements
 17 of instruction 17, or, all of the elements of instruction 18.
 18 To clarify we don't have to prove 17 and 18.
 19 Mr. Davis hadn't had a chance to respond but we are
 20 not asking to go back to primary liability or anything else but
 21 to clarify what seems to be a potential ambiguity in this
 22 example. The question itself wasn't ambiguous, it is the
 23 answer, and I apologize to the Court for not having seen it or
 24 understood it. We kept looking at it trying to figure out how
 25 this example came up.

1 THE COURT: Mr. Davis?
 2 MR. DAVIS: All of us looked at the question together
 3 and everyone in here agrees it is the preponderance of the
 4 evidence standard which applies. That is why we gave the
 5 answer in a declarative fashion because the literal answer to
 6 the question is, yes. That is why we said the answer to the
 7 question is yes, the preponderance of evidence standard applies
 8 to all parts of the charge, which is indisputable.
 9 We have already been through all of the charges the
 10 jury should be instructed with; so at this point there is
 11 nothing further to instruct the jury on. You have given them
 12 the instructions. Should they have another question we will
 13 take that up when the issue presents itself but this was the
 14 answer agreed upon by the parties, I thought the answer to that
 15 question, and I don't think any further instruction would be
 16 warranted at this juncture.
 17 They went to great lengths in their closing talking
 18 about, or, or, or and the instruction says or, or, or. I don't
 19 know what else Your Honor can do. I don't want to emphasize
 20 the aiding and abetting conspiracy is the heart of their case,
 21 but I don't want any more emphasis placed on it other than in
 22 the instructions that have already been given.
 23 MR. KERRIGAN: The problem I think is best evidenced
 24 by the language that was used in the instructions which was,
 25 you may consider instruction 17 and 18 to determine whether or

1 not the plaintiffs have proven the elements above by a
 2 preponderance of the evidence. It perhaps has created an
 3 ambiguity. It seems to me an instruction that says you may
 4 consider either 17 and all of the elements, or, 18 and all of
 5 the elements for the plaintiffs to have proved their case,
 6 addressing the language where this and/or language has been
 7 used and it doesn't seem to be prejudicial or detrimental to
 8 the defense to clearly state what the instruction was intended
 9 to accomplish. It is this language 17 and 18 that seems to me
 10 to cause the problem. If they are approaching this logically
 11 and from the beginning they reading the very first one, they
 12 see 17 and 18. Then they go on to 17 and 18 and they don't
 13 know whether it is and/or and we respectfully request they be
 14 instructed in that manner.
 15 THE COURT: I will deny the request by the plaintiffs
 16 for any supplemental answer to the jury. The question to the
 17 jury was, does the preponderance of the evidence apply to all
 18 parts of the charge. The answer agreed to by the parties
 19 without issue was, yes, it does apply and they were asking
 20 whether it applies to page 17 and 18, aided and abetted and all
 21 the elements.
 22 Their question has been answered. I do not find it
 23 requires any further answer. The instructions as a whole are
 24 clear. The jury can consider the direct elements for the
 25 various causes of action as alleged by the plaintiff and they

1 may consider the aiding and abetting theory and the conspiracy
 2 theory and if you look at instruction number 17 and instruction
 3 number 18, they are clear and complete on their own. Each one
 4 of those instructions starts out with, the defendant may be
 5 found liable if you find. First, 17, that he aided and abetted
 6 others and indicates the elements that must be proved, or a
 7 finding of aiding and abetting others, and, likewise,
 8 instruction 18, the defendant may be found liable if you find
 9 he conspired with someone.

10 There is nothing in the instruction that indicate both
 11 of those have to be present for a finding, and the "and" in the
 12 prior instruction is the disjunctive rather than the
 13 conjunctive. Each one of those instructions may be applied.
 14 If they come back and ask that question, I agree,
 15 Mr. Kerrigan. If they are concerned they have to find both 17
 16 and 18 to find the defendant liable, what you propose may be
 17 appropriate; but at this stage based upon the question that has
 18 been submit L submitted, they want to know if the standard of
 19 approve applies to all the elements of aiding and abetting and
 20 instruction 17 and 18 and it does apply and nothing further
 21 needs to be done at this time. I think you are clutching. I
 22 don't think there is any indication in order to have aiding and
 23 abetting you need to have a conspiracy. If they ask that, we
 24 can certainly take it up.
 25 (Thereupon a recess was taken, after which the

