

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 99-8364 Civ-Hurley/Lynch

JUAN ROMAGOZA ARCE,)
NERIS GONZALEZ, and CARLOS)
MAURICIO,)
)
Plaintiffs,)
)
v.)
JOSE GUILLERMO GARCIA, an individual,)
CARLOS EUGENIO VIDES CASANOVA,)
an individual, and DOES 1 through 50,)
inclusive,)
)
Defendants.)

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**PLAINTIFFS' MOTION FOR RECONSIDERATION OF PREVIOUSLY DENIED
MOTION FOR PARTIAL SUMMARY JUDGMENT OF DEFENDANTS' *DE JURE*
COMMAND AUTHORITY, OR, ALTERNATIVELY, FOR DETERMINATION OF
FACTS WITHOUT SUBSTANTIAL CONTROVERSY**

Plaintiffs hereby move for reconsideration of their previous request under Federal Rule of Civil Procedure ("Rule") 56(d), based upon the intervening change in controlling law set forth in *Ford v. Garcia*, No. 01-10357, 2002 U.S. App. LEXIS 7866 (11th Cir. Apr. 30, 2002).

I. INTRODUCTION

Last year, Plaintiffs moved unsuccessfully for a determination under Rule 56(d) that the fact of Defendants' *de jure* command authority over the members of El Salvador's Military and Security Forces was without substantial controversy and should be deemed established for purposes of trial. On April 30, 2002, the Eleventh Circuit held in *Ford v. Garcia*, 2002 U.S. App. LEXIS 7866, at **11-23, that a prima facie showing of *de jure* command authority establishes a rebuttable presumption that a commander has "effective command" over his troops for purposes of the command responsibility doctrine. The *Ford* decision thus clarified the law of command responsibility in this Circuit, and made clear why Plaintiffs' previous request for a determination under Rule 56(d) would, if granted, significantly streamline the issues in this case.

In light of the recent *Ford* holding, Plaintiffs respectfully request that the Court reconsider its denial of their motion seeking a determination under Rule 56(d). Plaintiffs do not ask the Court to revisit their previous request for summary judgment as to the first prong of the command responsibility doctrine.

II. BACKGROUND

A. Plaintiffs' Previous Motion

On February 6, 2001, Plaintiffs moved for partial summary judgment seeking determination as a matter of law that Defendants possessed *de jure* command authority over members of the Salvadoran "Military Forces" (Infantry, Navy, and Air Force) and "Security Forces" (National Guard, National Police, and Treasury Police), and thus that Plaintiffs satisfied

the first prong of the doctrine of command responsibility with respect to each Defendant. In the alternative, Plaintiffs sought a determination under Rule 56(d) that Defendants exercised *de jure* command authority over members of the Salvadoran Military and Security Forces. See Motion at 6, 11-12.¹ Plaintiffs' Motion was supported by a Statement of Material Undisputed Facts, which set out in detail the nature and extent of Defendants' *de jure* command authority over their troops. Plaintiffs also set out the precise facts that they wished the Court to find established under Rule 56(d). See *id.* at 12.

Defendants' Response to Plaintiffs' Motion was perfunctory and, as Plaintiffs made clear in their Reply (filed on March 8, 2001), failed to cite a single genuine issue of material fact to preclude summary judgment or a determination of defendants' *de jure* command authority pursuant to Rule 56(d).

By Order dated March 19, 2001, the Court denied Plaintiffs' Motion without opinion.

B. The *Ford* Decision.

In *Ford*, the Eleventh Circuit addressed "the allocation of the burden of proof in a civil action involving the command responsibility doctrine brought under the Torture Victim Protection Act." *Ford*, 2002 App. LEXIS 7866, at *1. *Ford* made new appellate law establishing that a plaintiff in a criminal or civil case based on the command responsibility doctrine has the ultimate burden of proving that a defendant commander exercised "effective command" over his troops. *Id.* at **11-23. Equally as significant, the *Ford* court ruled that the

¹ For the Court's convenience, Plaintiffs file herewith a Notice of Filing Exhibits attaching the following documents from the parties' prior briefing: Plaintiffs' Motion (Exhibit A), Plaintiffs' Statement of Material Undisputed Facts (Exhibit B), Defendants' Response (Exhibit C), and Plaintiffs' Reply (Exhibit D).

