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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

HURLEY
Beach, Fl.

JUAN ROMAGOZA ARCE, et al.,) Docket No.
) 99-8364-Civ-
Plaintiffs,)
) West Palm
v.) July 22, 2002
) 9:30 a.m.
JOSE GUILLERMO GARCIA and)
CARLOS EUGINIO VIDES CASANOVA,)
)
Defendants.)
)
-----x

VOLUME 15
TRANSCRIPT OF JURY QUESTION
BEFORE THE HONORABLE DANIEL T.K. HURLEY
and a jury

APPEARANCES:

For the Plaintiffs: JAMES GREEN, ESQ.
PETER STERN, ESQ.
BETH VanSCHAACK, ESQ.

For the Defendants: KURT KLAUS, ESQ.

Court Reporter: Pauline A. Stipes, CSR, RPR, RMR

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United States Courthouse
West Palm Beach, FL 33401

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2552

1 THE COURT: Good morning.

2 MR. KLAUS: Good morning.

3 MR. STERN: Good morning.

4 MS. VAN SCHAACK: Good morning.

5 THE COURT: I think when we stopped on Friday one
of
6 the questions I posed to counsel was whether they had an
7 objection to the instructions of law as given by the court
and
8 the plaintiffs asked for the ability to wait on their
response
9 to that question until they had the opportunity to review
the
10 written instruction.

11 Let me turn now and post that question again, if
I
12 might, to counsel for the plaintiff.

13 Is there objection to the instruction of law,
14 supplemental instruction of law given to the jury?

15 MR. STERN: Your Honor, as the court is aware, we
have
16 submitted some briefing today on the two questions that
were --

jury on 17 two of the three questions that were received from the
18 Friday and our position is that we would object to the
the 19 instructions, further instructions, given by the court to
we 20 extent that they do not include the supplemental language
21 have submitted in our papers this morning.
while 22 In other words, the language given by the court,
23 we believe was helpful, it does not go far enough in
addressing 24 what we believe is the serious confusion the jury is
suffering 25 from at the moment.

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2553

already 1 THE COURT: All right. And I think defense has
2 responded to that.

3 MR. KLAUS: No objection.

4 THE COURT: Okay. I wanted to take a moment, if I
5 might, because I think this -- I would hope that this was
6 implicit in my rulings, but I think perhaps it would be
7 appropriate to make it explicit.

the 8 One of the questions I have looked at again over
9 weekend was the plaintiff's request, and I think it has
been

the 10 made at least twice in the case, that the court instruct
that 11 jury that there is a presumption that a de jure commander,
rank 12 is, someone who has military command by virtue of formal
they 13 or formal appointment, that there is a presumption that
the 14 have effective control and that the court should instruct
that 15 jury as to the existence of the presumption and indicate
that 16 the presumption exists unless it is rebutted by evidence
17 owing to the circumstances at the time, the presumption of
18 effective control has been rebutted.

that 19 I have twice denied the plaintiffs' request in
20 regard and I do so again and reaffirm my prior ruling.

11th 21 In the United States Court of Appeals for the
22 Circuit's opinion in the case of Ford versus Garcia issued
23 April 30, 2002, the court quoted extensively from opinions
24 issued by both the trial and the appeals chambers from the
25 International Criminal Tribunal for the former Yugoslavia.

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2554

do 1 I think it is significant that those proceedings

the 2 not involve jury trials, and it is true that in some of
the 3 text of the opinions issued by both the trial chamber and
term 4 appeals chamber, the word -- the phrase or the word, the
and it 5 presumption has been used. In one opinion, for example,
text 6 may be the case of Prosecutor versus Delic, D-e-l-i-c, the
itself may 7 reads: " In general, the possession of de jure power
it 8 not suffice for the finding of command responsibility if
may 9 does not manifest in effective control. Although a court
in 10 presume that possession of such power prima facie results
produced. " 11 effective control unless proof to the contrary is

11th 12 Using that quotation and others as a basis, the
13 Circuit discussed the concept of the presumption as that
of 14 concept has been used by the 11th Circuit in its analysis
of 15 Title 7 and other discrimination cases; that is, the proof
burden 16 certain facts creates a prima facie case and shifts the
17 of production to the other side.