1 following proceedings were had.)
 2 (Open court. Jury not present.)
 3 THE COURT: Estate of Winston Cabello, et al. vs.
 4 Armando Fernandez-Larios, Case Number 99-0528.
 5 Would counsel state their appearances.
 6 (All parties present.)
 7 THE COURT: The jury has issued another note. Both
 8 sides have a copy?
 9 MR. KERRIGAN: Yes.
 10 MR. DAVIS: We do.
 11 THE COURT: I will hear from either side as to your
 12 position.
 13 MR. KERRIGAN: Your Honor, as to the first request we
 14 have no objection to the jury having a transcript of the
 15 defendant's testimony and any portion of the depositions that
 16 were read in that.
 17 There were side bars that have to be eliminated
 18 because the side bars are obviously unknown to the jury.
 19 Would you like me to respond to question 2?
 20 THE COURT: Yes.
 21 MR. KERRIGAN: We are opposed, without research and an
 22 opportunity to analyze this material, because the Court doesn't
 23 give definitions in jury instructions, generally.
 24 Mr. Davis read a definition to the jury about
 25 "substantial" from the dictionary. We didn't object because it

1 would look like we were objecting to a reasonable explanation
 2 of a term and he only did it with one term; but that is an
 3 instruction of law. If you give this jury an explanation of
 4 willful or willfully, that is an instruction at law and we
 5 should have an adequate opportunity to research it and
 6 determine what the law is about this term in a civil context.
 7 The standard instruction involved in a criminal case
 8 involves mens rea. This is not involved in a civil conspiracy
 9 as far as we now know or think; but we don't have any other
 10 response because we have not done the research on this term not
 11 anticipating it would come up.
 12 MR. DAVIS: On the transcript issue, Your Honor, I am
 13 not sure how you would present that to the jury.
 14 I don't know what the Court's practice is in that
 15 regard. I don't have an objection to his testimony being given
 16 to the jury with obviously the side bars being redacted and
 17 eliminated.
 18 THE COURT: That wouldn't be available for them now.
 19 It would take Richard at least some time to prepare that.
 20 MR. DAVIS: I understand Your Honor. I am just giving
 21 our position depending what the Court's preference is.
 22 As to the word "willfully," I don't understand
 23 Mr. Kerrigan's argument since they have plead this as a civil
 24 conspiracy. The Court did not give a definition in the
 25 instructions. Lisa was kind enough to show us the pattern

1 instructions which had some definitions of the word "willfully"
 2 from the Eleventh Circuit and suggested we use something of
 3 that nature although that was in the criminal context.
 4 I have not researched the term in reference to this
 5 specific question.
 6 It is our position it has to be some sort of
 7 volitional, freely entered into act that you are forced into or
 8 negligently did.
 9 MR. KERRIGAN: If the Court would consider now with
 10 this question as the jury is dealing with conspiracy presenting
 11 the problem we discussed earlier, I would respectfully request
 12 Your Honor view these questions together, now they are in
 13 conspiracy, it looks to us, and you can't interpolate from jury
 14 questions alone, but it looks to us as though the jury is
 15 dealing with these two instructions together, like both have to
 16 be proved, 17 and 18.
 17 THE COURT: I don't think that has anything to do with
 18 this, Mr. Kerrigan. That was a different question. This
 19 question doesn't reference 17 and 18 or that issue whatsoever.
 20 MR. KERRIGAN: The previous question referenced 17 and
 21 this question references 18. It looks like this is exactly the
 22 problem the jury is trying to sort through.
 23 THE COURT: What problem?
 24 MR. KERRIGAN: That you used the term "and," that to
 25 the normal citizen -

