

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 1300,
2 7 September 2016.]

3 MJ [Col SPATH]: The commission is called to order. All
4 parties are again present that were present when the
5 commission recessed.

6 Trial Counsel, I know you were assisting with the
7 VTC. Is Commander Mizer available and ready to testify?

8 ATC [LT CANTIL]: Yes, Your Honor.

9 MJ [Col SPATH]: All right. Then let's get him up on the
10 screen and swear him in and, Defense Counsel, you may ask your
11 questions.

12 LDC [MR. KAMMEN]: Request that from this point forward
13 you be the person to swear people in rather than anyone else
14 because, actually as we go forward, when you have the
15 prosecutor do it, it really sends a very clear message that we
16 in the defense are second class.

17 MJ [Col SPATH]: I will do this. I don't think you're
18 second class.

19 LDC [MR. KAMMEN]: I understand you don't.

20 MJ [Col SPATH]: It is -- it has been a longstanding
21 practice in the military and I know that's where it came from.

22 LDC [MR. KAMMEN]: This is a different situation.

23 MJ [Col SPATH]: Understand.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. KAMMEN]: [Microphone button not pushed; no
2 audio].

3 MJ [Col SPATH]: We'll have to brief it and have a
4 response to it. Maybe the response is, after you guys talk,
5 it doesn't matter. I account for the parties in the military
6 and I'll let you guys have a conversation. It doesn't matter
7 today for Commander Mizer.

8 LDC [MR. KAMMEN]: No, it does not matter today.

9 MJ [Col SPATH]: I'm willing to hear you all and maybe you
10 can come to an agreement without my involvement. And that
11 would be great; if not, we'll move from there.

12 All right, for today, swear in Commander Mizer and,
13 Defense Counsel, you may ask your questions.

14 ATC [LT CANTIL]: Please raise your right hand.

15 MR. BRIAN L. MIZER, civilian, was called as a witness for the
16 defense, was sworn, and testified as follows:

17 DIRECT EXAMINATION

18 Questions by the ASSISTANT TRIAL COUNSEL [LT CANTIL]:

19 Q. Would you please state your name for the record,
20 spelling your last name.

21 A. It's Brian L. Mizer, M-I-Z-E-R.

22 Q. Where do you live, Mr. Mizer?

23 A. Arlington, Virginia.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Q. Are you in a place now where you can testify freely?

2 A. Yes.

3 Q. Is there anyone else in the room with you?

4 A. Yes.

5 Q. Who is in the room with you?

6 A. What's that? A court technician. Do you need his
7 name?

8 Q. Thank you. Your witness. No, Commander Mizer.

9 **Questions by the DETAILED DEFENSE COUNSEL [LCDR POLLIO]:**

10 Q. Good afternoon, sir. Lieutenant Commander Pollio.

11 A. Good afternoon.

12 Q. Can you hear me?

13 A. I can.

14 Q. If at any point things get jumbled up on the VTC,
15 please let me know and I'll repeat the question.

16 A. Okay.

17 Q. I'd like to start a little bit about your current
18 position. Can you please answer what is your current civilian
19 position and also your job as a reservist?

20 A. So on the civilian side, I am the senior appellate
21 defense counsel for the Air Force with -- I guess part of the
22 reason for the position is capital litigation within the Air
23 Force on the military side. My reserve job is, until

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 December 1, appellate defense counsel for the Navy JAG Corps.

2 Q. Sir, in your position as the senior appellate defense
3 counsel, are you a DoD employee?

4 A. Yes. On the general service.

5 Q. On the general service.

6 A. General schedule. Excuse me.

7 Q. Yes, sir. Can you briefly describe some of your Navy
8 litigation background, when you joined as a Navy JAG and your
9 experience before you became a civilian and reservist?

10 A. I resigned my Army commission in April of 2000,
11 accepted a direct commission into the Navy JAG Corps, went
12 through in NJS that fall of 2000, and then went to what was
13 then the naval legal service office at Great Lakes north of
14 Chicago.