discrimination 18 The classic example in a Title 7 or
necessary, 19 case is by showing the various requirements that are
20 the defendant employer is usually required to come in with

21 evidence of a legitimate nondiscriminatory reason, and if
that
22 is done, the presumption, if you will, vanishes, and the
burden
23 of proving discrimination remains with the plaintiff and
as the
24 court explained in its opinion in Dudley versus Walmart
Stores
25 at 166 F.3rd, 1317, in that type of a situation, it is not

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2555

1 appropriate to instruct the jury about shifting burdens of
2 production. It is too confusing.
3 Now, I think everybody understand an appellate
court
4 responds to the issues that have been placed before it,
and in
5 the Ford case, the argument that was being placed before
the
6 court was that lack of effective control constituted an
7 affirmative defense and that by placing the obligation on
the
8 plaintiffs to prove effective control, there was a
9 misallocation of burdens of persuasion, and the court
evaluated
10 that and again by looking initially at the concept of
command
11 responsibility as it had developed in our own juris
prudence,

cases, 12 the Supreme Court's opinion of In Re Yamashita and other
Command 13 and then looking to the development of this Doctrine of
14 Responsibility as in more recent times as applied by the
all 15 International Criminal Tribunals in Yugoslavia and Rwanda,
16 of those tribunals, it is the plaintiff's burden to prove
17 effective control.

18 Interestingly enough, all of these tribunals, of
19 course, are interpreting statutes that have been enacted
Convention 20 whether it be the amendatory protocol to the Geneva
of 21 or the individual statutes passed by the General Assembly
have 22 the United Nations that's discussed and have -- at least,
23 within them the concept of command responsibility.

24 Now, having looked at this, and what I was about
to 25 say was, clearly, if there was a presumption in a sense of
a

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2556

1 presumption that shifted burdens of proof and under the
2 Evidence Code, Rule 301, if there was some type of legal
3 presumption as that term -- for instance, presumption of
4 innocence, or some of the other presumptions we regularly

would 5 instruct juries upon, it seems to me the 11th Circuit
find 6 have clearly indicated that existed, and I simply can't
7 that anywhere.
For 8 There is no statute creating that presumption.
Nations 9 instance, when you look at the enactments of the United
military 10 General Assembly, and I've tried to look at our own
So, 11 Code of Justice, and I simply can't find that presumption.
12 it seems to me that as I've indicated earlier, one has to
13 understand the concept of a presumption as the 11th
Circuit has 14 analyzed it, and, that is, that when you do have a
military 15 commander with de jure authority, there is, if you will,
this 16 presumption of effective control with respect to a prima
facie 17 case, and when a defendant comes in with competent
evidence to 18 suggest that owing to the circumstances at the time the
control 19 defendant/military commander did not have effective
the 20 because of a breakdown in the chain of command, because of
squads 21 existence of renegade units who were involved in death
private 22 because of other political interference, oligarchical
military, I 23 interference coming in and co-opting members of the

place

24 think that is enough to have the presumption vanish and
25 upon the plaintiff the obligation to establish effective

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2557

legal
sufficient
and it

1 control.
2 Now, my point is, I want it clear I have made a
3 finding that the defendants have come forth with
4 evidence to establish lack of control so that the normal
5 presumption regarding prima facie case has now vanished
6 becomes a jury question.

reaffirming
a
the
did
and I

7 It is for that reason that I, number one,
8 my earlier rulings not to instruct as to the existence of
9 presumption. I think that would be in contravention of
10 11th Circuit's opinion in Dudley versus Walmart. But I
11 want to make an explicit finding that I have concluded,
12 do find that the defendants have come forth with adequate
13 evidence establishing a lack of effective control so that
14 makes it a jury question, and in this overall context, the
15 responsibility to establish that is on the plaintiffs by a

it

16 preponderance of the evidence.

17 Now, let me turn to the requested jury
instructions.

18 In thinking and in reviewing this question about
19 whether the court should, in fact, give a supplemental
20 instruction indicating existence of a presumption, and so
on, I
21 have had occasion to go back and look at some of the base
22 documents that we've talked about.