1 THE COURT: It has nothing to do with using "and."
 2 This is an area about 18.
 3 MR. KERRIGAN: The previous question was about 17.
 4 THE COURT: The previous question was about what was
 5 the standard to be applied to each and every element in 17 and
 6 18. One has nothing to do with the other.
 7 MR. KERRIGAN: We believe the use of the word "and"
 8 has created this confusion and the word "and" is presented not
 9 in a disjunctive presentation and we think the average citizen
 10 when you say "and," includes both. That is our concern.
 11 THE COURT: I would note for the record that
 12 instruction was without objection by the plaintiff and that
 13 language was without objection by the plaintiff.
 14 MR. KERRIGAN: Respectfully, we object to the entire
 15 presentation of the aiding and abetting instruction,
 16 respectfully.
 17 THE COURT: I am sorry?
 18 MR. KERRIGAN: We objected to the entire presentation
 19 of the aiding and abetting instruction.
 20 THE COURT: You didn't want aiding and abetting?
 21 MR. KERRIGAN: Not as a footnote in the rest of the
 22 instructions to go to 17 and 18. Our position is clear, we
 23 anticipated these would be reduced to secondary theories of
 24 secondary importance. We are entitled to prevail in this case
 25 if we can prove he aided and abetted, period. We don't have to

1 prove anything other than that. We are just concerned the way
 2 this is being presented the jury is putting these together.
 3 THE COURT: Where in this question is there anything
 4 that indicates that the jury is concerned about aiding and
 5 abetting and conspiracy? Where in this question?
 6 MR. KERRIGAN: We read the questions together.
 7 THE COURT: Where in this question?
 8 MR. KERRIGAN: It includes the question that came
 9 before. The jury is dealing with the issue of 17 and 18.
 10 THE COURT: Where in this question does it refer to
 11 the previous question?
 12 MR. KERRIGAN: There is nothing in this question that
 13 says it refers to the previous question.
 14 THE COURT: Thank you.
 15 I don't know -- in fact I instructed the jury prior to
 16 trial that transcripts would not be available for them. It was
 17 only after Mr. Kerrigan went through his closing and indicated
 18 all the page numbers of the transcript that it was all of a
 19 sudden an implication that the transcripts would be available
 20 to them. In fact my preliminary instructions to them were that
 21 no transcripts would be available to them in a manner or format
 22 they would have transcripts available for them.
 23 MR. KERRIGAN: I did the rebuttal arguments.
 24 Mr. Davis made three distinct references to the transcript, by
 25 page number and respectfully Your Honor -

1 THE COURT: I don't think he said the page numbers.
 2 MR. KERRIGAN: He absolutely did because I went right
 3 to those pages and read them to the jury.
 4 THE COURT: Then you both did.
 5 MR. KERRIGAN: I was in rebuttal.
 6 THE COURT: I know what you did, Mr. Kerrigan.
 7 Was the deposition introduced into the record?
 8 MR. DAVIS: No. There were two or three or four
 9 references at different times when Mr. Kerrigan attempted to
 10 impeach him. You did tell him it was improper impeachment.
 11 THE COURT: The deposition was not in, other than what
 12 was read into the record.
 13 MR. DAVIS: Correct.
 14 THE COURT: So the deposition would not be available,
 15 that would be my first response, the defendant's deposition has
 16 not been introduced as an exhibit in the record.
 17 MR. DAVIS: I notice it does say looking more at this,
 18 maybe I am reading it differently, we would like the
 19 defendant's deposition, then it says and transcripts of sworn
 20 testimony, and I don't know if that means all of them or not.
 21 I know your ruling would be the same regardless, but I note
 22 that reading that. I am not sure whether they want the
 23 defendant's transcripts or the transcripts of all the sworn
 24 testimony in the case.
 25 THE COURT: I don't know about the preparation time.

1 MR. KERRIGAN: They have been ordered.
 2 THE COURT: There would be additional work by the
 3 reporter redacting the side bars.
 4 I understand you both have the transcript but that has
 5 side bars in it. Side bars would not be in a format to go back
 6 to the jury, so you would have to order an additional
 7 transcript without side bars. A redacted transcript from the
 8 court reporter.
 9 MR. CUNNINGHAM: From the transcript we have we could
 10 redact out the side bars expeditiously, in a matter of minutes.
 11 MR. DAVIS: There are at least three situations in
 12 which Mr. Cunningham and I would agree on there were errors in
 13 transcriptions that would have to be corrected as well.
 14 THE COURT: How many side bars were there?
 15 MR. DAVIS: I couldn't tell you. I think it is eight
 16 volumes of testimony.
 17 THE COURT: How many volumes are there for the
 18 defendant's testimony?
 19 MR. DAVIS: Two. It would be the Friday volume and
 20 the following Tuesday.
 21 THE COURT: Are you going to make the copies without
 22 the side bar?
 23 MR. CUNNINGHAM: We can do that.
 24 MR. DAVIS: My only response -- I have no objection if
 25 they want my client's testimony, but I am not sure if that