15 From there, I went to the USS KITTY HAWK for two
16 years in Yokosuka, Japan. After that to Navy appellate
17 defense for three and a half years. I did a brief stint
18 at Code 14, which is the Navy's civil litigation division
19 before then chief defense counsel Colonel Dwight Sullivan
20 asked me to accept orders over to OMC-D at the time. I did
21 two years there, and then left active duty after a little more
22 than nine years.

23 Q. I notice you said that the chief defense counsel

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 asked you to accept orders. Do you know why he personally
2 asked you to come over to the commissions?

3 A. I have known Colonel Sullivan personally and
4 professionally since 2004. I worked on some capital
5 litigation with him at the Code 45 Appellate Defense Division,
6 and it appeared at the time that military commissions were
7 going to get underway again after Hamdan v. Rumsfeld, that
8 Congress was working on a statutory fix. So he wanted three
9 or four litigators that were experienced and that he trusted
10 to take that assignment. So he called, and I said yes.

11 Q. Is it fair to say that within the Navy JAG Corps
12 there is a shortage of just experienced litigators versus
13 general practicing staff judge advocates?

14 ATC [LT CANTIL]: Objection, Your Honor.

15 MJ [Col SPATH]: Hang on, Commander Mizer.

16 WIT: Aye, sir.

17 MJ [Col SPATH]: Basis?

18 ATC [LT CANTIL]: Foundation, Your Honor. How would
19 Commander Mizer know that?

20 MJ [Col SPATH]: Defense Counsel.

21 DDC [LCDR POLLIO]: Sir, I believe Commander Mizer would
22 know the answer because I believe he would testify as to why
23 he was personally selected from the chief defense counsel in a

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 pool of ----

2 MJ [Col SPATH]: He can certainly give his impressions
3 about that. Counsel, it is a motion hearing. I will take
4 testimony as it's offered, and assess the credibility of the
5 witness.

6 Commander Mizer, you can answer the question.

7 WIT: Particularly at that time, Commander, there was a
8 shortage of experienced litigators. I would say that I was a
9 plank holder of the military justice career track in the Navy,
10 and that is being remedied, but I believe that there still
11 remains a shortage of skilled litigators within the Department
12 of the Navy, which is why the Navy has that program.

13 **Questions by the DETAILED DEFENSE COUNSEL [LCDR POLLIO]:**

14 Q. Yes, sir. And I'll come back to present-day
15 litigation issues and why reservists are coming back to the
16 commissions for litigation roles.

17 When you left active duty, how much litigation
18 experience had you accumulated at that time as a Navy JAG; is
19 there a way to quantify that?

20 A. I don't know. I mean, it was a brief stint at the
21 Navy Legal Service Office, and we're talking about almost
22 17 years ago now. I think the vast majority of my experience
23 was at Code 45, working with appeals, I think well over 125,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 150 appeals, somewhere in there.

2 Q. And were some of those appeals capital litigation
3 appeals?

4 A. At that time I worked on some of those cases, yes,
5 although not as counsel of record.

6 Q. Sir ----

7 A. I argued 19 cases before the Court of Appeals for the
8 Armed Forces in that three years, which I believe was more
9 than any other judge advocate in the service.

10 Q. Sir, given that skill set and your experience, were
11 you able to then parlay that into a civilian litigation
12 career?

13 A. Yes. So as I mentioned, I left active duty in 2009,
14 with the commissions closing, and accepted a position with the
15 office of the federal public defender in Alexandria. I was
16 brought on to do national security litigation and terrorist
17 cases, which that division, along with the Southern District
18 of New York, specializes in.

19 Q. And you said national security cases. Approximately
20 how many national security cases have you worked on?

21 A. During that time, five. Federal public defender.

22 Q. And were those cases that involved, you said,
23 terrorism as well, or for the ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. Four of them involved terrorism, material support for
2 terrorism. One of them -- I don't know how to describe it.
3 It was a national security case involving a green beret out of
4 Afghanistan.

5 Q. Yes, sir. During your time with the public
6 defenders, were you continuing your career as a reservist with
7 the Navy?

