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1 [The R.M.C. 803 session was called to order at 1603,
2 24 September 2018.]

3 MJ [LtCol LIBRETTO]: This commission is called to order.
4 All parties present when the commission last recessed are
5 present again, with a number of exceptions, including my
6 predecessor, Colonel Rubin as Military Judge, Captain Depue
7 for the prosecution, and Commander Cooper, Captain Fischer,
8 and Major Fewell for the defense. The accused is not present.

9 The commission was previously scheduled to commence
10 this morning at 0-9. The accused refused to attend that
11 session of the commission and refused to expressly waive his
12 presence via a written waiver. This written waiver which
13 contains the notes of the JTF-GTMO deputy SJA is marked as
14 Appellate Exhibit 124N.

15 Subsequently the senior medical officer conducted an
16 examination of the accused, the results of which are
17 documented in Appellate Exhibit 125M. Based on that
18 examination and its results, the government indicated an
19 intent to present evidence in order to determine whether the
20 commission may proceed in the accused's absence.

21 I will provide a bit more background as I summarize
22 the three 802 conferences that we had today in a moment, but
23 at this point, I will have the parties note who is present,

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1 and then we are going to proceed directly to taking the
2 testimony of the senior medical officer.

3 I will address the excusals of certain counsel in
4 addition to allowing the parties to conduct voir dire and take
5 up other matters that were due to be addressed during this
6 week's session at a later time.

7 At this session we will solely be receiving the
8 testimony of the senior medical officer.

9 Tomorrow morning, when we reconvene, at that time if
10 the accused is not present and has refused to attend the
11 session, the commission will receive any additional evidence
12 and argument the parties would desire to present on the issue
13 of whether this commission can and should proceed in his
14 absence.

15 Trial Counsel, if you would please state who is here
16 to represent the government.

17 TC [CDR SHORT]: Thank you, Your Honor. All members of
18 the government who were present when the commission recessed
19 are once again present, with the exception of Assistant Trial
20 Counsels Lieutenant Commander David Lincoln and Captain Eric
21 Depue. Your Honor, just for the record, you did not
22 mention -- I don't believe you mentioned Lieutenant Commander
23 Lincoln in your summary, but I just want to make sure that is

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1 clear. They have moved on to their next assignments, and we
2 wish them well in their new endeavors, Your Honor.

3 MJ [LtCol LIBRETTO]: Okay. Thank you. And if you would,
4 please state for the record where the proceedings are being
5 transmitted to by closed-circuit television.

6 TC [CDR SHORT]: Absolutely, Your Honor. These
7 proceedings are being transmitted stateside via CCTV to remote
8 viewing sites at Fort Meade, Maryland and Fort Devens,
9 Massachusetts, pursuant to the commission's order, Appellate
10 Exhibit 005I.

11 MJ [LtCol LIBRETTO]: Thank you very much.

12 And Defense, who is here to represent the accused?

13 ADC [MR. THURSCHELL]: Judge, Adam Thurschwell, acting
14 lead counsel, pending the appointment of Ms. Susan Hensler as
15 permanent lead counsel. She remains, one year later --
16 actually more than a year later -- without the required
17 security clearance required for her to step into that job. I
18 do not anticipate staying in this position too much longer,
19 but for now, I am acting lead counsel.

20 With me at counsel table is Major Yolanda Miller,
21 United States Air Force. At the next table is Mr. Raul Ayala
22 Santiago and Mr. James Anderson.

23 MJ [LtCol LIBRETTO]: Thank you very much,

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1 Mr. Thurschwell. I will note the absence of Major Fewell for
2 this session was consented to by the accused and approved by
3 the commission in Appellate Exhibit 124K.

4 I further note the absence of civilian defense
5 counsel Brent Rushforth who previously requested permission to
6 be absent from this session in AE 007S, which was subsequently
7 granted by the commission.

8 As I mentioned a moment ago, I will address the
9 excusals of Commander Cooper and Captain Fischer on the record
10 at a later session of this commission.

11 And although we are not going to proceed with voir
12 dire at this time, I will note that I was detailed to this
13 commission pursuant to Rule for Military Commissions 503 on
14 13 June of 2018 by the Chief Judge of the Military Commissions
15 Trial Judiciary who at that time was Colonel James Pohl. I am
16 certified and qualified in accordance with Articles 26(b) and
17 (c) of the Uniform Code of Military Justice as well as Rules
18 for Military Commission 502 and 503. I have previously been
19 sworn under Article 42(a) of the Uniform Code of Military
20 Justice and Rule for Military Commissions 807.

21 For the record, I am not aware of any matter that
22 might tend to disqualify me from presiding over this
23 commission. And as I mentioned a moment ago, I will permit

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1 counsel to explore that further at a later session of this
2 commission.

3 Prior to proceeding, I will provide some clarity as
4 to what has occurred today by way of summarizing the three 802
5 conferences that were held today. First, a Rule for Military
6 Commissions 802 conference was held at 1700 -- excuse me. I
7 apologize for a moment -- 1700 on 23 September 2018 in AV-34.
8 The military judge and both parties were present. The accused
9 was not present.

10 After brief introductions, I informed the parties we
11 would start today's session with voir dire. I noted that I
12 know Major Rudy from the Marine Corps Base Camp Lejeune and I
13 previously had worked for Brigadier General Baker.

14 We discussed the start time, the overall order of
15 today's session, and the fact that the commission is mindful
16 of the accused's health status and will proceed accordingly.

17 With regard to the order of today's session, we
18 discussed that I will state my qualifications on the record,
19 address excusals and absences of counsel, and then address
20 motions in the following order: AE 117, 024, 027, 019, 085,
21 and if we had time, 121.

22 The defense requested additional time to meet with
23 the accused prior to today's session, and I had approved that

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1 request. Additionally, I requested the commission be notified
2 of any issues that may cause delay.

3 The defense requested clarification with regard to
4 their AE 059E motion to transcribe 802 conferences, and I
5 confirmed that it was constructively denied at that time, but
6 could be taken up at a later time if desired.

7 The defense informed the commission they will address
8 medical accommodations according to the accused's real time
9 health status and that they would like to state a new fact on
10 the record that will be relevant to AE 012I, if they choose to
11 move the court -- the commission to reconsider the
12 commission's previously ruling on that issue. Finally, the
13 defense stated that they would like to clarify their position
14 as presented in AE 026B.

15 A second Rule for Military Commission 802 conference
16 was held at 0845 this morning, on 24 September 2018. The
17 military judge and both parties were present. The accused was
18 not present. Prior to the conference, the defense via e-mail
19 renewed their request that the 802 be transcribed verbatim and
20 entered in the record. Once again, the commission
21 constructively denied that motion.

