JAMES K. GREEN, P.A.
LAWYERS

NINA M. ZOLLO
JAMES K. GREEN

SUITE 1650, ESPERANTE'
222 LAKEVIEW AVENUE
WEST PALM BEACH, FLORIDA 33401
561.659.2029
FACSIMILE 561.655.1357

July 15, 2005

Mr. Thomas Kahn
Clerk
United States Court of Appeals
Eleventh Circuit
Elbert P. Tuttle Court of Appeals Building
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: *Romagoza v. Garcia*, Appeal No. 02-14427-FF (Argued on July 31, 2003)

Dear Mr. Kahn:

Plaintiffs-appellees ("plaintiffs") submit this letter brief in response to the Court's Order of June 24, 2005 (the "Order").[1]

(1) Is it appropriate to use the May 11, 1999 original Complaint as the date on which the action commenced (i.e., was the February 28 opinion wrong to use the February 22, 2000 Second Amended Complaint as the date on which the action commenced)?

[1] For the reasons set forth at the end of this letter, Plaintiffs also request that the Court vacate its April 20, 2005 Order denying the Petition for Rehearing and Rehearing En Banc in order to ensure this Court's jurisdiction to issue an amended opinion or judgment, if it deems one appropriate, and to clarify the deadline for petitioning for Supreme Court review.

The date this action commenced is May 11, 1999, the date of filing of the original Complaint (R1-1), not February 22, 2000, the date of the Second Amended Complaint (R1-39). Under the law of this circuit, the claims of plaintiffs Juan Romagoza Arce ("Romagoza") and Neris Gonzalez set forth in the Second Amended Complaint relate back to the May 11, 1999 filing date because they arose out of the same conduct and the same underlying facts described in the original Complaint.[2] *See* Fed. R. Civ. P. 15(c)(2) ("An amendment of a pleading relates back to the date of the original pleading when . . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . ."; *see also Mederos v. United States*, 218 F.3d 1252, 1254 (11th Cir. 2000); *Davenport v. United States*, 217 F.3d 1341, 1344 (11th Cir. 2000) (to relate back, the later claims must have arisen from the "same set of facts" as the original claims); *Pruitt v. United States*, 274 F.3d 1315, 1319 (11th Cir. 2001); *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275-76 (11th Cir. 2003).

All of the claims made by plaintiffs Romagoza and Gonzalez against Vides-Casanova in the Second Amended Complaint were in the original Complaint. Moreover, these claims all arose from the same set of facts alleged in the original Complaint, the torture of plaintiffs in El Salvador in 1980 by members of the National Guard and the liability of defendant Vides-Casanova as director of the National Guard under the doctrine of command responsibility.[3] In fact, the only difference between these Complaints relevant to the Court's current inquiry is the removal of the pseudonym Jane Doe for plaintiff Neris Gonzalez in the Second Amended Complaint.[4] Because plaintiffs' claims in the Second Amended Complaint

---

[2] Vides-Casanova was served with the original Complaint on May 13, 1999, as indicated by the return of service filed with the district court on May 19, 1999. R1-8. Service was therefore effected within 10 years of Vides-Casanova's retirement as Minister of Defense of El Salvador on May 31, 1989.

[3] Vides-Casanova claimed no prejudice below by the filing of the Amended Complaints, nor could he.

[4] Gonzalez initially filed her claims in the original Complaint under the pseudonym Jane Doe. The allegations regarding Jane Doe in the original Complaint and the allegations regarding Neris Gonzalez in the Second Amended Complaint are the same and indicate that Gonzalez is Jane Doe. *See, e.g.*, R1-1-9 at ¶ 37 ("Plaintiff Jane Doe is a Salvadoran woman who worked for several years as a lay worker with Catholic parishes throughout El Salvador."); R1-39-6 at ¶ 25 ("Plaintiff Gonzalez is a Salvadoran woman who worked for several years as a catechist and lay worker with Catholic parishes throughout El Salvador."); R1-1-10, -11 at ¶¶ 44-46 ("On December 26, 1979, during the middle of the day, Plaintiff Jane Doe went to the market in San Vicente. At the time, she was eight months pregnant. As she was returning home, four men she recognized as National Guardsmen . . . . approached her . . . . The National Guardsmen forcibly led Plaintiff Jane Doe from the market to the National Guard Post in San Vicente, located across the street . . . ."); R1-39-6 at ¶ 26 ("On December 26, 1979, Plaintiff Gonzalez -- who was then eight months pregnant -- was abducted without cause from the central market in San Vicente by four

relate back to the original Complaint, this action commenced on May 11, 1999.