8 A. Yes. Yes.

9 Q. And in what roles were you fulfilling as a reservist
10 at that time?

11 A. I continued on with Code 45, the appellate defense
12 division. I moved on to be the executive officer of the
13 defense service office east, when that was stood up. I want
14 to say four years ago. And then I have been sent to the
15 military judge's course, but most recently reassigned to
16 Code 45, appellate defense, and as I said, that will change on
17 1 December.

18 Q. What will your new role be?

19 A. I don't know. As reservists, we go through slating
20 process just like you do. That board met on 22 August. The
21 results are not known.

22 Q. I'd like to talk about how you returned to the
23 commission for round two. When did you first return to the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 military commission system?

2 A. July of 2013.

3 Q. In what capacity did you return?

4 A. Initially, I was to be a resource counsel for the
5 Nashiri team, as I understood it, but then Commander Steve
6 Reyes, who was the detailed defense counsel, was accepted into
7 Harvard for his LLM, and then it was quickly -- I guess I was
8 quickly slid into the detailed counsel role for this team.

9 Q. And at that time, was there a trial in sight?

10 A. Yes and no. When I got there in July, no; two weeks
11 later, there was a trial. Judge Pohl set a trial schedule for
12 the following -- I believe it was August of 2014.

13 Q. I'd like to talk a little bit more about your role on
14 the team. You mentioned that it was quickly decided that you
15 would take over as the detailed military. Can you explain a
16 little bit more about why this role was given to you, given
17 that at that time my understanding is there were other
18 military attorneys on the team?

19 A. There were other military attorneys. There was an
20 Air Force major and an Air Force captain, and the then-chief
21 defense counsel, Colonel Mayberry, made the decision that I
22 should assume the detailed counsel role given their
23 experience. I think between them, they had spent two or three

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 years in litigation billets. I'm not sure that they would
2 even be qualified to serve as a circuit defense counsel in the
3 Air Force or for the Navy.

4 Q. And Colonel Mayberry was aware of your background
5 with not only extensive appellate work with the Navy but also
6 as a Federal Public Defender and your national security
7 background; is that fair to say?

8 A. Yes, that's right. There was an interview process
9 before individuals were accepted into the office.

10 Q. I'd like to talk a little bit as a reservist, you
11 came back to the commissions. At that time were the majority
12 of the billets to the commissions Navy reservists, at least on
13 the Navy house -- side of the house?

14 A. I believe so, yes, that that was how the Navy had
15 elected to staff -- staff that requirement.

16 Q. Okay. Moving on a little bit to your -- you say you
17 first came to the case in 2013. Do you recall about roughly
18 when it was you first met with Mr. Nashiri?

19 A. It would have been August of 2013. I was supposed to
20 be introduced to Mr. Nashiri with Nancy Hollander, but she was
21 stopped at the gate, and so I had to go introduce myself
22 alone, essentially, in this case.

23 Q. So when you had to meet him alone because

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Ms. Hollander was not able to come in there with you, how were
2 you able to build -- without going into too much
3 attorney-client detail, how were you able to build a rapport?
4 Did you discuss your credentials, perhaps, or was there
5 something else?

6 A. Yeah. I think it was just general -- general
7 background. Nothing about the case, but just trying to
8 establish some personal relationship like I would do with
9 really any client, particularly in a capital case.

10 Q. Did you notice that this particular client,
11 Mr. Nashiri more so than perhaps other clients, had a more
12 difficult time accepting client [sic], or did you face greater
13 difficulties building that relationship?

14 A. Yeah. I think that the psychological issues that are
15 at issue and have been made part of the record in this case
16 certainly inhibit an attorney-client relationship, but working
17 with our expert, Dr. Crosby, and spending the time there at
18 Guantanamo, I think that we eventually were able to build a
19 rapport, yes.

20 Q. And as that relationship became better over time,
21 were you able to build up some trust with Mr. Nashiri?

22 A. Yes, I believe so. I think that we had a very good
23 working relationship before I left.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Q. What impact do you think the loss of other counsel
2 throughout this case has had on the importance of forming that
3 attorney-client relationship?