existence of *de jure* command authority gives rise to a rebuttable presumption that a defendant commander exercises "effective command" over his troops. *Id.* at **16-17. Accordingly, once *de jure* command authority is established, if the defendant commander fails to come forward with evidence to rebut the presumption of "effective command," then the plaintiff's burden of persuasion as to "effective command" under the command responsibility doctrine is met. *Id.*

III. ARGUMENT

This court has discretion to reconsider its previous Order. *Lamar Adver. of Mobile, Inc. v. City of Lakeland*, 189 F.R.D. 480, 489-90 (M.D. Fla. 1999). Reconsideration may be granted based upon "an intervening change in controlling law." *Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002). The *Ford* holding, which completely recasts the role of *de jure* command authority in the context of command responsibility law, amply justifies reconsideration of Plaintiffs' Rule 56(d) request.

Given *Ford's* holding that *de jure* command authority gives rise to a presumption of "effective command," Plaintiffs' previous request that the fact of Defendants' *de jure* command authority be deemed undisputed, and established as "without substantial controversy" under Rule 56(d) becomes more important than ever, and ripe for reconsideration.²

Defendants have failed utterly to raise a genuine issue of material fact regarding their *de jure* command authority over their troops. Under *Ford*, Plaintiffs are entitled to use this failure to establish a presumption of "effective command," which is part of the burden Plaintiffs must

² By contrast, because the formulation of prong one of the command responsibility doctrine in Plaintiffs' Motion differs from the standard set out in *Ford*, it is not appropriate to revive that portion of Plaintiffs' request for summary judgment.

carry to show liability under the command responsibility doctrine.³ As contemplated by Rule 56(d), therefore, the Court can and should grant Plaintiffs' Motion in order to "narrow the issues in the case, advance the progress of the litigation and provide the parties with some guidance on how they proceed with the case." *Warner v. United States*, 698 F. Supp. 877, 880 (S.D. Fla. 1988) (citations omitted).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reconsider its previous denial of adjudication under Rule 56(d), and find that the fact of Defendants' *de jure* command authority (as detailed in Plaintiffs' Motion at 12) is "without substantial controversy" under Rule 56(d) for purposes of trial.

Dated: May 10, 2002

By: _____

James K. Green
ATTORNEYS FOR PLAINTIFFS

JAMES K. GREEN
(Florida Bar No. 0229466)
222 Lakeview Avenue
Suite 1630, Esperante
West Palm Beach, Florida 33401
Tel: (561) 695-2029
Fax: (561) 655-1357

³ Plaintiffs intend to submit a proposed jury instruction regarding this presumption, consistent with the *Ford* holding.

JAMES J. GARRETT
PETER J. STERN
BETH VAN SCHAACK
Morrison & Foerster LLP
101 Ygnacio Valley Road, Suite 450
Walnut Creek, CA 94596
Tel: (925) 295-3300
Fax: (925) 946-9912

JOSHUA SONDHEIMER
The Center for Justice & Accountability
588 Sutter St., No. 433
San Francisco, CA 94102
Tel: (415) 544-0444
Fax: (415) 544-0456

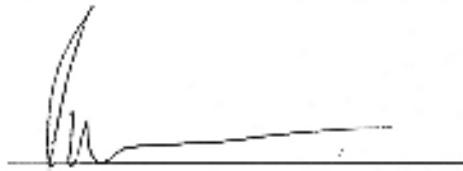
CAROLYN PATTY BLUM
Boalt Hall School of Law
685 Simon Hall
University of California
Berkeley, CA 94720-7200
Tel: (510) 642-5980

SUSAN SHAWN ROBERTS
135 Beaumont Avenue
San Francisco, CA 94117
Tel: (415) 750-9914
Fax: (415) 750-9924

PAUL HOFFMAN
Schonbrun Desimone Seplow
Harris & Hoffman, L.L.P.
723 Ocean Front Walk
Venice, CA 90291
Tel: (301) 396 0731

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to KURT R. KLAUS, JR., ESQ., 3191 Coral Way, Suite 502, Miami, Florida 33145, by Facsimile and U.S. Mail, this 10th day of May, 2002.



Attorney