1 question the way it is written is asking for the entire trial
 2 testimony. Mr. Kerrigan did say in his closing the trial
 3 transcripts would be available to them if they wanted it. I
 4 was pointing out the trial transcript and citing it to the jury
 5 because I thought it was important they know the details of
 6 this case, but the way it is written, transcripts of sworn
 7 testimony means to me they are asking about the entire trial.
 8 THE COURT: The entire trial?
 9 MR. DAVIS: That is how I read it. The defendant's
 10 deposition, I don't know whether his pretrial deposition --
 11 THE COURT: You think it means all the sworn
 12 testimony?
 13 MR. DAVIS: I do. Obviously I don't know the answer
 14 to that because it is only in the jury's mind.
 15 THE COURT: As far as the first part of the question,
 16 my response would be to them, that the defendant's deposition was
 17 not introduced as an exhibit into the record.
 18 What transcript -- what sworn testimony transcripts
 19 are you referring to, and they can let us know what they are
 20 referring to.
 21 As far as the second portion, the second question, you
 22 must rely upon the instructions of the whole and your common
 23 sense. We don't have a definition of "willfully" in a civil
 24 context.
 25 Any objection to that response to the jury?

1 MR. DAVIS: No.
 2 MR. CUNNINGHAM: With respect to the first point, it
 3 is the case that the deposition is not an exhibit. However, it
 4 is also the case several questions had been put to the
 5 defendant and he said he said them.
 6 THE COURT: It would be included in sworn testimony,
 7 but it was not a separate exhibit.
 8 MR. CUNNINGHAM: Right. My concern is, the jury may
 9 not be sensitive to the distinction between testimony and
 10 exhibit and may think, therefore, if we referred in closing --
 11 THE COURT: I will modify the first answer to say, the
 12 defendant's deposition as a whole was not introduced as an
 13 exhibit. Some references were made to the defendant's
 14 deposition during his testimony on the stand. Then the
 15 question, what sworn testimony transcript are you referring to.
 16 MR. CUNNINGHAM: That would be fine, thank you.
 17 MR. DAVIS: No objection.
 18 THE COURT: I would think if it is two volumes it will
 19 take somebody more than a few minutes to go through it. It
 20 will take more than a few minutes.
 21 MR. CUNNINGHAM: I am contemplating going through with
 22 scissors so hopefully it will be quickly.
 23 THE COURT: It will look a little strange, but, okay.
 24 (Interruption.)
 25 THE COURT: We have another note. It is hard for me

1 to read the first word. They wrote something over -- I think
 2 it is, if considering instruction number 18, can the word
 3 "defendant," be interchanged with conspiracy or conspiracy
 4 group.
 5 I don't even see -- conspiracy is in quotes.
 6 Conspiracy group is in quotes and defendant is in quotes.
 7 I don't see conspiracy group in there. Am I missing
 8 it?
 9 MR. CUNNINGHAM: No, Your Honor.
 10 MR. DAVIS: The answer to the question would be, no.
 11 THE COURT: Do you have a response?
 12 MR. KERRIGAN: If we could see a printout of the note,
 13 Your Honor.
 14 THE COURT: Lisa will make copies.
 15 (Interruption.)
 16 MR. CUNNINGHAM: Your Honor, with respect to the
 17 second question, what I believe the question being asked is,
 18 whether or not, in light of instruction 18, can the word
 19 "defendant" as used in the substantive instructions be
 20 interchanged with conspiracy or conspiracy group. Conspiracy
 21 and conspiracy group are the jury's term, they are not the
 22 instruction's term. The answer to that question would be, yes.
 23 Our initial reading was whether or not there could be
 24 some substitution within instruction 18 itself. The question
 25 makes no sense if it is read that way