4 A. I believe that it probably has impacted his trust in
5 counsel and in the system in general. I mean, it's probably
6 difficult, for any number of reasons, to trust this system.
7 But the revolving door of counsel, if you will, impacts that,
8 yes.

9 Q. And going back to your role as the lead military
10 counsel, I'd like to ask you a little bit, understanding that
11 the statute says there has to be a military counsel, but I
12 want to ask you what you, as military counsel, provided to
13 this team.

14 If you had to estimate, would you know about how many
15 motions it was that you led and prepared, given your extensive
16 background?

17 A. I think you could probably see that in the record
18 from the filings that began in the August time frame of 2013.
19 I was primarily involved in, I would say, every single motion
20 that was filed before the commission. If I had to put a
21 number on it, 150 motions.

22 Q. And with respect to the charges surrounding the Motor
23 Vessel Limburg, is it fair to say that you led the charge in

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that?

2 A. Yes. And I was familiar, having litigated what I
3 believe is still the only contested military commission,
4 Hamdan, familiar with many of the issues that were presented
5 there, and could draw on that experience, motions that I had
6 drafted and worked on in that case, and then just apply them
7 to some of the same issues in this case.

8 Q. Based on your meetings with Mr. Nashiri, is it fair
9 to say that Mr. Nashiri recognized the impact that you
10 personally have on his case and his defense?

11 A. Yes, I am confident in saying that, yes.

12 Q. I'd like to talk a little bit about your break in
13 active duty when you came in on 2013. Do you recall about
14 when that first set of orders expired?

15 A. Excuse me. I think -- I believe it was July of '14,
16 I had some health issues with my daughter, and took several
17 months hiatus between orders. But again, there was still a
18 trial date set at that point and had moved from -- obviously
19 from August of 2014 -- and I'm sorry, I'm having to remember
20 these dates. It had moved from August of 2014 to sometime in
21 2015. So I accepted another set of orders, given that there
22 was a firm trial date.

23 Q. And that break in service when you remobilized, were

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 those one-year orders again?

2 A. They were, yes.

3 Q. And during this second activation, did you remain as
4 the lead military counsel?

5 A. Yes.

6 Q. During this second activation, the unlawful influence
7 issue came about and was litigated in this case. Is it fair
8 to say that you spearheaded the efforts on that litigation as
9 well?

10 A. Yes. And as I say, I mentioned on the record, one of
11 the 19 cases that I did at the Court of Appeals for the Armed
12 Forces was U.S. v. Lewis which is the first apparent UCI
13 dismissal in the history of the code. So I was intimately
14 familiar with that area of the law. And when I saw the
15 conduct that had occurred in the convening authority's office,
16 I identified the issue and put together that litigation, yes.

17 Q. And during this time on -- your time on Team Nashiri,
18 given that there were other military attorneys, you mentioned
19 their lack of experience. Is it fair to say that you were
20 also the main support for the learned counsel in this case?

21 A. Yes. He works out of Indiana and is very involved in
22 the litigation, but the day-to-day operations, coordination,
23 filing, that fell to me, yes.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Q. And, again, Mr. Nashiri was in the courtroom and he
2 saw you litigate. Is it fair to say that he attributes the
3 success of that motion to your personal skills?

4 A. I think that's fair to say, yes.

5 Q. And at this time, too, were you preparing for a loss
6 of other counsel in this case?

7 A. Yes, due to normal rotation. So I was the only
8 reservist on the case. As I said, that's how the Navy at that
9 time had elected to staff its mission. The Air Force and Army
10 were sending active duty officers, and so there were two Air
11 Force officers that were issued permanent change-of-station
12 orders, and an Army active duty officer.

13 Q. Did you recognize that the loss of these detailed
14 counsel would have significant impacts on the case?

15 A. I did. I think that Mr. Nashiri had close working
16 relationships with each of those attorneys, and so I think it
17 was important to him, or impactful, I guess I would say, to
18 lose so many lawyers what would have now been two years ago.