23 And I wanted to make sure that the record
reflected
24 I've looked at an article entitled Humanitarian Law,
Uncertain
25 Contours of Command Responsibility by Matthew Lipman found
in

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2558

1 the Tulsa Journal of Comparative and International Law,
cited
2 as Nine Tulsa Journal Comparative International Law,
Volume
3 One.

4 I've also reviewed an article by Timothy Wong-
Sung,
5 W-o-n-g dash S-u-n-g, and Jonathan Kung, K-u-n-g, appeared
in
6 the Harvard Winter Law Journal 1997, Criminal Liability
for the
7 Action of Subordinates, Doctrine of Command Responsibility
and

8 its Analogs in United States Law. That is cited at 38
Harvard
9 International Law Journal, 272, 38 Harvard International
Law
10 Journal, 272.
11 And, finally, an article by Ann B. Ching, C-h-i-
n-g.
12 This is a comment entitled Evolution of the Command
13 Responsibility Doctrine in Light of the Celebici,
14 C-e-l-e-b-i-c-i decision International Criminal Tribunal
for
15 the Former Yugoslavia. This appears in the North Carolina
16 Journal of the International Law Commercial Regulation in
Fall
17 1999, cited 25 North Carolina Journal, International
Commercial
18 Regulation 167.
19 All of these articles have reviewed the
development of
20 this doctrine, and as the lawyers argue to the jury and
21 suggested that the doctrines have really been applied most
22 recently both in the Tokyo trials and in the Nuremberg
trials,
23 and now we have seen a new wave by the International
Criminal
24 Tribunals for the former Yugoslavia and Rwanda.
25 But they -- these doctrines have looked at
concept of

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of 1 holding the military commander responsible for the actions
2 the subordinate and have applied the statutory
requirement. I 3 say statutory because it is found in both of the statutes
4 creating the tribunals for Rwanda and the former
Yugoslavia,
5 and it is also to some degree found in -- although the
language
6 is just ever so slightly different, in the amendatory
language
7 Protocol One to the Geneva Convention of 1949. And what
this
8 talks about is the concept of knowing or should have known
that
9 the acts either were about to or had taken place and
taking
10 reasonable measures.

11 The language between the protocol and the
statutory
12 language creating tribunals for Rwanda and former
Yugoslavia
13 indicate that this doctrine operates on agreed upon
principles,
14 first, that a superior can be liable for admission, that
is,
15 failing to act within his duty to control subordinate; and
16 second, superior is only liable if he knew or should have
known
17 that the subordinate committed or was about to commit a
18 violation of humanitarian law.

19 Now, with that as background, I've looked at what
the

20 plaintiffs have asked for in this case, that is, for a
proposed
21 response to the jury's questions, and I believe that the
22 plaintiff's request is erroneous.

23 In the Court's instruction on command
responsibility,
24 and I am talking about the original instruction, we talked
25 about the dates when each of the plaintiffs testified as
to

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2560

1 their torture, for example, Dr. Romagoza is December 12,
1980
2 and thereafter, Ms. Gonzalez 1979, and thereafter, and
3 Professor Mauricio June 13, 1983, and thereafter.

4 In thinking about this, let me take Dr. Romagoza,
for
5 example.

6 What the plaintiffs have to establish is that as
of
7 December 12, 1980, looking at that time frame, the
plaintiff
8 has to establish that he was tortured, that the torturers
were
9 members of the military and security forces, or somebody
acting
10 in concert with them, that a superior subordinate
relationship

11 existed between the particular defendant being sued, that
is,
12 General Garcia and General Vides, and the people who
committed
13 the torture.

14 Now, that means that the plaintiffs have to prove
that
15 in this time frame of December 12, 1980, that the
defendant
16 generals, general or generals had effective control over
those
17 people who were committing the torture, and I've defined
that
18 as the material or practicability to prevent or punish.