1 MR. DAVIS: We object. We had objections to the
 2 entire conspiracy claim even going to the jury. They are
 3 saying can the word "defendant," as used in the instruction a
 4 number of times, and I believe your Honor, the answer to the
 5 question, would be, no. There is no interchanging that is
 6 going to be done in the instruction. Your Honor has given the
 7 instruction on the law. You have ruled on it over my
 8 objection. This instruction has gone into the jury and to
 9 further change it, broaden it, it would be totally
 10 inappropriate just as in the arguments previously used, Your
 11 Honor said with respect to the word "willfully," that you must
 12 rely upon the instructions as a whole and your common sense.
 13 My answer to the question, is unequivocally no, if you
 14 used the word "conspiracy" throughout the instruction, it
 15 wouldn't work and the reply you just gave to the jury about the
 16 word "willfully."
 17 MR. CUNNINGHAM: The jury is struggling to understand
 18 there are these alternative bases of liability and they are
 19 trying to make sense of the instructions and they inartfully
 20 asked about interchanging words and the question really is in
 21 light of these concepts, can we apply the conspiracy and
 22 conspiracy group concepts in the substantive instruction.
 23 THE COURT: Except it doesn't say that.
 24 I agree with you maybe that is what they are
 25 struggling with, but the question doesn't say that. It only

1 references instruction number 18, which is the conspiracy
 2 theory instruction. It doesn't refer back to any of the other
 3 numbered instructions.
 4 MR. CUNNINGHAM: We are reading the same instruction
 5 and I am struggling to understand it. I would focus the Court
 6 on "considering." Considering instruction 18, not in in
 7 instruction 18, but then again we can't read the first word.
 8 THE COURT: Maybe it is "in."
 9 Instruction 18 is in quotes and
 10 parentheticals. I don't know if they are referring to
 11 instruction 18 separately or they are referring to the
 12 cautionary paragraph in the substantive instruction.
 13 MR. CUNNINGHAM: In each of the substantive
 14 instructions we did use the word "consider," which causes me to
 15 think they are looking for clarification how they do that,
 16 considering.
 17 THE COURT: In response to your question as written,
 18 you must rely upon all of my instructions given as a whole and
 19 your common sense.
 20 It is not clear to me whether they are referring to
 21 the substantive offenses or not, and I am not going to ask them
 22 if they are referring to the substantive offenses. In response
 23 to your question as written, and it may invite them to ask
 24 another question.
 25 MR. DAVIS: No objection.

1 MR. CUNNINGHAM: I think we should signal to them we
 2 are not clear what their question is. We are purporting to
 3 answer it and it is really going to the fundamentals of the
 4 nature of our theory of this case. If my interpretation is
 5 correct, the answer would be, yes.
 6 THE COURT: It wouldn't be a simple yes. It may be
 7 yes, it may not be yes. It would have to be yes in conjunction
 8 with there was a finding a conspiracy existed and whether he
 9 was a member of that conspiracy and whether it was in fact a
 10 conspiracy that was suborning the act.
 11 MR. CUNNINGHAM: What I would request is, you preface
 12 the response by indicating that the question isn't clear to the
 13 Court. It truly isn't.
 14 THE COURT: The modification would be, as written -- I
 15 don't know it is appropriate for me to tell them their question
 16 isn't clear. This is their question.
 17 MR. DAVIS: Your Honor, I must go back --
 18 THE COURT: One minute, Mr. Davis.
 19 Let me say this. The instruction would be what I had
 20 indicated before. In response to your question as written, you
 21 must rely upon all of my instructions individually and given as
 22 a whole and your common sense.
 23 I am available for any further questions you may have.
 24 MR. DAVIS: I don't have any objection to that, Your
 25 Honor. It is just that we answered the previous question

1 regarding "willfully," that you must rely upon the instructions
 2 as a whole and your common sense and now you are expanding that
 3 answer a little bit.
 4 THE COURT: I am indicating it is as written, because
 5 I don't think the question is clear. In response to your
 6 question as written, you must rely upon all my instructions
 7 individually and given as a whole and your common sense. I am
 8 available if you have any further questions.
 9 MR. DAVIS: I prefer that last part not be in there.
 10 MR. CUNNINGHAM: I prefer that to what was suggested
 11 before.
 12 THE COURT: I will not tell them their question isn't
 13 clear.
 14 The response will be, in response to your question, as
 15 written, you must rely upon all of my instructions individually
 16 and given as a whole, and your common sense.
 17 The Court is available if you have any further
 18 inquiry.
 19 (Interruption.)
 20 THE COURT: The testimony transcript of the defendant
 21 on the stand, specifically the plaintiff's questioning of the
 22 defendant.
 23 I guess that is the transcript they are looking for.
 24 MR. DAVIS: If we put in the defendant, we put in the
 25 entire testimony.