22 The defense informed the commission that the accused
23 has not signed a waiver of appearance. The government

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1 informed the commission that the JTF SJA requested the senior
2 medical officer to conduct a medical evaluation, after which
3 they will be made available for testimony with regard to the
4 health status of the accused. The government additionally
5 requested that both the SJA and senior medical officer testify
6 under a pseudonym.

7 At that time the commission postponed the 0-9 start
8 for the session today pending an updated report by the senior
9 medical officer after he had an opportunity to evaluate the
10 accused.

11 Later on in the day, the senior medical officer had
12 conducted a medical evaluation; and in light of an updated
13 declaration by the senior medical officer, a third Rule for
14 Military Commission 802 conference was held. That was held at
15 1400 this afternoon. The military judge and both parties were
16 present. The accused was not present.

17 The government informed the commission that under the
18 circumstances, they request the commission go on the record
19 for a fact-finding session and present the testimony of the
20 JTF SJA and senior medical officer. They recommended this
21 session take place today due to future availability concerns
22 regarding the senior medical officer. The defense objected to
23 this proposal for starting -- or for conducting that hearing

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1 today, but stated that if it were to go forward, that they
2 would be provided time to interview the senior medical officer
3 prior to going on the record.

4 The commission determined a session will be held
5 today, this afternoon, for the limited purpose of hearing
6 testimony from the senior medical officer, and further
7 provided the defense time to interview the senior medical
8 officer as requested. The commission was due to proceed at
9 1500, at which time the defense requested an additional hour,
10 which the commission granted.

11 Do both parties concur with my summation of the 802s
12 that occurred yesterday evening and earlier today, or have
13 anything else to add relative to them?

14 ATC [MR. SPENCER]: Your Honor, just from the government,
15 if I misspoke during the 802, I apologize. The government,
16 subject to the commission's request to have the senior medical
17 officer and the ASJA standing by for possible testimony, it
18 will be the government's position that AE 124M and AE 124N,
19 AE 124M being the latest declaration and November being the
20 unsigned waiver or the waiver that was unsigned by the accused
21 with notes from the medical officer, are sufficient for the
22 commission to make its ruling on the question of
23 voluntariness.

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1 Again, as requested by the commission, both those
2 witnesses are standing by. Should the commission desire to
3 hear from them or should the defense wish to call them, then
4 we are prepared to examine them, Your Honor.

5 MJ [LtCol LIBRETTO]: So if I understand your position
6 correctly, the government does not intend to call either of
7 those two individuals?

8 ATC [MR. SPENCER]: Not unless the commission wishes to
9 hear from them, in which case we would call them as our
10 witnesses, if the commission so desires.

11 MJ [LtCol LIBRETTO]: Okay. Thank you.
12 Defense?

13 ADC [MR. THURSCHELL]: First, I would just note for the
14 record that in response to the e-mail notice of the second 802
15 hearing this morning, the defense renewed its request to have
16 the 802 hearings transcribed. I don't recall if that was
17 addressed explicitly, but to the extent it was denied
18 constructively, again, I would appreciate your making that
19 explicit on the record now.

20 We also object strenuously to going on the record to
21 take any evidence whatsoever today in the absence of
22 Mr. Al-Tamir, and I request the opportunity to make my record
23 and explain that, that basis. If, in the event the commission

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1 denies -- ultimately overrules that objection, I request the
2 opportunity, subject to that objection, to renewing our --
3 requesting reconsideration of AE 102I, which, if granted,
4 would have an effect on some of the objections that I -- that
5 we have to proceeding today.

6 So may I proceed with my objections to moving
7 forward?

8 MJ [LtCol LIBRETTO]: Do you have anything else to
9 summarize or add to the summary of 802 conferences?

10 ADC [MR. THURSCHELL]: I do not.

11 MJ [LtCol LIBRETTO]: Okay. Please bear with me a moment,
12 then. And although contained in the summary of the 802
13 conferences, I believe I did mention that I constructively
14 denied the motion to -- the e-mail motion, that is, to, once
15 again, transcribe and record the 802 conferences. Okay.

16 Mr. Thurschwell, with regard to your request to
17 proceed with putting your objections on the record to this
18 fact-finding session wherein we are only going to be taking
19 the testimony of a single witness, that is, the senior medical
20 officer, that request at this point is denied.

21 You will have the opportunity, either in writing or
22 orally on the record tomorrow, depending on the circumstances
23 of that session and whether or not the accused presents

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1 himself for the session, to make a record as to the -- well,
2 frankly for this session this afternoon. And if the
3 commission were to determine that we are going forward in the
4 accused's absence, you can certainly at that time place your
5 objections on the record at that time. However, I do not
6 believe it's necessary to provide the defense the opportunity
7 to put those objections on the record based on the extremely
8 limited scope of this session this afternoon.

9 With that, government, I do ----

10 ADC [MR. THURSCHELL]: Judge, pardon. Judge.

11 MJ [LtCol LIBRETTO]: Yes.

12 ADC [MR. THURSCHELL]: The second piece of that request
13 was if you denied the opportunity to put the objection on the
14 record and overruled it, I asked if I could very briefly move
15 orally for reconsideration of AE 102I, which, if granted,
16 might help the underlying objections that we wish to speak.

17 May I speak briefly to that?

18 MJ [LtCol LIBRETTO]: As to -- are you going to move the
19 court for reconsideration?

20 ADC [MR. THURSCHELL]: I am.

21 MJ [LtCol LIBRETTO]: Okay. Not at this time. You will
22 have the opportunity to do so before we proceed any further
23 given the limited, again, nature of this session wherein we

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1 are only taking and preserving the testimony of the senior
2 medical officer who may or may not be reasonably available in
3 light of his other duties to testify tomorrow morning, which,
4 as we discussed during the 802 session, may become moot
5 entirely in light of the accused once again being provided the
6 opportunity to attend the session tomorrow morning.

7 So you can move the court either in writing -- well,
8 I'm going to require the motion to reconsider the previous
9 ruling to be in writing if you intend to so move.

10 ADC [MR. THURSCHELL]: Thank you.

11 MJ [LtCol LIBRETTO]: Government, with that, please call
12 the senior medical officer. And I understand that you are
13 requesting that the senior medical officer be permitted to
14 testify under a pseudonym.

15 ATC [MR. SPENCER]: Yes, Your Honor, consistent with
16 AE 014A, which is the Protective Order #3.

17 MJ [LtCol LIBRETTO]: Very well. That request is
18 approved, and you may call the witness.

19 ATC [MR. SPENCER]: Your Honor, the government calls the
20 current senior medical officer to the stand.

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1 CURRENT SMO, U.S. ARMY, was called as a witness for the
2 prosecution, was sworn, and testified as follows:

3 DIRECT EXAMINATION

4 Questions by the Assistant Trial Counsel [MR. SPENCER]:

5 Q. Good afternoon, Major. Would you please state for
6 the record your current duty station and current billet
7 assignment.