19 Now, the plaintiffs have said as long as you
establish
20 that the general has this power -- that the
defendant/military
21 commander has this power, generally, that is enough, and I
22 don't think that is accurate. I think you have to prove
that
23 the relationship that existed between the torturers and
the
24 defendant, that the military commander had, as a matter of
25 fact, had he chosen to exercise it, he had the power to
punish

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2561

1 those people. That was within his ambit of authority, and
I

2 think that anything that would be done to defuse that,
that is,
3 anything that is done to lessen that, impermissibly
reduces
4 what has to be shown to hold a military commander liable.

5 I think that is particularly demonstrated in the
6 Harvard article that I've talked about. And in the
Nuremberg
7 trials there was one particular general, I think Van Leeb
or
8 Von Leeb, and dealt with military political officers, and
9 civilians, and the court grappled with what he should or
should
10 not be held responsible for. They held him responsible
for
11 some things and not others, but this concept of
establishing
12 ability to control the people who are doing the act is
13 critical, and I don't think we can dilute that by saying
you
14 have to show he has general authority.

15 Now, clearly, he doesn't have to know, that is,
he,
16 the military commander doesn't need to know their names --
or
17 the plaintiff doesn't have to show he knew their names, so
on,
18 so forth, but I think, as a matter of fact, the plaintiffs
must
19 show that the military commander had that type authority
over
20 the people who were doing the torturing.

21 Now, the third requirement is, of course, that he

this 22 should have known that his subordinates were engaging in
23 kind of activity, and I suppose that goes to and can be
24 established by what has happened before then.

25 You know that the reports of atrocities by the

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2562

had 1 military have been abundant and the complaints alleging
2 atrocities by subordinates under the commander's authority
3 been abundant, and then showing that he didn't do anything
4 about that, and we've talked before about essentially
giving 5 the green light.

adhere to 6 So, for all of these reasons, I am going to
7 the jury instructions that were given. I think they are
8 correct and I am going to wait and see if the jury has
9 additional questions for us.

10 I don't want to do anything that --

11 Let me go back to one last thing.

12 Consistently in discussing this, the 11th Circuit
13 indicated that this concept of having the practical or the
term 14 that was used is the material ability to prevent or punish
is 15 simply critical to this holding of effective control.
Some of

is 16 the statement talks about actual ability. The phrase that
ability. 17 used on page 2295 of the Court's opinion is material
I 18 Again, taken from many of the United Nations reports, and
19 think we've, in our case, we've agreed that material and
20 practical are one in the same. We have talked about the
21 practical ability to prevent or punish.

adhere to 22 So, for all of those reasons, I am going to
at 23 the prior jury instructions that were given and leave it
24 that.

25 Is there anything else to come before the court?

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2563

Honor 1 MR. GREEN: Your Honor, I understand that Your
2 feels bound by the 11th Circuit, and you ruled a number of
3 times about not giving an instruction on presumption,
however, 4 and if you want -- we understand that you just ruled, we
do 5 feel that the instruction, plaintiffs' proposed
supplemental 6 jury instruction including factors to consider does not
run

7 afoul of the 11th Circuit's language against giving
presumption
8 instruction. This circuit has in both Title 7, ADA
employment
9 and other civil rights cases, and corporate alter ego
cases has
10 repeatedly approved instructions that help the jury --
help
11 guide the jury in evaluating the law by considering
factors,
12 and it is pretty clear in our proposed instruction that
this is
13 the existence of the chain of command. Uniforms, location
are
14 factors that the jury can consider that are not limited to
or
15 bound by.

16 I wanted to make that clarification.

17 And for the record, we would ask that the court
18 rethink that. We've gone through and cited three, and I
went
19 through the entire 500 pages of 11th Circuit pattern jury
20 instructions and found areas where the court has
instructed and
21 considered various factors. There is no standard jury
22 instruction on command responsibility in the 11th Circuit
as
23 Your Honor is aware, and we do appreciate the amount of
24 thinking the court has given about this particular problem
of
25 command responsibility and how to adequately instruct the

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would 1 jury. We really do. We just think factors, some factors
limited 2 be particularly helpful to the jury and the jury is not
3 to these factors.

afternoon 4 Your Honor said three, four times on Friday
where 5 that the jury's question reflected serious confusion, and
burden, 6 there is serious confusion, the court, obviously, has a
Honor 7 an obligation, as difficult as it is, and we know Your
instruction in 8 has been grappling with this to try to tailor an
clarity to 9 this case, supplemental instruction to try to bring
10 what is clearly serious confusion.