1 THE COURT: I agree. The entire testimony not just
 2 the plaintiffs' questioning of the defendant.
 3 MR. KERRIGAN: Your Honor, then there should be all
 4 kinds of other impeachment evidence and everything else. The
 5 jury asked for one aspect of this. It seems the Court is going
 6 beyond the jury's question.
 7 THE COURT: The testimony transcript of the defendant
 8 on the stand. Specifically the plaintiffs' questioning of the
 9 defendant.
 10 MR. KERRIGAN: Your Honor, that is a very unambiguous
 11 request. We think it is very unfair to send to the jury
 12 something they haven't asked for. It is suggesting to the jury
 13 Your Honor thinks it is important to see and suggests the Court
 14 wants them to look at evidence.
 15 THE COURT: There are two parts of this. The
 16 testimony transcript of the defendant on the stand,
 17 specifically the plaintiffs' questioning of the defendant.
 18 It seems to me they are asking for the testimony of
 19 the defendant and specifically asking for the plaintiffs'
 20 questioning of the defendant.
 21 MR. KERRIGAN: Why would they use the word
 22 "specifically," if they intended to have a broader request? It
 23 seems they are trying to assist us and the Court getting to
 24 them what they actually need. Wouldn't it be easier for them
 25 to say we want to see everything the defendant said under oath.

1 This is a very precarious situation, Your Honor, when other
 2 evidence goes to the jury that they didn't ask for.
 3 MR. DAVIS: Then we would object to any transcript
 4 going into the jury.
 5 THE COURT: What was my question to them?
 6 MR. DAVIS: You asked what sworn testimony transcripts
 7 are you referring to.
 8 THE COURT: The answer was, the testimony transcript
 9 of the defendant on the stand, particularly the plaintiffs'
 10 questioning.
 11 MR. DAVIS: My reply would be, the entire testimony
 12 goes in or your instruction, none of the transcripts are
 13 available and they have to rely on their recollection.
 14 MR. KERRIGAN: If you do that and think that is the
 15 best way to do that, we would request you say something along
 16 these lines, when the jury asks for witnesses' questions, the
 17 Court's policy is to provide answers and questions by both
 18 lawyers so the jury has the entire testimony or something that
 19 indicates the Court would be assuring this would be a policy
 20 you would follow and not specifically in this instance reacting
 21 by giving them something they are not asking for.
 22 It is not my objection but on this occasion to give it
 23 to them suggests that the Court wants them to have this additional
 24 evidence.
 25 THE COURT: Any problem stating it is the Court's

1 policy to provide the entire testimony of the witness?
 2 MR. DAVIS: I am trying to limit what we say to the
 3 jury. I don't look at this as being some sort of, hey, look at
 4 this testimony or look at this witness' testimony. They asked
 5 for the defendant's testimony and you are going to give it to
 6 them. That is my concern.
 7 THE COURT: And you all will have to get it prepared.
 8 MR. KERRIGAN: We are.
 9 Let me talk to Mr. Davis about this and we may reach
 10 an accord that takes the Court out of this. We may not have a
 11 dispute.
 12 THE COURT: Let me go into my afternoon calendar and
 13 you all can meet.
 14 (Interruption.)
 15 (Open court. Jury not present.)
 16 THE COURT: Estate of Winston Cabello, et al. vs.
 17 Armando Fernandez-Larios, Case Number 99-0528.
 18 Would counsel state their appearances.
 19 (All parties present.)
 20 THE COURT: I don't know where you are in preparing
 21 the transcript but I intend to send the jurors home now.
 22 MR. DAVIS: We are almost done, is the short answer.
 23 THE COURT: This will give you some additional time so
 24 you don't feel so pressured. I will tell them the transcript
 25 is being prepared for them and they will have it tomorrow