(2) Does Carlos Eugenio Vides-Casanova's record conduct during his tenure as Minister of Defense of El Salvador (from 1983 to 1989) qualify Juan Romagoza Arce and/or Neris Gonzalez for equitable tolling until Casanova's retirement on May 31, 1989?

The record amply demonstrates that Vides-Casanova's actions while he was the Salvadoran Minister of Defense from 1983-89 require equitable tolling of the claims against him of both Romagoza and Gonzalez.[5]

I. The Law of Equitable Tolling

The doctrine of equitable tolling permits plaintiffs to sue after the statutory time period has expired "if they have been prevented from doing so due to inequitable circumstances." *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998) (citation omitted). Defendant misconduct "is not formally or always required for the application of equitable tolling," but is one "factor" to be considered in combination with others. *Arce v. Garcia*, 400 F.3d 1340, 1348 n.5 (11th Cir. 2005).

The United States Supreme Court has held that equitable tolling applies not only in situations where, for example, "the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass," but also in other "appropriate" cases." *Young v. United States*, 535 U.S. 43, 50 (2002). One such example is where governmental misinformation or obstruction blocks "the path to unmasking who was responsible" for a plaintiff's injuries. *Barrett v. United States*, 689 F.2d 324, 330 (2d Cir. 1982).

The recent Eleventh Circuit decision in *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), identified another category of evidence a court should consider when addressing equitable tolling in cases brought

---

National Guardsmen dressed in uniform and armed with assault rifles. The National Guardsmen forcibly led Plaintiff Gonzalez to the National Guard Post in San Vicente where she was detained in a small interrogation room."); R1-1-11, -12, -13 at ¶¶ 47-59 (describing her torture, including being forced to sit in ice water, having a bed frame balanced on her abdomen and being forced to watch the torture of a man hanging from the ceiling and a 14-year-old boy); R1-39-7 at ¶¶ 29-32 (same).

[5] As the Court directed, plaintiffs' argument below applies only to plaintiffs Romagoza and Gonzalez, not plaintiff Mauricio. *See* Order at 2-3.

under the Alien Tort Statute and the Torture Victim Protection Act. Plaintiffs, survivors of Winston Cabello, a Chilean economist murdered in 1973 by members of the Chilean military's "caravan of death," *id.* at 1152, sued Armando Fernandez-Larios, a military officer, twenty-six years after Cabello's murder. *Id.* at 1153.

The Eleventh Circuit rejected Fernandez-Larios's defense that the statute of limitations barred the claims against him, even though there was no direct evidence that Fernandez-Larios participated in the Chilean military's cover-up of Cabello's murder. The Court held that the misconduct of the Chilean military, as a whole, justified equitable tolling for Cabello's claims until 1990, when the fall of Chile's military government finally permitted the Cabello family to uncover the details of his murder:

> The Chilean government, with whom Fernandez conspired, concealed both the manner in which Cabello died and his place of burial. The Chilean government also created great confusion by sending three conflicting death certificates to the Cabello family. Until the first post-*junta* civilian president was elected in 1990, the Chilean political climate prevented the Cabello family from pursuing any efforts to learn of the incidents surrounding Cabello's murder. The district court decided that Cabello's family could not possibly have pursued their claims until Cabello's body was exhumed.
>
> We agree with the district court's conclusion that the cover-up of the events surrounding Cabello's death made it nearly impossible for the Cabello survivors to discover the wrongs perpetrated against Cabello. As a result of this deliberate concealment by the Chilean authorities, equitable tolling is appropriate in this case.

Id. at 1155.

Under *Cabello*, then, this Court must examine the actions not only of Vides-Casanova, but also of the military regime under his control, to determine whether the claims of Romagoza and Gonzalez merit equitable tolling.