11 Sorry to re-argue.

12 THE COURT: What is defense view?

list 13 MR. KLAUS: I think it is too late to give them a
14 of factors. It may have been helpful. Maybe in the
future it

responsibility, 15 will be contained in an instruction on command
I 16 and maybe it should be, but I have a host of factors that
17 think are appropriate, too, in the determination of actual
18 control or effective command or effective or practical

19 control. I don't want to get -- I mean, I thought about
it a
20 long time. Obviously, I have been thinking about it for
three
21 years, almost.

22 This doctrine is grounded in -- almost all the
cases
23 cited in any of the prior decisions, prior to the 11th
Circuit
24 decision involve cases where there was an order given
where
25 there was actual participation in the atrocities or
torture or

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2565

1 war crimes by the commander.
2 This isn't the case here. The factors I would
want to
3 consider is whether the commander was present when the
4 perpetrator committed his act.
5 Whether the act was against specific instructions
or
6 orders on the books by the commander.
7 Whether or not there was a special relationship
8 between a commander and perpetrator, in other words, had
the
9 commander trained that man individually? Had the
commander --
10 did he know that person personally? Did he have a special

and 11 relationship that would give him actual control over it,
area 12 that is why in my closing I mentioned this is such a hard
what 13 of law to try to hold another individual responsible for
doesn't 14 someone else did. Even God gives us free will. God
them, 15 accept responsibility for our acts here. He may forgive
will. 16 but he doesn't accept responsibility. He gives us free
case 17 Unfortunately, that is what a plaintiff is up against in a
on 18 like this where we don't have any indication, not anything
the 19 the record, about the commander's actual participation in
20 act, except for maybe the voice of General Vides, not even
Romagoza in 21 present when the act was happening, but viewing Dr.
22 his condition.

23 So, I think anything now, it would completely
have --
24 if those factors were considered, it would completely
change my
25 approach to the case and completely change my closing
argument,

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on, 1 and change whatever evidence I would have attempted to put

Unfortunatly or 2 and probably would have changed their's too.

jury so 3 fortunately we have to deal with what we have given the

4 far as effective command.

the 5 MR. GREEN: The plaintiffs' factors, these go to

defense 6 subordinate superior relationship. The factors that

and the 7 counsel is suggesting, rather, go to effective control,

8 jury question here reflects confusion about the superior

9 subordinate relationship. That is why we suggest these

10 factors.

of 11 If Your Honor wants to give the first two prongs

one 12 the instructions that we've suggested and add the third

we 13 with the factors that we have submitted here, that is what

14 think would balance it out.

about 15 THE COURT: I think we've agreed -- we talked

the 16 this, because defense had the view we ought to just say to

light of 17 jury, we've instructed on this and decide the case in

think 18 the instructions, and we talked the other day, that I

concepts 19 that we forget that we've been wrestling with these

the 20 for awhile, and the jury has been presented with them for

21 first time in the jury instructions, and I have always
believed
22 strongly, and I think it is within the Court's discretion
to
23 respond to questions that are posed by the jury.

24 I think that, frankly, I think it is our
obligation to
25 try to assist the jury if we can, and I think that
obligation

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2567

1 is heighten when it is clear by the jury's question that
there
2 is a misunderstanding of, A, of an instruction of law. We
may
3 have thought that the jury instruction is so clear that
that
4 misunderstanding should not exist, but, for example, the
jury's
5 second question that said shouldn't it be absolutely
necessary
6 for the accused torturers to be identified, or at least
proved
7 to be subordinates of the defendant commanders? Well, the
8 answer to that is, absolutely, they have to have been
9 subordinates of the commanders, and if someone doesn't
10 understand that, that is a basic misunderstanding of what
the
11 law requires.