1 morning.
 2 Lisa has been in touch with the travel agency that the
 3 Court uses and depending what kind of ticket he has, sometimes
 4 it is a package deal if you don't use the first leg you can't
 5 use the second leg. She will find out that information from
 6 him. It is either \$300 plus one way or \$666 for a round trip.
 7 We will find out the information from him and make the
 8 requisite reservations and will work out with you all how it is
 9 going to be paid. She will find out that information. We
 10 don't want him to not be able to use his return.
 11 I will call them in and tell them it is a quarter of
 12 five. One of the jurors has a class at 5:45 anyhow. I will
 13 tell them the transcript is being prepared for them and they
 14 will have it tomorrow morning at 9:30.
 15 Mr. Davis: I have a scheduling problem. I am
 16 supposed to start a case in Vero Beach Thursday.
 17 THE COURT: We can take that up tomorrow.
 18 I don't think you will be able to go if we are not
 19 finished.
 20 Who is it before?
 21 MR. DAVIS: It is a summary jury trial we were ordered
 22 to try. My client is flying in from California.
 23 (Jury present.)
 24 THE COURT: Ladies and gentlemen of the jury, the
 25 transcript you requested is being prepared and will be ready

1 for you in the morning. The hour is getting late and I will
 2 let you go.
 3 Do not discuss this case amongst yourselves or anyone
 4 else. Have no contact whatsoever with anyone associated with
 5 the trial. Do not read or listen to anything touching on this
 6 matter in any way. If anybody should try to talk to you about
 7 this case, instruct them to immediately stop and be in contact
 8 with my staff concerning it.
 9 Lisa will be collecting your notebooks and all the
 10 exhibits and any papers you have and putting them in a safe
 11 place for the evening.
 12 Tomorrow morning we are not going to reconvene Court
 13 before you start deliberating but you cannot start to
 14 deliberate until all your members are present. At the time all
 15 of your members are present, Lisa will bring to you your
 16 notebooks, the verdict form, the exhibits and that will be your
 17 signal to start deliberating. While you are waiting for
 18 everybody, talk about the Marlins, the Panthers, the Cubs, the
 19 Yankees, but don't talk about the case until everyone is
 20 present then you can resume your deliberations in the morning.
 21 Again, I caution you not to read, see or listen to
 22 anything touching on this matter this evening. It has been a
 23 long day, you have worked hard. Go home and enjoy your
 24 families and I will see you tomorrow at 9:30.
 25 (Jury leaves room.)

1 THE COURT: Tomorrow you will have an agreed upon 1
2 transcript to go into the jury? 2
3 MR. DAVIS: Yes. I will finish it right now and 3
4 Ms. Healy will come over to my office and we will photograph 4
5 the last portions and we can complete that. 5
6 Do you want it in notebook form? 6
7 THE COURT: If it is easier. You can put it into a 7
8 notebook form so they can refer to the pages. If they don't 8
9 finish deliberating tomorrow I don't know how you will drive to 9
10 Vero Beach. I will be happy to speak to the Judge in Vero 10
11 Beach. 11
12 MR. DAVIS: If they are here until 9 o'clock tomorrow 12
13 night -- 13
14 THE COURT: They will not be here until 9 o'clock. 14
15 MR. DAVIS: I can leave at the end of business 15
16 tomorrow. 16
17 THE COURT: If they come to a conclusion tomorrow you 17
18 will have no problem. 18
19 Tomorrow, give the number to Lisa and I will call up 19
20 there. If you have a deliberating jury here you cannot be 20
21 somewhere else. They will just have to wait for you. I would 21
22 have to wait for you. The Judge in Vero Beach will have to 22
23 wait for you. 23
24 Plaintiffs have three attorneys there, you are only 24
25 one. I don't know how I can let you go. 25

1 Give the information to Lisa and I will be happy to 1
2 speak to the Judge up there for you. 2
3 I will have Lisa front end it and call the office and 3
4 if there are any problems I will be happy to speak to the Judge 4
5 up there and she will find out the information regarding juror 5
6 number 5 so we can make sure, because there aren't a lot of 6
7 seats, as we can tell, available and we will need to arrange 7
8 for the back end of the reservation on Sunday. 8
9 I will see you tomorrow. 9
10 10
11 oOo 11
12 12
13 I certify that the foregoing is a correct 13
14 transcript from the record of proceedings 14
15 in the above-entitled matter. 15
16 16
17 17
18 _____ 18
19 Date Official Court Reporter 19
20 _____ 20
21 _____ 21
22 _____ 22
23 _____ 23
24 _____ 24
25 _____ 25