II. Vides-Casanova's Affirmative Misconduct

At trial plaintiffs presented evidence of numerous specific instances of Vides-Casanova's affirmative misconduct from 1983-1989 that require application of equitable tolling to the claims of Romagoza and Gonzalez.

A. Vides-Casanova and the Salvadoran Military Concealed Incidents of Torture and Obstructed Judicial Investigations into Claims for Torture

No military officer was ever punished or prosecuted for human rights abuses when Vides-Casanova was Minister of Defense during 1983-89. R16-1381. In fact, the evidence at trial showed that rather than stopping torture, Vides-Casanova and his military subordinates routinely concealed torture or obstructed judicial investigations into torture. Defendants' own expert, Edwin Corr, a former U.S. Ambassador to El Salvador, testified that the Salvadoran military carried out a "large amount" of torture against civilians and that Vides-Casanova knew about this torture. R19-1949-1954.

A briefing paper of October 23, 1983, written for U.S. Secretary of State George Schultz in anticipation of a face-to-face meeting with Minister of Defense Vides-Casanova, stated that "[t]he military is the most powerful actor on the Salvadoran political scene." Plfs. Ex. 559 at R 3849. The briefing paper went on to detail the pattern of misconduct by which Vides-Casanova's military sought to conceal human rights abuses. Noting that "[m]any of the members [of death squads] are in the security forces," and that "[w]ith his elaborate intelligence network, [Vides-Casanova] cannot fail to know who is doing what," *id.* at R 3847, the briefing paper observed:

> No action has been taken against army officers involved in human rights abuses in the field, including at the Las Hojas cooperative where at least 18 innocent men were mudured [sic] by an army unit in February: the officer in charge has been given another command.
>
> [Vides-Casanova] can discipline officers involved in human rights violations, and this means more than simply a transfer to another unit as in the Las Hojas case. At Las Hojas there is ample evidence that an army unit killed innocent civilians yet nothing has happened. He [i.e., Vides-Casanova] must follow up on earlier incidents at La Florida and Santa Elena.

Id. at R 3846-47.

Vides-Casanova's handling of the investigation of the Las Hojas massacre epitomizes his response to allegations of abuses by subordinates. In a July 20, 1983 CIA cable entitled "Reluctance of the Salvadoran Minister of Defense to Prosecute Military Officers for Alleged Human Rights Violations," a U.S. official described Vides-Casanova's efforts to "play down" Armed Forces' involvement in the massacre:

> Minister of Defense General Carlos Eugenio ((Vides)) Casanova confided to officers of the Salvadoran General Staff that he was troubled by growing interest by the international press and human rights groups over an atrocity allegedly committed by members of Military Detachment Six in Sonsonate Department. ([redacted] comment: The atrocity, specifically the murder of 18 peasant members of a cooperative farm, took place on 22 February and eyewitnesses said that the murders were committed by uniformed troops of the Sixth Detachment under the commander [sic] of Captain Salvador ((Figueroa)) Morales.) Vides confided that while he did not doubt that Figueroa was guilty of supervising the massacre or that Detachment Six troops were involved, he preferred that the incident be forgotten since any public mention of the case could only adversely affect the image of the Armed Forces.
>
> Vides instructed Lieutenant Colonel Ricardo Aristides ((Cienfuegos)), chief of the Armed Forces Press Commission (COPREFA), to play down the incident as much as possible. Vides said that he had transferred Captain Figueroa from Sonsonate to Morazan and stated that he hoped the move would suffice as an alternative to prosecuting him. Vides added that he had no intention of allowing the prosecution of Colonel Elmer ((Gonzalez)) Araujo, Sonsonate Departmental Commander, although Vides opined that Gonzalez may have ordered the massacre of the peasants. Vides stressed his view that prosecution of military officers would damage the morale of the Armed Forces as a whole and the officer corps in particular and would be used as a propaganda issue by leftist insurgents.

Plfs. Ex. 565 at R 4094 (emphasis added) (internal paragraph numbers omitted).