12 Now, we wanted to go on and say that doesn't mean
you
13 have to know their names or ranks or serial numbers, but
you
14 certainly have got to establish the plaintiffs must
establish
15 that the perpetrators were members of the military, so on,
so
16 forth, and that they were subject to the effective control
of a
17 particular defendant, the defendant who sought to be held
18 liable.

19 Now, I think the court is absolutely obligated to
20 respond when there is a misunderstanding and it is
obvious.

21 Now, Rule 51 of the Federal Rules of Civil
Procedure
22 indicate that at the close of the evidence or at such
earlier
23 time during the trial as the court reasonably directs any
party
24 may file written requests regarding instructions.

25 Now, the plaintiff has come forth during the

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2568

1 deliberation process, obviously, well after the close of
the
2 evidence, and as a second proposed instruction has offered
its
3 version of some of the factors that one might look to in

4 determining whether the superior subordinate relationship
has
5 been established. And I would agree, I think every one of
the
6 factors that has been listed is legitimate and a
reasonable
7 factor to consider, you know, whether the people were
wearing
8 uniforms, where it allegedly occurred. The problem is
this is
9 the beginning of probably a list of factors that one might
look
10 at. I am not sure you can draw the distinction between
command
11 responsibility and lack of effective control.

12 They are interrelated here and, for example,
while
13 this is phrased -- I am not suggesting this is a proposed
14 instruction that tilts toward the plaintiff, but I do
think as
15 counsel for the defense has suggested there are probably
other
16 factors that one might add to the list, you know, even if
they
17 were wearing military uniforms. Is there -- are they
people
18 who are acting pursuant to legitimate military orders, or
are
19 they members of a renegade death squad, various other
things.

20 I won't begin to go into how you would all set these
things out
21 in neutral ways and ask the jury to look at those things.

22 My point is, this is a substantive instruction
that

23 may well have been helpful, but I think we are beyond this
24 now.

25 If the jury should come back to us with a
question

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2569

1 that directly looks at this and we can develop, you know,
a

2 fairly objective list of factors, it may become
appropriate to

3 say to the jury here are some things you can look at, but
I

4 think to go back now and give a supplemental instruction,
5 particularly one that may not be as exhaustive as I think
this

6 kind of instruction needs to be so that at least it takes
into

7 account issues raised by both sides which if established
would,

8 in fact, be legitimate issues. I think it is too late to
do

9 that.

10 I am going to decline to give this supplemental
11 instruction at this time.

12 MR. GREEN: So the record is clear, and, again, we
13 appreciate Your Honor's efforts in this matter, we do
object to

14 the instructions as read because they fail to clarify what
we

part 15 believe are questions reflecting serious confusion on the
16 of the jury. And we also object to the extent that the
court 17 has rejected our proposed written responses to the
questions 18 posed by the jury, as well as, our proposed supplemental
19 instruction regarding factors.

objection 20 Further, we reiterate our previously stated
21 and we understand that the 11th Circuit has spoken on the
22 presumption, but we do believe there should be an
instruction 23 on presumption arising from de jure.

going to 24 THE COURT: All right. Thank you all. We are
25 be in recess, then --

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2570

We 1 MR. STERN: Your Honor, there is one additional
2 question, the jury asked about the providence of Ex. 565.
3 looked into that and have a stipulation with opposing
counsel.

would -- 4 Ex. 565 is a CIA cable. I think neither side
5 both sides feel it is appropriate to respond by simply
telling 6 the jury that, or I have put this on a piece of paper that

7 opposing counsel has looked at.

8 THE COURT: Could I see that for a second?

9 MR. KLAUS: I ask that -- we haven't be able to
10 ascertain whether the date is on the face of the exhibit
or
11 not.

12 MR. STERN: I don't think the question asked about
the
13 date.

14 THE COURT: The question says: " What is the
origin of
15 Plaintiffs' 565? "

16 Do you feel comfortable in giving this response?

17 MR. KLAUS: That is fine.

18 THE COURT: Okay. Would you ask to Mr. Caldwell
make a
19 copy, give the original back to me and give a copy to the
20 jury.