8 A. Joint Task Force GTMO as the senior medical officer.

9 Q. Thank you. And I will refer to you as approved by
10 the military judge under pseudonym. I will use "SMO" or
11 "Current SMO" to refer to you.

12 So SMO, would you please explain to the commission
13 how long have you been the current SMO?

14 A. I came on island most recently and started duties
15 handing off on the 17th of September.

16 Q. So you have been in Guantanamo conducting SMO duties
17 since last week, early last week approximately?

18 A. Yes.

19 Q. The outgoing SMO who had previously signed
20 declarations previously submitted to this commission, did you
21 have the opportunity to turn over with the outgoing SMO?

22 A. Yes, ongoing.

23 Q. And that -- so that turnover is ongoing. Your

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1 current assignment is as the senior medical officer?

2 A. Correct.

3 Q. As part of that turnover, did you have the
4 opportunity to discuss the accused's medical history with the
5 prior SMO?

6 A. Yes.

7 Q. Did you have the opportunity to discuss his current
8 medical status with any other medical providers?

9 A. Yes. With the team here, including the corpsmen,
10 physical therapy, physical therapy techs, and then
11 communication with the neurosurgeon.

12 Q. So the neurosurgeon is the neurosurgeon that
13 previously operated on the accused; is that correct?

14 A. Correct.

15 Q. Are you aware of communications between the previous
16 SMO and the neurosurgeon in recent days?

17 A. Yes. I know about their e-mails.

18 Q. Understood. How many times have you evaluated the
19 accused?

20 A. I saw him last week for one major visit where I was
21 responsible for all elements of the examination and history,
22 and then twice more in visitation with the current SMO and
23 then again this morning.

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1 Q. So that's four times total that you now have
2 personally participated in medical evaluations of the accused;
3 is that fair to say?

4 A. Yes.

5 Q. How long on average did those visits last?

6 A. Anywhere between 15 to 30 minutes at each visitation
7 with him, other time reviewing records.

8 Q. Have you had an opportunity to review his current
9 medical records?

10 A. Yes.

11 Q. Have you had an opportunity to review his prior
12 medical records let's say prior to his May -- his most recent
13 surgery?

14 A. Yes, from the time of that surgery.

15 Q. So from the time of the May surgery, you have had the
16 opportunity to review those medical records?

17 A. Correct.

18 Q. How long did your evaluation of him this morning
19 last?

20 A. I'd say in the realm of 20 to 30 minutes, 25 minutes,
21 around that time frame. The same as prior.

22 Q. And was anyone else present when you conducted this
23 evaluation?

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1 A. Yes. Guard staff, corpsmen, and the transfer of
2 authority to a SMO.

3 Q. The outgoing SMO?

4 A. Uh-huh.

5 Q. Or the prior SMO with you being the current SMO?

6 A. Correct.

7 Q. What was the accused's demeanor when you evaluated
8 him this morning?

9 A. When I first went in to see him, he didn't want to
10 see us yet because he was going to wash his feet. So he was
11 walking around getting in position and then stepped back. And
12 then we talked together, no different than prior. It was
13 pleasant.

14 Q. How was he walking around when you first attempted to
15 meet with him?

16 A. Through a walker.

17 Q. So he is walking in his -- the area that he is in
18 with the aid of a walker?

19 A. Correct.

20 Q. Is that consistent with what you've previously
21 observed with him?

22 A. On the prior assessments I have only seen him sitting
23 and didn't observe him walking, but this time I did observe

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1 that.

2 Q. Did he relate to you his current medical condition as
3 of this morning?

4 A. Yes, we discussed how he was feeling this morning.

5 Q. And what did he say to you about his current medical
6 condition?

7 A. In discussion with him, it was asking comparison from
8 prior to now; and he seemed to indicate that things were about
9 the same as they were before.

10 Q. Did you ask him if there had been any change from
11 Friday, when you last evaluated him?

12 A. We talked about two things for a change. One would
13 be how pain was particularly, and then how side effects and
14 medications were, because I made some medication change last
15 week due to side effects.

16 Q. What were the -- can you talk about those medication
17 changes, Doctor? What were those changes?

18 A. Last week he had been taking Flexeril, and he said
19 that that made him very sleepy or groggy, and so we switched
20 that to methocarbamol.

21 Q. And is there another name for methocarbamol?

22 A. Robaxin.

23 Q. So the reason for the transition from Flexeril to

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1 Robaxin was to make -- hopefully make him less drowsy; is that
2 accurate?

3 A. [No verbal response from the witness.]

4 Q. Okay. Did he relay any additional symptoms that he
5 previously had not relayed to you in your evaluations of him
6 last week?

7 A. No, no new symptoms.

8 Q. Did you get a sense from him as to whether he was in
9 pain at all during this visit?

10 A. He reported the same as he has, which he felt has not
11 changed significantly, but doesn't limit his activities around
12 in his space.

13 Q. So he didn't say that there was no pain, but that it
14 was just consistent with the same level, whatever that was,
15 with prior reports to you?

16 A. Yes.

17 ADC [MR. THURSCHELL]: Objection to restating the answer.

18 MJ [LtCol LIBRETTO]: The objection is overruled.

19 Q. Now, based on your discussions with him this morning,
20 did you form an opinion as to whether he is able to be
21 transported for either meeting with his counsel or sessions of
22 the commission?

23 A. Yes.

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1 Q. Is that opinion also based on consultation with other
2 medical providers?

3 A. Yes.

4 Q. And that would include the medical providers you
5 mentioned earlier?

6 A. Correct.

7 Q. What is your opinion, Doctor, as to whether he is --
8 can be moved for meetings with counsel or sessions of the
9 commission?

10 A. I believe that it would be reasonable for him to move
11 for, I would say, no more than four hours; that he be allowed
12 some time to stretch during those events, during those moves,
13 and probably only once a week, really just for comfort.

14 Q. And the movement that you have just indicated,
15 that -- excuse me. Let me rephrase.

16 The movement that you are indicating, up to four
17 hours once a week, does that include travel time to and from
18 the meeting location or the commission location or not?

19 A. Most reasonable, to be most cautious, to be kind to
20 his pain and symptom would be no more than that in terms of
21 everything. Most worrisome to me would be static position for
22 a long period of time. So that's kind of four hours of having
23 to sit particularly may be uncomfortable. So that's where

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1 that really came from.

2 Q. Now, the movement itself, the up to four hours in one
3 location and the process getting him to and from that
4 location, do you have an opinion as to whether that will
5 impact his health in any way?

6 A. I would say not specifically or in detail. Four
7 hours seemed like a reasonable time for a static position.
8 And so a total of four, versus going over by a couple of
9 minutes for transportation, I guess would seem reasonable.