Defense expert Ambassador Corr served in El Salvador from 1985 to 1988. Toward the end of his posting, on June 29, 1988, he authored a key memorandum that summarized the pattern of misconduct by which Minister of Defense Vides-Casanova frustrated investigations into human rights abuses. Plfs. Ex. 557. In this memorandum, Corr stated:

- The "normal reaction" of the Salvadoran military to a human rights accusation "is to deny involvement." *Id.* at R 3820. The military "tries to generate an alternative explanation to the effect that the FMLN [i.e., the Salvadoran guerilla forces] was responsible." *Id.* In numerous cases, the Salvadoran military "also responded by blocking any civilian attempts at internal investigation of the military." *Id.*

- Salvadoran military commanders "have refused to assist in civilian investigations" into human rights crimes of their troops. *Id.* at R 3822. "Even the USAID-funded special investigative unit . . . has not been granted access to witnesses, firearms, or unit personnel lists to try to solve some of the crimes." *Id.* at R 3822-3823. It is evident that the commanders of the units are responsible for the obstruction of justice, and they apparently can count on at least silence from anyone of equivalent or higher rank." *Id.* at R 3823.

- "The immunity of the military from unwanted investigation and prosecution is well entrenched and will be difficult to eradicate." *Id.* at R 3827.

- "The unwillingness of military officers to submit fellow officers to public scrutiny is strongly entrenched in the mentality of the officer corps and is not likely to diminish for many years. Any effort to investigate and punish human rights (or other criminal) abuses by officers above the rank of lieutenant will have to contend with this obstacle." *Id.* at R 3835.

In his memorandum, Ambassador Corr also held Minister of Defense Vides-Casanova specifically responsible for covering up a military crime.

Ambassador Corr explained that when Salvadoran Bishop Rosa Chavez accused military personnel of committing a human rights abuse (the 1988 "Canton Melendez murders"), the military "responded with an expression of outrage obviously intended to intimidate the Bishop from further declarations of this sort." *Id.* at R 3820. Later, however, a witness linked a National Guard member to the killings. *Id.* at R 3828. Vides-Casanova's reaction was, in Ambassador Corr's words, "instructive" (*id.* at R 3827):

> The eyewitness to the abductions of the [Canton Melendez] victims eventually gave declarations in court, but failed to mention the San Jose Guayabal GN [i.e., the National Guard suspect] or identify any of the other assailants except a former guerilla whom they know as "Tony." The Judge then ordered Gen. Vides to provide the names of the First Brigade soldiers patrolling the Canton Melendez area on the night of the incident. But Vides responded with a list of 450 names, 50 of which are "Antonios," and the court must now seek the cooperation of First Brigade Commander Col. Campos Anaya, which is unlikely to be forthcoming.

Id. at R 3828-3829. Ambassador Corr admitted that he was "frustrated" by Vides-Casanova's actions in the Canton Melendez matter and that Vides-Casanova "effectively stopped" this investigation. R19-1980.

By the end of the 1980s, on Vides-Casanova's watch, the number of abuses rose, with a "definite increase in attacks on the labor movement, human rights groups and social organizations." Plfs. Ex. 32 at 37. The Army reverted to the practice of mass executions. *Id.* In 1988, Ambassador Corr wrote, "For the first time in years, blindfolded bodies are again beginning to appear in San Salvador with their hands tied behind their backs." Plfs. Ex. 570 at R 4108. The number of death squad killings increased threefold from 1987 to 1988. Plfs. Ex. 32 at 38.

One of the starkest manifestations of Vides-Casanova's misconduct during this period was his appointment of a number of senior level officers known to be associated with human rights violations. According to Plaintiffs' expert Professor Terry Karl, these appointments were "extremely distressing to the U.S. Embassy and State Department" because they indicated that:

there [was] not going to be a move to try to curb the human rights abuses, but instead given the nature of the appointments which are extremely hard line individuals, many of whom have been clearly associated with human rights abuses, given that there is a feeling that General Vides -- there is a fear that General Vides will not act to curb these human rights abuses.

R15-1171. During Vice President Bush's December 1983 visit, he specifically insisted on the removal of officers with histories of human rights abuses. Rather than comply with this demand, Vides-Casanova transferred only a few officers and replaced them with other hardliners. R15-1195.