19 Q. And your orders expired, I believe, in October of
20 2015; is that correct?

21 A. Yes, that sounds right. End of October.

22 Q. And at that point, you requested to withdraw from
23 Brigadier General, who is the chief defense counsel -- what is

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 your understanding of why you had to request from this -- this
2 from Brigadier General Baker?

3 A. Well, at the time, before he came in, Colonel
4 Mayberry, given the state of the commission and the appellate
5 litigation at that point, had told me I was going to be
6 allowed to simply end my orders, given that it wasn't clear
7 that there would be a resumption of this case.

8 When General Baker came in, citing the R.M.C.
9 provision that makes him responsible for release of counsel,
10 he directed me to submit a request to leave the case, which he
11 denied. Does that answer your question?

12 Q. Yes, it does.

13 And did you ask Mr. Nashiri if he would consent to
14 your withdrawal from the case?

15 A. I did not. We determined that that should be done
16 with conflict-free counsel, and I believe that Mr. Kammen did
17 that.

18 Q. And are you aware, though, that he has not consented
19 to your withdrawal?

20 A. I am.

21 Q. You mentioned earlier that you are a Navy reservist.
22 Are you currently in a selected drilling reserve status?

23 A. Yes, I'm SELRES, or selected reservist, yes.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Q. And as a reservist, there are many duties and
2 functions which you might be able to perform; is that correct?

3 A. Yes.

4 Q. Understanding that you chose not to accept full-time
5 activation into a full-time military status, would you be
6 willing to continue your representation of Mr. Nashiri as a
7 reserve status, in a reserve capacity?

8 A. If so authorized. As you know, Commander, I can only
9 do what The Judge Advocate General authorizes me to do by
10 statute. So with that caveat, yes.

11 Q. Can you give me one moment, sir, please?

12 A. Sure.

13 DDC [LCDR POLLI0]: Sir, at this time, that's all the
14 questions that I have. I'm going to turn you over to the
15 prosecution. I assume they might have a few questions as
16 well.

17 WIT: Sure.

18 MJ [Col SPATH]: Trial Counsel.

19 **CROSS-EXAMINATION**

20 **Questions by the ASSISTANT TRIAL COUNSEL [LT CANTIL]:**

21 Q. Good afternoon, Commander Mizer. This is Lieutenant
22 Jon Cantil.

23 A. Good afternoon.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Q. We have spoken briefly before; is that correct?

2 A. We have, yes.

3 Q. Okay. I just want to establish a few things. You
4 left the defense team in October of 2015, right?

5 A. Yes, that's right.

6 Q. And you were not to be reassigned to the Office of
7 the Chief Defense Counsel, right?

8 A. I don't know if I would put it that way. I declined
9 orders, extension, yes.

10 Q. You didn't want to be there in an active capacity
11 anymore, correct?

12 A. Right. There was no case at that point.

13 Q. Right. Now, when you left, was it a special request
14 that initiated you leaving, or was it just the end of your
15 orders?

16 A. It was the end of my orders.

17 Q. Okay. And you left for personal reasons, to do
18 something else; is that right?

19 A. Well, I'm a civilian. I have a job, and given that
20 there didn't appear to be a case, yes, to the extent that
21 that's personal, yes.

22 Q. When you left, you provided notice, as you just
23 stated, to the chief defense counsel on August 14 of 2015,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 right?

2 A. That sounds correct, yes.

3 Q. And prior to -- so you provided notice in August, and
4 then you left in October, correct?

5 A. Yes.

6 Q. So it's fair to say that your departure has been on
7 the defense's radar since at least August, right?

8 A. Yes, absolutely.

9 Q. And you spoke with the chief defense counsel and
10 Colonel Mayberry prior to writing that letter requesting your
11 release, right?

12 A. Yes, I did.

13 Q. Okay. Now, regarding your role on this team, I want
14 to clarify one of the issues that you had brought up.

15 Lieutenant Commander Pollio asked you what your role was on
16 the team and you said you were the lead military counsel.

17 A. Yes.

18 Q. Did I hear that right?

19 A. That's right.

20 Q. Okay. But you weren't the detailed defense counsel,
21 right? You were an assistant detailed defense counsel?

22 A. For political reasons, yes.

23 Q. Okay. But the answer is yes?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. But I was -- well, not really, no. Colonel Mayberry
2 told me that I was to serve as the detailed counsel.