10 Q. Now, with respect to the answer that you just gave,
11 is it fair to say then that moving him and having him in one
12 place for a total of four hours for that whole evolution would
13 not endanger his health in any significant way?

14 A. I don't know that it would endanger his health. It
15 would all be related to just discomforts of movement, sitting,
16 and placement.

17 Q. So he might experience discomfort at some level, but
18 would it affect his underlying medical condition in any way?

19 A. I don't believe so.

20 Q. And what types of things could he do to -- or could
21 be done to ameliorate the effects in terms of his symptoms?

22 A. The periods of time for movement or stretching,
23 medications, particularly which we have available kind of as

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1 needed for him, are kind of the most reasonable things.

2 Q. Is the accused currently on medication?

3 A. Is prescribed, yeah, prescribed both as-needed
4 medications for pain as well as scheduled medications for
5 chronic medical conditions.

6 Q. In response to his reported nonchange today from
7 prior pain, did he -- was he offered any medication to address
8 those concerns this morning?

9 A. I offered that when I saw him.

10 Q. And what was his response?

11 A. He didn't want to take them at this time -- or when I
12 saw him.

13 Q. Doctor, one final question. What was the medication
14 that you offered him this morning?

15 A. One of three: Either ibuprofen,
16 acetaminophen/Tylenol, or the Robaxin/methocarbamol.

17 Q. Does he have other medications that are also
18 available to him if he is experiencing significant pain?

19 A. Yes. What I've kind of said is two tiers of
20 medication, one that are non-sedating and things for pain
21 management, the ibuprofen/Tylenol and Robaxin. And then for
22 severe pain or symptoms, Valium and Percocet are available to
23 him.

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1 Q. And he didn't indicate a desire to take any of those
2 medications; is that accurate?

3 A. Correct.

4 ATC [MR. SPENCER]: Thank you, sir. I have no further
5 questions. The defense may have some questions for you as
6 well as the commission.

7 MJ [LtCol LIBRETTO]: Mr. Thurschwell, any questions for
8 the senior medical officer?

9 ADC [MR. THURSCHELL]: Yes, Judge, if I can have one more
10 moment.

11 MJ [LtCol LIBRETTO]: Sure. You may.

12 **CROSS-EXAMINATION**

13 **Questions by the Assistant Defense Counsel [MR. THURSCHELL]:**

14 Q. Hello, again ----

15 A. Hello.

16 Q. ---- SMO. We met briefly for about 45 minutes
17 earlier this afternoon; is that correct?

18 A. Yes.

19 Q. Thank you again for meeting with us. I want to go
20 over a few of the areas you testified about and some of the
21 areas we discussed earlier.

22 You testified that you met Mr. Al-Tamir for the first
23 time last week; is that correct?

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1 A. That's correct.

2 Q. Okay. And you met with him twice separately and ----

3 A. I'm sorry, I don't know.

4 Q. I'm sorry. Twice with -- where you were the lead
5 examining physician?

6 A. The lead examining physician definitely on Friday,
7 and then kind of a -- I would say in a conjunction between the
8 current and myself -- or the outgoing and myself this morning.

9 Q. Okay. And so you -- and you spent, I think you
10 testified, between 15 and 30 minutes with him each time?

11 A. I would say that.

12 Q. Now, during the -- sorry.

13 In your examination this morning -- let me go back to
14 your examination this morning, and I then I'll work back.

15 You went to see him this morning because you had
16 heard he had not gone to court; is that correct?

17 A. Correct.

18 Q. And you had heard that through one of the operations
19 people at JTF?

20 A. Right.

21 Q. So -- and you wanted to know why he hadn't gone; is
22 that correct?

23 A. I wanted to check on how he was doing.

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1 Q. Okay. You didn't ask him?

2 A. Didn't ask him? Didn't ask him? Sorry.

3 Q. You didn't ask him why he didn't go?

4 A. I didn't ask him why he did not go.

5 Q. And he didn't offer an explanation at all?

6 A. He did not.

7 Q. Now, you mentioned also that he -- in describing his
8 symptoms, he said there wasn't much change from last week.

9 A. Correct.

10 Q. That was the upshot of this?

11 A. Yes.

12 Q. Now, last week, just to be clear, on Monday he
13 experienced severe upper back spasms, correct?

14 A. Correct.

15 Q. That were sufficiently severe that it caused him to
16 be unable to breathe for a brief period of time?

17 A. Yeah. The outgoing SMO saw him at that point in
18 time. I was not there for that event.

19 Q. Okay.

20 A. My reflection with him was from Friday when I saw him
21 through today.

22 Q. Okay. And you are aware that he had at least one
23 other incident last week in which more or less the same thing

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1 happened?

2 A. Correct.

3 Q. He suffered severe upper back pain and spasms and had
4 difficulty breathing again?

5 A. That event did happen, yes.

6 Q. Yes. Now, those -- are you aware that he was
7 suffering pain in the form of spasms during -- throughout the
8 whole week last week?

9 A. He reports tightness and tension in his shoulders and
10 in his trapezius that he says has been consistent for a long
11 time. I think when I saw him last week he reported that
12 that's been going on for a long time; I didn't clarify exactly
13 how long. And those are what he reported to me this morning.

14 Q. And, in fact, those -- those symptoms are exacerbated
15 or triggered, the severe ones, when he sits up for any period
16 of time; is that correct?

17 A. I'm not clear on that. I'm not clear on exactly what
18 causes them to occur. I'm not present when they occur. I
19 haven't been present when they occur. I'm not sure what
20 positions he is in or how he is -- how he is sitting.

21 Q. Did -- in your meeting with him last week, did you
22 ask him what were the triggers for the symptoms?

23 A. For those exacerbations? Those two events, is that

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1 what you are speaking about?

2 Q. Yes.

3 A. Okay. In those -- I'm trying to remember. I think
4 the first one, I didn't have any discussion with him about the
5 first episode that happened. The second episode that
6 happened, like I said, the outgoing senior medical officer saw
7 him. And as she described it to me, and I wrote, it was doing
8 nothing in particular. I don't remember whether she wrote
9 that or not. But he, I believe, was sitting at that point in
10 time.

11 Q. Okay. So if he were to report that sitting up in one
12 of his chairs was a trigger for the severe spasms, would you
13 have any reason to doubt that statement of his?

14 A. No.

15 Q. You don't have any reason to doubt his reports of his
16 pain at this point, do you?

17 A. No.

18 Q. You don't have any reason to doubt his reports of his
19 other symptoms either?

20 A. I don't.

21 Q. Okay. Now, you -- in discussing your recommendation
22 against extending the total time that he is moved beyond the
23 four hours, I think you said you -- the concern is that he

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1 might experience discomfort; is that right?