B. Vides-Casanova Prevented the Salvadoran Legal System From Handling Human Rights Claims

In its Opinion, this Court noted that "the fact that a foreign country's courts were unavailable does not explain why a suit could not have been brought in this country." *Arce*, 400 F.3d at 1350. However, although plaintiff Romagoza came to the United States in 1983, the facts above would have made even the filing of a case in the United States impossible due to the continuing abuses and climate of impunity in El Salvador. Neither Romagoza nor his lawyers could have safely traveled to El Salvador prior to 1989 to investigate the case. Not only would they have been in danger from the Salvadoran military and death squads, but eyewitnesses would have been unwilling to speak to them, much less testify in court. Discovery in such circumstances would have been futile. The military's consistent denials and cover-up of Armed Forces' responsibility for abuses would not have permitted Romagoza to successfully litigate a case attempting to prove the liability of the Minister of Defense without recourse to investigation in El Salvador. Such investigation would have been impossible prior to 1989. Plfs. Ex. 32 at 23, 131-132, 139-141, and 170.

The same situation applied to plaintiff Gonzalez, but the stakes for her were even higher, because she lived in El Salvador until 1997. Although the Court found that "a plaintiff's residency is largely within her control," *Arce,* 400 F.3d at 1350, even Gonzalez's relocation to the United States would not have improved her possibilities for bringing a successful case against Vides-Casanova. Not only would she have confronted the same obstacles as Romagoza, but unlike him, she did not have any direct

contact with Vides-Casanova during her detention and would not have been able to discover his responsibility for her torture without a thorough investigation in El Salvador.

Unrebutted evidence at trial showed, moreover, that during his tenure from 1983-89, Minister of Defense Vides-Casanova systematically undermined any effort by El Salvador's legal system to provide civil redress to human rights plaintiffs. Vides-Casanova's military created an environment where torture was tolerated and even encouraged, making it futile for Romagoza and Gonzalez to file claims and further deterring them from bringing suit in the United States.

Dr. Romagoza testified at trial that following his release from detention, neither he nor any member of his family ever filed a complaint with the Salvadoran authorities, explaining that "to go in and present such a thing would be to place my family in greater risk. No one had ever been tried for this type of torture, abuse, and violations that had taken place in the jails and by the Army. Quite the contrary. Anyone who tried to denounce anything like this or collect information about this would suffer the same fate, the same persecution . . . . It was impossible to present these cases to court." R9-139-140.

Similarly, plaintiff Neris Gonzalez testified at trial that until she had the opportunity to testify before the United Nations Truth Commission in 1992 following the Salvadoran Peace Accords, she had not filed any complaints or lawsuits in El Salvador related to her detention or torture because "[i]n my country you cannot present these types of actions. There is no system where we can take or make this type of denunciation, we don't have one. You cannot do this . . . . Fear, terror. We could make no denunciation." R17-1593.

Plaintiffs' testimony concerning the danger they faced if they tried to seek legal redress was confirmed at trial by expert witnesses. Defendants' expert, Ambassador Corr, acknowledged that military death squads would have threatened and intimidated any torture victim who sought to bring a human rights lawsuit during El Salvador's civil war. R19-1937. Obstruction of investigations of human rights abuses was tacitly or specifically approved by the highest officials of the Salvadoran military, including Vides-Casanova. R16-1320. Consequently, witnesses were afraid to identify military officers as responsible for human rights violations. R16-1378. Ambassador Corr noted that few people were willing to "risk

their lives" to name guilty parties before a judge. Plfs. Ex. 557 at R 3820; *see also* R19-1936-1937. He stated that bringing such a lawsuit would not have been "prudent." R19-1937.

Salvadoran justice system expert Margaret Popkin testified that the Salvadoran military prevented the country's civil justice system "from carrying out investigations and being able to proceed with prosecutions." R14-994. The courts were unable to compel the military to produce witnesses and evidence, and the military blatantly refused to carry out its independent obligation to investigate human rights crimes by soldiers. R14-1002-1003. There was "no willingness" on the part of Vides-Casanova's military to investigate the crimes of its soldiers. R14-1038. Asked to explain her view that El Salvador's justice system was "totally unable" to handle claims of human rights abuse, Popkin testified:

> A. [The justice system] was very much intimidated and manipulated by the military who were responsible for the human rights violations. There simply weren't lawyers who were ready to bring those cases, victims were afraid to try to do so with good reason, and had no reason to believe that they would succeed.
>
> Q. In your opinion would it have been possible for victims of human rights abuses in that period to obtain documents or witnesses to help with their case?
>
> A. It would have been extremely difficult, if not impossible.
>
> Q. Why would it have been so difficult?
>
> A. Witnesses were not willing to come forward. They didn't want to risk their lives taking on the military during that period, and documents -- there really wasn't [sic] documentary records that could be obtained that would have been helpful.
>
> Q. Your testimony that you have just given includes victims of torture at the hands of the military [or] security forces?
>
> A. Yes.