21 MR. STERN: Thank you, Your Honor.

22 THE COURT: All right. Thank you all.

23 MR. KLAUS: Your Honor, we will remain available
10
24 minutes by telephone.

25 THE COURT: Yes, please, just in case there is a
jury

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1 question so we can respond.

2 Thank you all.

3 (Thereupon, a recess was taken.)

4 (Thereupon, 12:05 p.m. court reconvened.).

5 THE COURT: We received a question from the jury
that

6 says as follows: " We need you to interview the jury as to
7 outside knowledge of El Salvador. One of the jurors has
stated
8 if you know what I know".

9 Now, my proposal would be --

10 Let me stop for a moment.

11 We are dealing here with a suggestion that a
juror is

12 suggesting to other jurors that there may be information
which
13 if they had knowledge of would assist them in resolving
some of
14 the issues in this case.

15 I say that because we do not have an allegation
of a
16 juror bringing other outside influences into the jury
room, for
17 instance, other books or papers, something like that.

18 I think there are two aspects of this that are
19 troubling. Of course, the first is that someone may have
some
20 knowledge that they did not disclose to us during the jury
21 selection process, because I think we pretty much covered
these
22 areas.

23 The second aspect is someone trying to share
something
24 that has not been introduced into evidence to the other
members
25 of the jury.

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2572

1 I think the appropriate response would be to say
that
2 each juror has taken an oath to decide this case based on
the
3 evidence that they found to be believable, that is,
evidence
4 that was presented in the courtroom and the law as
presented by
5 the court, and that the verdicts of each juror should be
based
6 on that and on that alone.

7 That is what I propose we say to the jury.

8 MR. GREEN: The problem, judge, which I think Your
9 Honor correctly identified initially is that this suggests
that
10 the juror is allowing extraneous matters, matters not
11 disclosed, not received in evidence to influence what he
or she
12 finds to be believable in this case. And I think this is
a
13 potentially serious problem and I think we are all
familiar

14 with what was on the questionnaires. No one claimed to
have
15 any knowledge of El Salvador based on the questionnaires.

16 THE COURT: Other than what they told us, some
people
17 did respond.

18 MR. KLAUS: What we talked about, in addition to
the --
19 in addition to the instruction the court suggests, we
talked
20 about asking them if that is sufficient, because if it
isn't,
21 then maybe we need to do further inquiry. In light of the
22 first -- the prior question about somebody claiming a
special
23 knowledge regarding metal of honor, and this someone
claiming
24 another special knowledge comes from sources outside the
25 evidence presented.

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2573

1 THE COURT: How would you recommend this question
be
2 answered?

3 MR. KLAUS: The same way the court suggested with
the
4 caveat that -- or inquiry of the jury itself, is this
5 sufficient to answer your question, or just leave that
off, and

6 if it isn't I am sure we will get another question, soon.

those
7 MR. GREEN: This is the the second question along
8 lines. Your Honor has been clear that outside evidence is
not
9 appropriate.

10 THE COURT: How would you suggest the question be
11 answered?

an
12 MR. GREEN: First a suggestion that -- and this is
13 escalating request on the part of the jury. We need you
to
14 interview the jury as to outside knowledge of El Salvador,
and
15 we would suggest you conduct a very brief individual voir
dire
16 or even a collective voir dire of the 10 jurors on this
point.

what I
17 Is there someone here who is saying if you know
18 know. And then once that person is identified, then the
court
19 conduct an individual voir dire of that.

20 THE COURT: Where do we go from there?

21 MR. GREEN: If that juror is being influenced by
22 matters that are outside the record, outside the evidence
--
23 beyond the instructions of law, that juror would need to
be
24 removed.

25 MR. STERN: Or were not disclosed in the

1 questionnaire.

2 MR. GREEN: Or not disclosed in the questionnaire,
that
3 juror would be removed. I don't know which juror that
would
4 be. I don't think any of us know whether that information
is
5 favorable or unfavorable to either side. If that juror is
in
6 fact contaminating the remainder of the jury, we need to
get a
7 decision from the juror.

8 MR. KLAUS: Only if the first answer doesn't cure
the
9 problem, we need to go to the suggestion by Mr. Green.

10 MR. STERN: The ultimate problem, if a juror is
trying
11 to use outside information to influence others, clearly,
that
12 would influence the jury in his or her own determination
which
13 is equally as much the problem.