2 A. Yes.

3 Q. So -- and I think you said -- did I hear you correct
4 that you didn't think it would cause actual health injury?

5 A. I don't believe that it would change his underlying
6 condition, but it -- he would be at risk for discomforts.

7 Q. Okay. And by "discomfort," I take it you mean
8 experiences like the ones he had last week of severe upper
9 back spasms, inability to breathe, and the immediate need to
10 lie down; is that correct?

11 A. Not necessarily. I think since I had seen him in
12 that event last week and then talking to him this morning,
13 over the period that he has been through the weekend, there
14 have been long periods of time where he sits. Seeing that
15 that hasn't happened since then, I felt it reasonable.

16 Q. But the risk of discomfort that would concern you
17 would be a repeat of those extreme symptoms that happened at
18 least twice that you are aware of last week?

19 A. That could happen.

20 Q. Right. And, in fact, he told you he felt about the
21 same as he did last week, correct, this morning?

22 A. As he did on Friday when I saw him.

23 Q. Okay. You are aware that -- did you review the

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1 testimony of the neurosurgeon who testified at an earlier
2 hearing in this proceeding?

3 A. Testimony? No, I have not reviewed the testimony,
4 only the medical record.

5 Q. Okay. So if that neurosurgeon -- if I represented to
6 you that that was a neurosurgeon who had been his surgeon in
7 four of his operations up to that point, you would have no
8 reason to doubt me on that, I take it.

9 If the neurosurgeon testified that he had no reason
10 to doubt the accuracy of Mr. Al-Tamir's descriptions and
11 accounts of his own pain, that would be consistent with your
12 limited experience so far?

13 A. Yeah, I believe so.

14 Q. And if the neurosurgeon also testified that the
15 patient's subjective account of his physical symptoms and pain
16 are a very important factor for diagnosis and for determining
17 therapeutic decisions, would you agree with that?

18 A. I mean, all pain reports are subjective reports. I
19 mean, we guide treatment based on that.

20 Q. Okay. Now, the -- you testified that you were -- I'm
21 going to try to find your exact words -- you had communicated
22 with the neurosurgeon or you had had a communication with the
23 neurosurgeon. Was that your testimony?

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1 A. I don't know that I testified to that here. When we
2 talked earlier I had been aware of e-mail communications with
3 the outgoing SMO.

4 Q. I am talking about your testimony just now in court.
5 Do you recall testifying that you had a communication with the
6 neurosurgeon?

7 A. Not during -- not during now.

8 Q. You don't recall saying that. But, in fact -- and,
9 in fact, you did e-mail the neurosurgeon?

10 A. Yes, I e-mailed the neurosurgeon.

11 Q. And that e-mail was an inquiry about -- well, you
12 tell me.

13 What did you -- what did you e-mail him about?

14 A. My e-mail to him was to let him know that I was
15 taking over as the SMO, and if he had any concerns or
16 worries ----

17 Q. Okay.

18 A. ---- that I should know about or act upon.

19 Q. And he didn't respond to that?

20 A. I haven't seen a response yet.

21 Q. So you have actually had no communication from the
22 neurosurgeon about his current state?

23 A. Other than the e-mails from the outgoing SMO and her

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1 conversation, her e-mail over the last week or so, which I
2 haven't -- I think I -- I can't remember whether I've seen
3 that or not or whether we talked about it.

4 Q. Okay. Now, your -- the neurosurgeon does not see him
5 on a regular basis, correct?

6 A. Correct.

7 Q. Your training is not in neurosurgery or orthopedic
8 surgery; is that correct?

9 A. That's correct.

10 Q. You have a primary board certification in family
11 medicine?

12 A. Correct.

13 Q. And then you have another board certification in an
14 area that is completely unrelated to the medical issues of
15 Mr. Al-Tamir; would that be a fair characterization?

16 A. Correct.

17 Q. Okay. So your -- so when you opine on his medical
18 fitness for travel, you're basing that on your current
19 experience. Okay.

20 Now ----

21 ADC [MR. THURSCHELL]: One moment, Judge. I'm sorry.

22 Q. So to clarify, your medical opinion is based on your
23 experience in your past and current practice and your training

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1 within your two board certifications; is that correct?

2 A. That's correct, in conjunction with information from
3 the physical therapist, physical therapy techs.

4 Q. And, in fact, you and/or prior SMO -- and prior SMOs
5 have been tremendously dependent on the medical opinion of the
6 expert neurosurgeons who have treated Mr. Al-Tamir in his
7 various surgeries?

8 A. In particular for surgical management.

9 Q. You examined -- in rendering your opinion today, you
10 base that in part on the medical records that you reviewed
11 last week?

12 A. Yes.

13 Q. And before coming to court today?

14 A. Yes.

15 Q. And over the past -- medical records relating to the
16 past, fair to say, couple of weeks?

17 A. I actually reviewed the chart going back to the time
18 of his surgery ----

19 Q. Okay.

20 A. ---- in brief review of everything so I could try to
21 understand.

22 ADC [MR. THURSCHELL]: All right. Your Honor, we would
23 request discovery of the medical records from the past two

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1 weeks and the opportunity to continue the cross after we
2 receive them. We will continue now, but that's a request
3 before anything else -- any decision is made on the basis of
4 this testimony.

5 I'm happy to continue on other areas, but I'd like
6 the opportunity to review the medical records that form the
7 basis of his opinion. We do not have them. We have medical
8 records only as of about a month ago, 30 days or so ago.

9 MJ [LtCol LIBRETTO]: Did you have additional matters to
10 inquire into with the witness outside of those records?

11 ADC [MR. THURSCHELL]: I do.

12 MJ [LtCol LIBRETTO]: You may proceed on those.

13 ADC [MR. THURSCHELL]: Just let me consult for one
14 moment. And I am not going to have too much more, I think.

15 MJ [LtCol LIBRETTO]: All right.

16 [Pause.]

17 Q. In our discussion earlier today in the interview, not
18 in court, you mentioned that you wanted to meet with
19 Mr. Al-Tamir in part because you wanted to figure out what
20 makes a good day versus what makes a bad day for him. Is that
21 a fair characterization of your discussion?

22 A. Yeah. Last week when I first met with him, trying to
23 understand that.

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1 Q. Right. And that was because you were getting to know
2 him, and you were aware that he has good days and bad days?

3 A. True.

4 Q. And his bad days recently, as of last week, include
5 these kind of severe stress symptoms in his neck, leading to
6 breathing difficulties and the related need to lie down and
7 take immediate measures; is that fair to say?

8 A. From my understanding, yeah.

9 Q. So, in fact, it's a little hard to predict what his
10 good days and what his bad days will be?

11 A. Fair.

12 Q. These symptoms overtook him suddenly and
13 spontaneously to your knowledge; is that correct?

14 A. As far as I know.

15 Q. At least two times last week when he sat up for a
16 relatively brief period of time, he was thrown into extreme
17 pain, stress, and difficulty breathing?