Q. Are you aware of any victim of torture at the hands of the military or security forces in 1979 through 1983 who pressed a human rights claim in El Salvador?

A. I am not aware that anyone did so during that time period.

R14-1044-1045.[6]

A U.S. State Department cable dated June 12, 1982, sent to the U.S. Embassy in San Salvador, powerfully supports Popkin's conclusions. Plfs. Ex. 554. This cable responded to an earlier message from foreign service officers on the ground in El Salvador. Plfs. Ex. 553. The local Embassy personnel had recounted in detail the horrific torture of several Salvadoran civilians by members of the security forces. In reply, the State Department urged that "as soon as victim safely departs country," the Embassy should seek out the Salvadoran Minister of Defense and President and urge swift discipline for the military torturers and the dismantling of all torture facilities. Plfs. Ex. 554 at R 3806-3807.

The State Department cautioned, however, that the Embassy must preserve anonymity for the torture victims. Plfs. Ex. 554 at R 3808. "You [i.e., the Embassy] should not, repeat not, reveal names of individuals or date of torture except to place it in the month in which it occurred this year." *Id.* The U.S. State Department obviously regarded it as inevitable that any torture victim (and his or her family) who publicized injuries at the hands of the Salvadoran military would risk further abuse, and even death. The idea of such a victim bringing a lawsuit against the Salvadoran military was, for U.S. officials, inconceivable.

IV. The Actions of the Salvadoran Military Regime Under Vides-Casanova's Command, as Well as His Own Obstructions and Cover-Ups, Justify Equitable Tolling for Plaintiffs Romagoza and Gonzalez

Equitable tolling is appropriate because plaintiffs Romagoza and Gonzalez, who were confined and tortured in clandestine cells under Vides-Casanova's command and control, were unable to

[6] Plaintiffs' expert Karl likewise testified that "[t]here is a consistent pattern of witnesses being afraid to identify military and security officers [and] in seeking in particular the protection of the church for the things that they have witnessed . . . . And there are consistent incidents . . . that show that people are afraid if they actually witness something or bear witness to something, that they will be injured themselves." R16-1378-1379.

discover the perpetrators of those abuses. To conclude otherwise would conflict with the core value that bars "inequitable reliance" on statutes of limitations: "[N]o man may take advantage of his own wrong." *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 232 (1959).

Moreover, the *Cabello* case makes clear that the misconduct of other military personnel in El Salvador's brutal regime should be attributed to Vides-Casanova. Vides-Casanova was not merely an ordinary officer, but rather the nation's Minister of Defense; *a fortiori*, the justification for tolling the statute of limitations based on his subordinates' gross acts of concealment, intimidation, and outright violence is even stronger than in *Cabello*, where Fernandez-Larios did not command the troops who concealed the victim's body and lied to his family.

In *Cabello*, the "political climate prevented the Cabello family from pursuing any efforts" to safely investigate or seek redress in their case. 402 F.3d at 1155. In both *Cabello* and this case, the actions of the governing military regimes prevented potential plaintiffs from safely investigating or identifying the evidence and witnesses needed to pursue their claims. It only became possible to take legal action when the fall of those military governments finally permitted the parties to safely seek the evidence and witnesses necessary to effectively present their cases.[7]

In this case, equitable tolling should be considered in the context of Vides-Casanova's liability under the doctrine of "command responsibility." *Ford v. Garcia,* 289 F.3d 1283, 1288 (11th Cir. 2002) (per curiam).[8] The evidence showed not only the Salvadoran military's pattern and practice of human rights violations, but also Minister of Defense Vides-Casanova's

---

[7] These concerns informed the district court's decision below to find equitable tolling: "[Bearing] in mind the testimony regarding the nature of the military in El Salvador, [its] cohesiveness, the fact that from the Plaintiffs' point of view, what was happening in San Salvador was being directed by the military [it is] unrealistic to suggest that the mere presence of General Vides here [after he left power in 1989], while the military remained in power, where people either associated with, or related to or close to the Plaintiffs would be subject to reprisals. We are talking about the ability to gather evidence and take other actions that would be appropriate to maintaining a lawsuit." R17-1662, -1664-65.