3 Q. But on your detailing memorandum, it said you're the
4 assistant detailed defense counsel?

5 A. That's right. It does say that.

6 Q. Okay. Now, you talked a little bit about working on
7 a capital appeal. Is it fair to say you haven't tried a
8 capital case as a trial defense attorney; is that accurate?
9 Besides -- excluding this one.

10 A. Through jury verdict? What's your question,
11 lieutenant?

12 Q. Yes, that's right.

13 A. I worked on a capital case in the Eastern District of
14 Virginia, the Torres case, for several years. We were fired
15 immediately before counsel. I also was detailed counsel to
16 Abdul Aziz Ali in the 9/11 military commission and I recently
17 completed the United States v. Witt case, which is a capital
18 case on direct appeal in the Court of Appeals for the Armed
19 Forces.

20 Q. In the Witt case you were as appellate counsel,
21 right?

22 A. Right.

23 Q. Do I understand that right?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. Yes.

2 ATC [LT CANTIL]: I have nothing further.

3 MJ [Col SPATH]: Defense counsel, any follow-up?

4 DDC [LCDR POLLIO]: Yes, sir, briefly.

5 **DIRECT EXAMINATION CONTINUED**

6 **Questions by the DETAILED DEFENSE COUNSEL [LCDR POLLIO]:**

7 Q. I'd like to clarify a little bit about the
8 distinction between the lead military counsel and your
9 assistant detailed counsel. When you first arrived here,
10 Commander Reyes had a detailing letter that said detailed
11 counsel; is that correct?

12 A. That's right.

13 Q. When you came on to the team, did anybody after that
14 have a letter saying detailed counsel, or was everybody
15 assistant detailed counsel?

16 A. Everyone was made assistant detailed counsel,
17 although, as I said, I was given the direction that I was to
18 serve as the detailed defense counsel by Colonel Mayberry.

19 Q. And why were you given the direction to serve as
20 detailed counsel, although your detailing letter might have
21 said assistant, as did everybody's letter at that time?

22 A. Because of litigation experience.

23 DDC [LCDR POLLIO]: I think that's it.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col SPATH]: Trial Counsel, any follow-up?

2 ATC [LT CANTIL]: Nothing further, Your Honor.

3 MJ [Col SPATH]: Mr. Mizer -- Commander Mizer, I know, in
4 your reserve capacity -- just give me a moment to take a look
5 through my notes and see if I have any questions.

6 WIT: Yes, sir.

7 **EXAMINATION BY THE MILITARY COMMISSION**

8 **Questions by the Military Judge [Col SPATH]:**

9 Q. From October of 2013 -- or I'm sorry, July of 2013, I
10 think August of '13 is when you said you first met
11 Mr. al Nashiri ----

12 A. Yes, Judge.

13 Q. ---- until your departure in October of '15, can you
14 give me an idea of how many times you've traveled to GTMO and
15 met your client?

16 A. I would say at least every other month, Judge. And
17 I'm sorry, between the two tours, it kind of runs together.
18 Between '07 to '09, and '13 to '15, the best I can say is at
19 least every other month.

20 Q. And each time you traveled down in that period, so
21 again, from August of '13 until October of '15, did you meet
22 with your client?

23 A. Yes.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Q. Probably hard to estimate how much ----

2 A. I guess let me have one caveat to that, Judge. There
3 was an issue with my read-on when I came back in. So at the
4 end of that tour, I think that there was one time where I was
5 turned away by JTF-GTMO, so I want to be precise with that.

6 Q. And it may be hard to capture. About how much time
7 would those meetings take, if you can?

8 A. We would meet all day, Judge. So eight hours at a
9 time. If we were down there for hearings and we're away
10 from -- we're away from the responsibilities before Your
11 Honor, we were out there on weekends, Saturday, Sunday. And
12 the JTF actually accommodated those visits, so pretty much
13 longer than probably any other interaction with a criminal
14 defendant, I would say, just because of the travel
15 constraints.