14 MR. GREEN: Given the fact this is the second
question
15 along this -- these lines. I would respectfully suggest
now is
16 the time for the court to intervene.

17 I think we are all concerned about this.

18 THE COURT: The case law in the criminal field

19 differentiates between what it refers to as internal
misconduct
20 and external misconduct, and, you know, a classic example
of
21 external misconduct would be somebody bringing something
into
22 the jury room, newspaper articles, and things like that.
An
23 example of internal misconduct is the jury discussing the
case
24 before they are supposed to. It is unclear what is
happening
25 here. It sounds like somebody is saying if you knew what
I

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2575

1 know, and clearly what they are suggesting is something
they
2 know not presented in evidence.
3 There is an aspect of external misconduct there,
and
4 that is what bothers me.
5 The case law suggests the court has broad
discretion
6 particularly when it is internal misconduct. When you get
into
7 external misconduct you try to identify it to make sure it
is
8 not playing a role.
9 The other side of the coin is, we don't want
something

10 like this to be used to oust a juror simply because others
11 don't agree with what they are saying or their evaluation
of
12 the evidence.

13 MR. GREEN: That is why --

14 THE COURT: So what I think I am going to do is,
I am
15 going to send them a note and indicate that each of them
has
16 taken an oath to decide the case based only on the
evidence
17 that was presented in court and that alone, and then apply
the
18 law to it.

19 If anyone finds that they cannot adhere to that,
they
20 should let us know immediately.

21 And second, if anyone possesses knowledge about
El
22 Salvador that they have not disclosed to us earlier, they
23 should let us know that immediately.

24 And that would at least bring to our attention
the
25 person and what it is that they know or don't know, and we
can

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2576

1 take whatever step is necessary.

had
unclear
the

2 MR. STERN: The problem is, though, that they have
3 that opportunity and they have evaded it, and so it is
4 to us how effective that type admonition is going to be
5 second time around.

kind

6 I think our view is that direct interview or some
7 of a --

8 THE COURT: Do we have the questionnaires?
9 What if we said if any member of the jury has
10 information of El Salvador that was not disclosed on the
jury
11 questionnaire, could you let us know immediately.

12 MR. KLAUS: Immediately?

13 THE COURT: Could you let us know immediately.

14 MR. KLAUS: Besides the first part?

15 THE COURT: Let me take a minute and write that
out.

16 Each juror took an oath to decide this case based
on,
17 one, the evidence presented in the courtroom that you
found to
18 be believable; and two, the law as explained by the court.
Let
19 this be the guiding principle of your deliberations.

20 Further, if any juror has knowledge of El
Salvador
21 that was not disclosed on the jury questionnaire, please
22 identify yourself immediately.

23 MR. GREEN: One possible solution to this-- We
think

the 24 that that is fine. Another possibility is preface that
the 25 second part of the response by saying if the jury -- if

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2577

other 1 jurors are unwilling -- unable or unwilling to disregard
2 knowledge, then you need to disclose this to the court.

3 THE COURT: Well, I am trying to respond to what I
4 think is Mr. Stern's point, and, that is, if there is
someone

5 in here who has this knowledge and not told us that, they
need
6 to come forward so you can at least find out what it is
they

7 know. They are trying to foist it on other people. The
8 question is, can they vote themselves? The only way you
know

9 that to find out what it is they think they know. I have
no
10 idea what they are talking about. If it is someone who
said

11 your questions never touched on that, if there is someone
in
12 there that has not told us the truth, and has substantive

13 knowledge, you can make your own judgments whether that
person
14 could ever have followed the evidence in this case.

15 MR. GREEN: We agree.

16 THE COURT: All right.

17 MR. GREEN: I withdraw my objection.

18 THE COURT: All right. Mr. Caldwell, would you
make a

19 copy, give me back the original and give the jury a copy.

20 MR. GREEN: And counsel.

21 THE COURT: Thank you all.

22 (Thereupon, a recess was taken.)

23

24

25

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