[8] In a command responsibility case such as this, the "essential elements" of liability are: "(1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime; (2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative of the law of war; and (3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes." *Ford*, 289 F.3d at 1288.

awareness of such violations, and his dereliction of military duty as a commander to prevent the violations or punish the offenders.[9]

V. Plaintiffs Respectfully Request that this Court Vacate its Denial of Plaintiffs' Petition for Rehearing and Rehearing En Banc

Finally, plaintiffs respectfully request that the Court vacate its April 20, 2005 Order denying plaintiffs' Petition for Rehearing and Rehearing En Banc in order to ensure that this Court retains jurisdiction to issue an amended opinion or judgment if the Court determines such action is appropriate. *See, e.g., Messer v. Kemp*, 808 F.2d 757 (11th Cir. 1987) (vacating denial of rehearing *en banc*); *United States v. Middlebrooks*, 624 F.2d 36 (5th Cir. 1980) (vacating denial of petition for rehearing).

Vacating the denial of the Petition for Rehearing would formally postpone the time for issuance of the mandate, which generally is to issue after the entry of an order denying a petition for rehearing. *See* Fed. R. App. P. 41(d)(1). Although the mandate in this case has not yet issued, vacating the rehearing denial that triggers the Rule 41 time for mandate issuance would provide clear notice to the parties that this Court alone continues to exercise jurisdiction over the case and that it is considering the impact, if any, on the judgment of the factual errors it described in its June 24, 2005 Order in light of the parties' responses. Vacating the rehearing denial would prevent any misunderstanding in this regard. *See Bell v. Thompson*, 2005 U.S. Lexis 5213, at *19 (June 27, 2005) (cautioning that a circuit's failure to "give notice to the parties that the court was reconsidering its earlier opinion" might mislead the parties into thinking that the failure to issue the mandate was "simply . . . a clerical mistake"); *Sparks v. Duval County Ranch Co.*, 604 F.2d 976, 979 (5th Cir. 1979) (noting that it "might be desirable" that "the parties be given notice of" an instruction to the Clerk to withhold issuance of the mandate pursuant to Rule 41(b), even though "[t]here is no requirement in the rule"), *aff'd on other grounds, Dennis v. Sparks,* 449 U.S. 24 (1980).

Vacating the denial of the Petition for Rehearing would also avoid any confusion about the appropriate deadline for any party petitioning for a

[9] The Eleventh Circuit's holding in *Ford* does *not* require that a defendant military commander have knowledge of human rights violations committed against any specific individual, or of the failure to prevent a specific offense or punish specific subordinates for their involvement in a particular human rights crime.

writ of *certiorari*, which is normally due 90 days after the denial of the petition for rehearing. *See* Sup. Ct. R. 13.3. Based on this Court's April 20, 2005 Order denying rehearing, a petition for a writ of *certiorari* was originally due July 19, 2005, but, following this Court's June 24 Order, plaintiffs sought and obtained a 30-day extension of time within which to file a petition, so that the petition currently is due on August 18, 2005. Only one additional 30-day extension is allowed by statute, however. *See* 28 U.S.C. § 2101(c); *cf.* Robert L. Stern, *et al.*, *Supreme Court Practice* § 6.4, at 357-359 (8th ed. 2002) (discussing when revision of court of appeals' opinion or judgment restarts 90-day period for seeking *certiorari*). Vacating the denial of plaintiffs' Petition for Rehearing would alleviate any possibility that this case could be pending before more than one court at the same time, and it would remove any artificial time deadline on this Court's deliberations.

Very truly yours,

James K. Green

cc: Kurt Klaus, Esq.