16 Q. So this case went through a period of time where it
17 was not active, was in a period of hold. As you remember, the
18 appellate court put a stop to our proceedings.

19 A. Yes, Your Honor.

20 Q. Can you give me an idea of how -- so from -- can you
21 give me an idea of how long you were participating in this
22 case while it was an active case, at least in your mind?

23 A. While it was an active case? They shut it down, I

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 think, the government, with the motions to stay, beginning in
2 June. If I'm wrong, I'm off by a month. So between August --
3 late July, early August of '13 to June of '15.

4 Q. All right. I think those are all of my questions.
5 Let me see if I have caused any more. Bear with us for a few
6 more minutes.

7 WIT: Aye, sir.

8 MJ [Col SPATH]: Defense counsel?

9 DDC [LCDR POLLIO]: Yes, sir. I just have a few
10 follow-up.

11 **REDIRECT EXAMINATION**

12 **Questions by the DETAILED DEFENSE COUNSEL [LCDR POLLIO]:**

13 Q. Sir, the judge asked a little bit about your meetings
14 with the clients. To be clear, when you come down to meet
15 with the client on client visits, those are more than one-day
16 meetings, correct?

17 A. Oh, absolutely. I didn't mean to leave that
18 impression. They were usually -- they go for the whole week.
19 So if we're there between a Monday and a Thursday, every
20 available day we would be meeting. So it would be the Tuesday
21 and Wednesday of that week, both of those days would be eight
22 hours back with the client.

23 Q. Understanding that it's incredibly difficult to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 travel here to Guantanamo and meet with your client, are there
2 other ways that you're able to continue that relationship
3 besides flying down to the island and physically meeting with
4 him?

5 A. Yes, through letters on the point-to-point system.

6 Q. And it's fair to say that you were in constant
7 communication via that system throughout this time as well,
8 correct?

9 A. Yes.

10 Q. And although the case was no longer perhaps in active
11 hearings down here in Guantanamo past that June 2015, it's
12 fair to say that your relationship continued after that point,
13 correct?

14 A. Yes, absolutely.

15 Q. Thank you.

16 A. I ----

17 MJ [Col SPATH]: Commander Mizer, you were going to say?

18 WIT: I just said that I just didn't counsel on the
19 severance issue, as I referenced before, Judge. That's it.
20 But our relationship continued. We continued a normal
21 attorney-client relationship on other issues after that point.

22 MJ [Col SPATH]: One more time, let me just check.

23 Trial Counsel, any follow-up?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ATC [LT CANTIL]: No follow-up.

2 MJ [Col SPATH]: Thank you.

3 DDC [LCDR POLLI0]: No, sir.

4 MJ [Col SPATH]: Commander Mizer, I know traveling to the
5 Mark Center can be challenging so I appreciate you traveling
6 over there and making yourself available to testify.

7 WIT: Yes, sir. Thank you.

8 MJ [Col SPATH]: All right. You're excused for now.
9 Thanks.

10 **[The witness was excused and the VTC was terminated.]**

11 MJ [Col SPATH]: Switching for a moment away from that
12 motion, I just want to look then to Lieutenant Commander Gill.
13 Where are we at with that witness?

14 ATC [LT MORRIS]: Your Honor, Lieutenant Commander Gill --
15 Mr. Gill, he will be testifying in his civilian capacity -- is
16 standing by at the Mark Center available to testify.

17 MJ [Col SPATH]: Then my plan, we'll take the testimony so
18 we can get the witness finished and out of the Mark Center,
19 and then we're going to take argument on what we just heard,
20 which I believe was 3 -- let me just make sure, 348 or 350.