18 A. Yes.

19 Q. So sometimes that can happen; sometimes it isn't --
20 doesn't. Is that your -- I took to be your testimony about
21 him being able to sit up for different points without those
22 symptoms.

23 A. Yes.

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1 Q. Okay. So when you -- when your opinion says he can
2 be moved for four hours at a time, inclusive of
3 transportation, once a week, it's pretty hard to say whether
4 that's going to be a day in which that kind of stress sends
5 off those kinds of symptoms or not; fair to say?

6 A. That's true.

7 Q. You couldn't predict, from talking to him in the
8 morning even, whether a particular -- on a particular day,
9 being put in his wheelchair, transported over bumpy roads in
10 the back of a van, moved in and out and sat down in court and
11 sitting up in court is going to cause those severe symptoms or
12 not?

13 A. Those symptoms? Not specifically.

14 Q. Okay. Now, I want to ask you about your declaration.
15 First, you say -- attest in your declaration that -- and this
16 is your specific medical opinion -- that "Based on my
17 evaluation today, a review of his medical record, and
18 consultation with the previous senior medical officer, it is
19 my medical opinion that defendant is medically able to be
20 moved and participate in a commission hearing."

21 Is that your language?

22 A. Yeah.

23 Q. Sorry?

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1 A. Yes.

2 Q. Yes. Okay. And so I just -- when you say "medically
3 able to be moved," let's stop there. By that, do you mean --
4 or let me put it this way: What you mean is that he could be
5 moved for that limited period of time once a week without
6 causing medical injury to his body. Is that what that
7 statement means?

8 A. Without worsening his medical condition.

9 Q. Without worsening his medical condition. Okay.

10 And when you say he is medically able to participate
11 in a commission hearing, do you -- you mean the same thing;
12 that his participation in the hearing will not deteriorate his
13 medical condition?

14 A. I'm not clear that it will.

15 Q. Okay. So what you are not saying is that he is
16 medically able to participate in a commission hearing in the
17 sense of being legally competent to participate fully in his
18 defense from -- with his -- participate with his lawyers,
19 attend and -- in an undistracted way attend to the sessions
20 and carry on discussions with his lawyer. That's not what
21 that means. Is that fair to say?

22 A. You're speaking to capacity? I'm sorry.

23 Q. I'm saying you are not -- your training does not

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1 enable you to opine on whether movement or any other stress on
2 a patient will either satisfy or not satisfy legal standards
3 for legal -- legally adequate participation in a legal
4 proceeding?

5 A. No, I don't believe that's ----

6 Q. Okay. So -- because you're not a lawyer?

7 A. No.

8 Q. And you can attest to possible levels of pain,
9 possible physical symptoms? You have to -- could you say ----

10 A. Correct.

11 Q. But you can't attest to whether those particular
12 levels of pain will distract him from the legal tasks at hand
13 to such an extent that he's no longer, for legal purposes,
14 participating in his own defense?

15 A. I couldn't comment to that in advance of competence,
16 no.

17 Q. Okay. And that's not -- and that's not a call that a
18 doctor can make?

19 A. I'm not clear on that. I'm not sure of the
20 situation.

21 Q. If the neurosurgeon testified that a SMO -- a prior
22 SMO's declaration could not mean that the -- Mr. Al-Tamir was
23 legally competent to participate in his defense, would you

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1 have any reason to disagree with that?

2 A. Can you say that one more time? I'm sorry.

3 Q. Sure. Well, actually ----

4 A. I ----

5 Q. ---- let me restate it.

6 If the neurosurgeon said -- a prior SMO, by virtue of
7 their medical training, could not opine on the legal
8 competence of a defendant to participate in his own defense,
9 as a legal matter, would you have any reason to doubt that
10 statement?

11 A. I guess that seems -- a legal opinion wouldn't be in
12 the purview of what I do.

13 Q. Okay.

14 A. I think getting more to your point, what I was
15 talking around is if someone -- medically something happened
16 to anyone in a court setting and they were unconscious, a
17 physician could determine that they were unconscious.

18 Q. I'm sorry. I couldn't -- I couldn't hear you.

19 A. If -- kind of saying couldn't determine as a
20 physician, but if something medically happened and they were
21 unconscious, I guess could determine that. But minute to
22 minute, yeah, I couldn't give a legal competence decision.

23 Q. Yeah. So you're not in a position to opine whether a

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1 certain level of pain, certain kinds of symptoms are so
2 distracting that they make it impossible for a defendant to
3 participate in his own defense?

4 A. No.

5 Q. And finally, I just -- coming back to the
6 declaration, you based this declaration on a prior -- on a
7 draft declaration, correct? And that was provided -- you're
8 shaking your head yes?

9 A. Yes.

10 Q. Okay. And that was provided to you by, I believe,
11 one of the SJAs?

12 A. Correct.

13 Q. All right. And that was a -- was that draft one that
14 had been done by a prior SMO?

15 A. Yes, I believe so.

16 Q. Okay. And you made certain changes in that draft
17 declaration ----

18 A. Yes.

19 Q. ---- in preparation of this, correct?

20 A. Yes.

21 Q. And then you showed it to the government?

22 A. Yes?

23 Q. And ----

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1 A. I'm saying that questioningly.

2 Q. I'm sorry?

3 A. The government ----

4 Q. I'm sorry. To trial counsel.

5 A. Oh. Yes.

6 Q. Okay. And they recommended certain wording changes?

7 A. Yes.

8 Q. Okay. And in our conversation, the one that you
9 remembered was in that same sentence, "Based on my evaluation
10 today, a review of his medical record, and consultation with
11 the previous senior medical officer, it is my medical opinion
12 that defendant is medically able to be moved and participate
13 in a commission hearing."

14 That's the same sentence I read to you earlier?

15 A. Right.

16 Q. You -- your recollection was that the trial counsel
17 had suggested or asked that you change the word "discussion"
18 to the current word "consultation"?

19 A. It was suggested. It seemed reasonable to me.

20 Q. Okay. And do you remember any other changes that
21 they recommended?

22 A. I think we talked about there were a number of
23 "the's." I wasn't sure whether it was "defendant" or "the

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1 defendant," and we moved some of those. I changed an "a" to a
2 "the."

3 Q. Okay. And at least -- I think you said at least one
4 of those changes was in that same sentence where you say, "It
5 is my medical opinion that defendant is medically able to be
6 moved and participate in a commission hearing." That's what
7 my recollection and notes say about our discussion; is that
8 accurate?

9 A. Yes.

10 ADC [MR. THURSCHELL]: One moment, Judge.

11 MJ [LtCol LIBRETTO]: Go ahead.

12 ADC [MR. THURSCHELL]: Nothing further. Thank you very
13 much.

14 MJ [LtCol LIBRETTO]: Trial Counsel, any follow-up?

15 ATC [MR. SPENCER]: Just very brief redirect, Your Honor.

16 MJ [LtCol LIBRETTO]: Go ahead.

17 ATC [MR. SPENCER]: After the commission questions is
18 acceptable to the government.

19 MJ [LtCol LIBRETTO]: You can proceed.

20 **REDIRECT EXAMINATION**

21 **Questions by the Assistant Trial Counsel [MR. SPENCER]:**

22 Q. Doctor, just a few quick follow-up questions. The
23 discussion that you had with myself and other trial counsel,

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1 members of the trial team, did we ask you to change your
2 opinion as to whether he could -- the accused could -- was
3 cleared to come to the commission?

4 A. No.

5 Q. Did we ask you to say anything that was inaccurate or
6 untruthful?

7 A. No.

8 Q. With respect to the spasms that the accused suffered
9 last week, did you observe any such spasms on Friday when you
10 examined him?

11 A. No.

12 Q. In your examination, both Friday and today, did you
13 just speak with the accused or did you conduct a physical,
14 hands-on evaluation of the accused?

15 A. A brief physical examination looking for pain or
16 spasm.

17 Q. Did you note any spasms -- I'm sorry?

18 A. Looking for pain or spasm.

19 Q. Did you feel the location of the complained-of spasms
20 from last week?

21 A. He noted where, yeah, on his upper back where it had
22 happened before; and I wanted to feel to make sure that there
23 wasn't a significant contraction.

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1 Q. And so did you observe or feel in that sense any
2 contractions, as you said ----

3 A. No.

4 Q. ---- either today or Friday?

5 A. Neither.

6 Q. Had there been any indication from the accused that
7 those spasms occurred since your examination of him Friday?

8 A. No.

9 Q. Did these -- so when you saw him Friday, in your
10 opinion, was the accused having a good day or a bad day?

11 A. From what I can tell, it's a reasonably good day.

12 Q. And so your observation of him today was consistent
13 with your observation of him on Friday?

14 A. It was, from what I'd seen.

15 ATC [MR. SPENCER]: Thank you.

16 **EXAMINATION BY THE MILITARY COMMISSION**

17 **Questions by the Military Judge [LtCol LIBRETTO]:**

18 Q. Just a few follow-up questions from myself.

19 He underwent his last surgery on 19 May of 2018, and
20 since that time, to varying degrees, he has been cleared by
21 medical opinion to be transported for commission sessions.
22 There was a period of time after 19 May that he was not
23 cleared at all.

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1 Subsequent to that I believe there was a period of
2 time that it was very limited, much like it is now. And then
3 there was a period of time where it was up to two to three
4 sessions per week for up to four hours at a session.

5 What is causing the fluctuation in those
6 recommendations?

7 A. I would have to say it's variability in the
8 assessment of how bad this could be. I think in my opinion, I
9 wanted to keep it restricted to the one four-hour session
10 because I don't really want to put him through something that
11 would be too uncomfortable. And since I don't know him as
12 well, kind of that good day/bad day, I don't have as long of a
13 record with him, I elected to keep it more conservative.

14 Q. So those fluctuations in the medical officer's
15 opinion is based -- at least yours are based on comfort as
16 opposed to medical risk?

17 A. I would say both. I don't believe that that movement
18 would cause a significant medical risk, but could cause
19 significant discomforts, including the spasm. Trying to limit
20 that I thought was reasonable.

21 Q. Does in any way an increase amount that the accused
22 is moved or transported for court sessions or participating in
23 court sessions affect the medical risks associated with his

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1 condition, or is it primarily based on comfort?

2 A. Primarily comfort.

3 Q. Since 19 May of 2018 when he underwent his last
4 surgery, has his condition, underlying condition, putting
5 aside for a moment symptoms or pain, increased -- improved or
6 gotten worse?

7 A. The best gauge of that would be from the physical
8 therapists and physical therapy techs; and overall, they've
9 seen a slight improvement in function.

10 Q. And that was a good segue into my next question.

11 What other activities -- or what activities is the
12 accused involved in currently in terms of physical therapy?

13 A. To physical therapy technician visits multiple times
14 per week. I would have to see exactly how many; I believe
15 it's supposed to be three. And then I would have to take a
16 look back to see how often the physical therapist is visiting,
17 but if I remember right now, I believe they visited last week.
18 And then self-directed activities; so they've provided a home
19 exercise program for him to participate with on his own to
20 speed and hopefully stabilize recovery.

21 Q. And to your knowledge, he's been engaging in those
22 activities?

23 A. As far as I can tell. I haven't observed him doing

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1 them myself, but -- as we noted, I am only there for brief
2 periods of time.

3 Q. During your time with him over the last several days,
4 have you noticed anything about his ability to move or
5 function physically that would make him unable to be
6 transported or participate in these commissions?

7 A. Part of my opinion was based on seeing him this
8 morning, that he was up and standing, moving in his room with
9 a four-wheel walker, able to move from sit to stand, I saw
10 twice while I was there; that I felt like that was actually a
11 pretty good function compared to -- previously I had only seen
12 him sitting, and so his function was well enough that I
13 believe that some of those could work. And I do know that
14 he's had other moves that he's tolerated.

15 Q. Based on the information available to you, are you
16 aware as to whether or not there's an increase or decrease
17 with pain symptoms depending on the time of day? In other
18 words, is there a trend that his symptoms increase in the
19 afternoon, or are they worse in the morning, such that the
20 timing of the commissions and transport might mitigate some of
21 those?

22 A. I would say the only marker I have of that -- as I
23 ask him about them, he kind of says the same thing. The only

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1 marker I have is when he chooses to take pain medications,
2 which in the last 72 hours has only been in the evening or at
3 night.

4 MJ [LtCol LIBRETTO]: Trial Counsel, any questions in
5 light of mine?

6 ATC [MR. SPENCER]: Yes, Your Honor. Very briefly.

7 MJ [LtCol LIBRETTO]: Go ahead.

8 **REDIRECT EXAMINATION**

9 **Questions by the Assistant Trial Counsel [MR. SPENCER]:**

10 Q. Doctor, are you aware of the location of the other
11 moves that you referenced in response to the military judge's
12 questions?

13 A. [Away from microphone; no audio.]

14 Q. I'm sorry. Your mic seems to have cut out.

15 MJ [LtCol LIBRETTO]: Just pull it a little closer.

16 WIT: They told me not to touch it. Okay.

17 A. One other visit where he actually returned for a
18 social visit.

19 Q. And by "returned for a social visit," do you mean
20 returned to his regular location of detention?

21 A. Correct.

22 Q. Do you know whether that social visit was at his
23 request or a direction from someone else?

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1 A. I'm not clear on that.

2 ATC [MR. SPENCER]: Thank you, sir.

3 MJ [LtCol LIBRETTO]: When did that take place?

4 WIT: I'm not sure of the exact time frame, sir.

5 MJ [LtCol LIBRETTO]: Ballpark, do you have any knowledge
6 of that information?

7 WIT: I have to think. It's been a whirlwind as I have
8 been getting here to try and keep track of the days. It did
9 happen before I arrived; I know that.

10 MJ [LtCol LIBRETTO]: Mr. Thurschwell, any follow-up
11 questions?

12 ADC [MR. THURSCHELL]: Yes, Judge. Thank you.

13 **RE-CROSS-EXAMINATION**

14 **Questions by the Assistant Defense Counsel [MR. THURSCHELL]:**

15 Q. Major SMO, you -- in response to the judge's question
16 about physical therapy or about his improvement, you testified
17 that the physical therapist report suggested there had been
18 improvement since his last operation. I think that was -- I'm
19 not sure if your words were "slight improvement" or
20 "improvement." Do you want -- is that right?

21 A. Overall, from the time of surgery until now ----

22 Q. Yes.

23 A. ---- there has been improvement.

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1 Q. Okay. Do you recall telling us in the interview in
2 response to that question that the report suggested that he
3 was a little stronger but his functionality isn't clear yet?

4 A. Yes. So strength was one of the things that they
5 measured in terms of surgery to now. In terms of function in
6 the long run, what his prognosis will be, what he'll be able
7 to do in the future is unclear. We won't know until we know.

8 Q. And with respect to physical therapy, are you aware,
9 since the operation, that it's at -- from time to time it had
10 to be curtailed or ended because of the severity of the
11 symptoms he was experiencing?

12 A. That may be the case. I don't know specifically.

13 Q. Now, also in response to the judge's question, you
14 said you had observed this morning that he was able to move
15 from sit to stand in his room and that he was able to move
16 about in his room, I think was your testimony.

17 You'd agree that movement within the confines of his
18 very small cell is not remotely as stressful as the movement
19 required to get from that cell to this courtroom?

20 A. I don't know about stressful or not. I know that
21 they are distinctly different. I would have to talk to him
22 about what specific triggers are for him.

23 Q. So you don't actually know if -- how stressful it is

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1 for him to move to this courtroom?

2 A. I would say it's definitely different than moving
3 around in the courtroom -- or moving to the courtroom, I
4 should say, yeah.

5 Q. Okay.

6 A. Moving in his room is different than moving to the
7 courtroom.

8 Q. But beyond that, you have no way of knowing, without
9 talking to him, how stressful it is for him?

10 A. I know some things about movement, but some of that
11 is kind of secure information.

12 Q. I'm sorry. I don't understand your answer.

13 I'm not asking you about the specifics of the
14 movement. I'm asking you about, whatever those movements are,
15 the ones that are required to get to this courtroom from his
16 cell are significantly more stressful on him physically than
17 the movements that you observed this morning within his cell?

18 A. They are different activities.

19 Q. Okay. And I think you just said he needs to -- you'd
20 have to ask him how -- the impact on him; is that correct?

21 A. On a regular basis I check in with him on how he's
22 doing and what affects him.

23 ADC [MR. THURSCHELL]: Okay. Thank you, judge.

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1 MJ [LtCol LIBRETTO]: Anything else for this witness
2 before we return him to his normal duties?

3 ATC [MR. SPENCER]: Nothing from the government, sir.

4 MJ [LtCol LIBRETTO]: Very well. Thank you for providing
5 the court information this afternoon. You may step down and
6 return to your normal duties. Thank you.

7 WIT: Thank you.

8 [The witness was excused and withdrew from the courtroom.]

9 MJ [LtCol LIBRETTO]: All right. Counsel, we are going to
10 take a 10-minute recess and then come back on the record and
11 finalize things for this afternoon. The court is in recess.

12 [The R.M.C. 803 session recessed at 1713, 24 September 2018.]

13 [The R.M.C. 803 session was called to order at 1728,
14 24 September 2018.]

15 MJ [LtCol LIBRETTO]: This commission will come back to
16 order. All parties present when the commission recessed are
17 again present.

18 During the testimony of the SMO, the defense
19 requested that the commission compel production of the medical
20 records pertaining to the witness' testimony. The commission
21 is deferring ruling on that motion to compel production of
22 those medical records outside the normal process by which
23 those matters are provided to the defense. And we'll take the

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1 matter up as necessary at a later time.

2 At this time, before the commission recesses until
3 tomorrow morning, it is making the following order:

4 The accused is to be advised prior to 0-9 tomorrow
5 morning of the following matters:

6 One, that a session of the commission will commence
7 tomorrow morning 25 September 2018 at 0900.

8 Two, pursuant to R.M.C. 804, the accused has a right
9 to be present at the session.

10 Three, the senior medical officer has medically
11 cleared the accused to travel to this commission session that
12 is scheduled for 25 September 2018.

13 The commission is hereby ordering the presence of the
14 accused at the 25 September 2018 session.

15 The commission will not order the use of force to
16 compel the accused's presence.

17 And finally, six, that it is possible that the
18 commission may proceed in the accused's absence if he refuses
19 to attend the 25 September 2018 session.

20 The government is further ordered and that shall be
21 in addition to the regular advisements as presented to the
22 accused this morning. In addition, the government will have
23 the individual who so advises the accused present and

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1 available to testify at 0900 tomorrow morning.

2 Any questions from either side with regard to the
3 commission's ruling?

4 ATC [MR. SPENCER]: None from the government, Your Honor.

5 ADC [MR. THURSCHELL]: Yes, Judge. May I be heard
6 briefly at the podium?

7 MJ [LtCol LIBRETTO]: On what matter?

8 ADC [MR. THURSCHELL]: On the decision to overrule
9 AE 074C without briefing or argument and on the request to
10 reconsider AE 102I to allow AE 074C to actually be honored by
11 this commission.

12 MJ [LtCol LIBRETTO]: Okay. I understand your request.
13 And as we discussed during the 802 conference, this issue may
14 be rendered moot tomorrow morning if the accused presents
15 himself and attends the session.

16 Your request to place those matters on the record at
17 this time is denied. You may possibly be given the
18 opportunity to do so tomorrow morning before we proceed.

19 ADC [MR. THURSCHELL]: I'm sorry, Judge, just to clarify.
20 The order that you just issued is in violation of AE 074C
21 which lays out the procedure by which the accused is informed
22 of his rights to be present and the method by which he is
23 offered the opportunity to waive. The order you just issued

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1 is directly contrary to AE 074C. That is my objection.

2 MJ [LtCol LIBRETTO]: I understand the objection.

3 Anything further?

4 ADC [MR. THURSCHELL]: [Microphone button not pushed; no
5 audio.]

6 MJ [LtCol LIBRETTO]: This commission is in recess until
7 0900 tomorrow morning.

8 [The R.M.C. 803 session recessed at 1732, 24 September 2018.]

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