21 LDC [MR. KAMMEN]: 348, the Mizer motion.

22 MJ [Col SPATH]: 348. So we'll take the argument after we
23 get that testimony, and we'll move into the 348, too. My plan

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 for the classified session now that I've had a chance to just
2 talk with the security officers and all, just to make it
3 easier, we'll do it tomorrow whenever we're done dealing with
4 unclassified information. Whatever time that is, we'll do it
5 in the afternoon so that we just stop once. We'll be able to
6 do the orders from the 505 hearing after that so that we're
7 ready to go on Friday with any classified hearing if we have
8 one. So that's our plan. I made sure everyone here that can
9 at least assist with drafting the orders and such, can we do
10 that, and we know we can. So that's where we're at. So we'll
11 just keep moving today through the unclassified information,
12 try to get through as much as we can that makes sense. Some
13 of it we won't get through today and we'll try to take up
14 tomorrow.

15 Let's take a short break and get the VTC set up and
16 get everything ready for Lieutenant Commander Gill. I see I
17 have got comments from both sides. Mr. Kammen, you're first
18 up, yes.

19 LDC [MR. KAMMEN]: Before we do this, now or late -- I
20 would like to make a record -- [Microphone button not pushed;
21 no audio] -- with respect to the whole witness issue on 332,
22 because -- so again, I'm happy to do it now or ----

23 MJ [Col SPATH]: We're going to do -- yes, I will give you

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the time to do that. I just want to get the testimony of the
2 witness so we can get them done.

3 LDC [MR. KAMMEN]: But I'd like to do it prior to the
4 testimony of the witness simply to put on the record sort of
5 how unorthodox this all is as compared to an Article III
6 court, starting with the statute. The statute provides -- and
7 I don't know if you want to take a break or we can go into it.
8 However you want to do it.

9 MJ [Col SPATH]: You will have an opportunity to be heard.

10 LDC [MR. KAMMEN]: Okay.

11 MJ [Col SPATH]: Trial counsel.

12 ATC [LT MORRIS]: Is there a need, Your Honor, to handle
13 the underlying motion to compel discovery, or will Your Honor
14 be handling that later this afternoon?

15 MJ [Col SPATH]: We will handle that after. We have
16 agreed on that witness testifying.

17 ATC [LT MORRIS]: The testimony and defense, correct me if
18 I'm wrong, is for the underlying 332X.

19 MJ [Col SPATH]: I understand. But you all have agreed on
20 that testimony. I mean, you've said that that witness you're
21 going to call, correct? Lieutenant Commander Gill.

22 ATC [LT MORRIS]: We made that witness available to the
23 defense. We follow Your Honor's footnote in your ruling, and

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 concur that in regards to your analysis of his relevance, we
2 want to agree with Your Honor in that regard. But in regards
3 to allowing him to testify and making his allegations, the
4 government provided him.

5 MJ [Col SPATH]: So here's the question. I mean, we have
6 the witness. Part of it is -- I don't think we're that
7 unique. We're unique from Article III courts because we're
8 not an Article III court. I say that frequently, again, in my
9 other job, because I'm an Article II court there. That's not
10 unique. Other agencies are able to do that. Other executive
11 agencies.

12 What I'm trying to do is use our time wisely. And
13 I'm quite comfortable I can segregate out if the testimony
14 ultimately is inadmissible or not necessary for the motion.
15 What we have done, though, is we have a witness travel all the
16 way to the Mark Center. They're available. We're here. And
17 so it makes sense to handle it, get the witness out of here,
18 and then, as I said, we'll take up 332AA and then we'll move
19 over from there to the substance of 332. And you will get a
20 ruling on 332AA regardless of what we hear now. We're not
21 going to change it. What I'm trying to do is use everybody's
22 time as wisely as we can.

23 And again, as I mentioned to Commander Mizer, I know

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 what it's like to go to the Mark Center and I know what that
2 entails in D.C. So just to not have him sit there, or worse,
3 travel for no reason, at least in his mind, we'll deal with
4 that and then we'll come back and move on with arguments.

5 I promise, Mr. Kammen, you will have a chance to be
6 heard on all of the issues in 332 and 348. We'll move from
7 there. When he's ready to go, let somebody from the judiciary
8 staff know, we'll come back on the record and we'll take that
9 testimony.

10 Thanks. The commission is in recess.

11 [The R.M.C. 803 session recessed at 1338, 7 September 2016.]

12 [END OF PAGE]

13

14

15

16

17

18

19

20

21

22

23

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT