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1 [The R.M.C. 803 session was called to order at 0949,  
2 6 November 2018.]

3 MJ [LtCol LIBRETTO]: This commission is called to order.  
4 All parties present when the commission last recessed are  
5 again present. The accused is also present.

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

8 TC [CDR SHORT]: Your Honor -- I'll go to the podium.

9 Your Honor, representing the government today is  
10 myself, Commander Douglas Short, Trial Counsel; Commander  
11 Kevin Flynn, United States Navy, Deputy Trial Counsel;  
12 Mr. Vaughn Spencer, Assistant Trial Counsel; and Captain  
13 Johnathan Rudy, Assistant Trial Counsel. Also present today  
14 is sergeant -- Sergeant First Class Dale Oe, United States  
15 Army.

16 MJ [LtCol LIBRETTO]: Thank you. And Commander Short, if  
17 you would, please state for the record where the proceedings  
18 are being transmitted to by closed-circuit television.

19 TC [CDR SHORT]: Yes, Your Honor. These proceedings are  
20 being transmitted stateside via CCTV to remote viewing sites  
21 at Fort Meade, Maryland, and Fort Devens, Massachusetts,  
22 pursuant to the commission's order, Appellate Exhibit 005I.

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

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1           And Mr. Thurschwell, if you would, please state who  
2 is here to represent the accused today.

3           ADC [MR. THURSCHELL]: For Mr. Al-Tamir, Judge, myself,  
4 Adam Thurschwell. There is at the table with me Major Yolanda  
5 Miller; our translator, [REDACTED]; Mr. Raul Ayala Santiago;  
6 Chief Mayes, and Mr. James Anderson.

7           Judge, I think at an appropriate point I need to put  
8 on the record Mr. Al-Tamir's current medical state, because it  
9 is relevant to our way forward, and I have a request or two  
10 based on that. And the order of business that I would prefer  
11 is to be able to do that now, or in the immediate future  
12 address that. Mr. Al-Tamir has specifically -- he is  
13 basically only here to be able to address you or have you  
14 direct questions about his current medical state. That is his  
15 real concern.

16           And if we could do that briefly and then proceed to  
17 the counsel excusal issues, which I believe were first up.  
18 And then if that's appropriate, we have requests about the  
19 next orders of business. So I will just say that and sit down  
20 and allow you to approve or not approve.

21           MJ [LtCol LIBRETTO]: Bear with me a moment.

22           ADDC [Maj MILLER]: Your Honor, if I may have a moment. I  
23 believe we are having technical difficulties. Mr. Al-Tamir is

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1 not wearing his headset right now. If we could just pause in  
2 place.

3 MJ [LtCol LIBRETTO]: Go ahead.

4 [Pause.]

5 ADC [MR. THURSCWELL]: Judge, apparently it's the wrong  
6 headset and they are getting the right headset now, I'm told.

7 MJ [LtCol LIBRETTO]: Thank you. It looks like it's  
8 coming in now.

9 ADC [MR. THURSCWELL]: Judge, I am told everything is now  
10 operating.

11 MJ [LtCol LIBRETTO]: Okay. Thank you.

12 Mr. Thurschwell, without going into the substance of  
13 what you would like to present to the commission at this time,  
14 beyond perhaps indicating to the commission that certain  
15 accommodations that we have previously discussed ought to be  
16 made and should be made and may have to be made throughout the  
17 proceedings this morning, such as frequent breaks to allow  
18 Mr. Hadi to stretch or stand up or the like, what is it --  
19 again, without going into the substance of it, what is the  
20 reason behind wanting to address that matter at this time as  
21 opposed to later on after the voir dire process takes place?

22 ADC [MR. THURSCWELL]: Judge, he doesn't belong here  
23 today. Medically he is not fit to be here. It was clear from

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1 our meeting that we tried to have in back; it was clear from  
2 the meeting we ended up having here. He is in obvious pain.  
3 He took -- he started the day with back spasms; he said pain  
4 level 7. He is here today at pain level 4 or so because he's  
5 on Percocet.

6 Even with that, he has trouble sitting still. He had  
7 trouble attending. The bed, which is one of the  
8 accommodations, the place for him to rest in back, causes him  
9 pain. He really needs -- to be able to have any rest at all  
10 during the breaks he needs the kind of bed that he has back in  
11 his recovery facility, which was, I think, part of the plan  
12 that was -- at AE 125A, the details of which I won't go into,  
13 but that was sort of understood as part of the reason for  
14 that.

15 MJ [LtCol LIBRETTO]: Mr. Thurschwell, what are you  
16 requesting of the commission at this time?

17 ADC [MR. THURSCWELL]: We are requesting, Judge, that  
18 because he came here really to -- his overwhelming concern is  
19 his medical situation. My proposal is to make it -- put his  
20 current medical state on the record. It's very important to  
21 get it on the record, how he is doing here today, because --  
22 and I don't know how long he is going to last. I don't think  
23 he is going to last very long. It's up to him. He is here

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1 because he wanted to be here. He wanted to try to get  
2 something done. But his concern is the medical stuff.

3           So my desire is to go -- start by putting a little  
4 more of that on the record, allowing you to address him and  
5 ask him about his medical state so you understand the  
6 condition of the person who is in front of you here today. We  
7 do the counsel excusal, which I believe was first on your  
8 agenda, and then we would request that we put off the voir  
9 dire so that we could do the two motions that are related to  
10 medical accommodations for him that would allow the defense to  
11 really at least begin to move the case a little bit, the  
12 motion for a medical expert, the motion to be able to visit  
13 him in the only place where I think we can have meetings in  
14 which he is not distracted by pain right now, based on the  
15 current experience.

16           And then we would ask you to postpone ruling on  
17 those, but at least they would be queued up for ruling until  
18 we then proceeded to the voir dire and the rest of the agenda  
19 that you suggested. So that is our request.

20           And Mr. Al-Tamir really is -- he considered not  
21 coming till the last minute because it would have been -- it's  
22 clear to me, as I said, I don't think medically he belongs  
23 here, but he wanted to come, both to show you and everyone

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1 else that he really does want to move this process, but  
2 especially to be able to have you see for yourself and inquire  
3 of him personally about his current medical state so he can  
4 feel that it's actually being understood in this proceeding,  
5 which he does not feel to date; and that the -- why the  
6 accommodations have not been adequate and why it's very, very  
7 difficult for him to proceed as we've been trying to do, so  
8 far unsuccessfully, based on the last hearing.

9           So that's my -- that is my request.

10           MJ [LtCol LIBRETTO]: Okay. I understand your request,  
11 Mr. Thurschwell. As we discussed yesterday, there was a  
12 certain order of business that we were going to take up, and  
13 most importantly in the commission -- from the commission's  
14 perspective is the voir dire opportunity in the presence of  
15 the accused.

16           That being said, Mr. Hadi, good morning. I  
17 understand ----

18           ACC [MR. HADI]: Good morning, sir.

19           MJ [LtCol LIBRETTO]: Good morning. Mr. Hadi, I  
20 understand very well, as presented by your counsel, your  
21 medical conditions, and I understand that you are in  
22 significant discomfort at this time probably. Having said  
23 that, you have decided to participate in the hearing today,

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1 and we will make every reasonable accommodation for you to  
2 make sure that the discomfort that you experience is as  
3 minimal as possible. Do you understand?

4 ACC [MR. HADI]: Yes, I do understand.

5 MJ [LtCol LIBRETTO]: So with that understanding, is it  
6 your desire to proceed today?

7 ACC [MR. HADI]: My presence today is mainly because of my  
8 health, because it is the most important thing and my  
9 preference right now.

10 MJ [LtCol LIBRETTO]: I understand, Mr. Hadi, that your  
11 health is a concern to you, and I appreciate you being here  
12 today; I sincerely do. There are certain things that I would  
13 like to accomplish today, the first of which is the  
14 questioning by your counsel of the military judge to ensure  
15 that there is an adequate opportunity for that process to take  
16 place, and to ensure the fairness of the proceedings going  
17 forward.

18 So with that in mind, do you have any objection to  
19 proceeding with that course of action at this time?

20 ACC [MR. HADI]: Yes.

21 MJ [LtCol LIBRETTO]: And what is your objection,  
22 Mr. Hadi?

23 ACC [MR. HADI]: My medical condition.

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1 ADC [MR. THURSCHELL]: Judge, if I could have a moment to  
2 speak to him, there might be a compromise situation that we  
3 can work out.

4 MJ [LtCol LIBRETTO]: Okay.

5 ADC [MR. THURSCHELL]: Let me try.

6 [Pause.]

7 ADC [MR. THURSCHELL]: Judge, as you may be able to see,  
8 he's shifting in his chair. He has to lift himself up. It's  
9 very difficult to him -- for him. I will ask you, and then  
10 maybe if he hears it from you I can suggest it to him, and if  
11 it would be acceptable to maybe, I mean, suggest doing the  
12 voir dire and then go right into the medical motions. Is that  
13 a COA that you could accept and I will see if we can get that  
14 done?

15 MJ [LtCol LIBRETTO]: Well, let's get through the voir  
16 dire process first and then we can take up the other matters.  
17 I don't know that one has to do with the other. I mean, the  
18 threshold issue, from my perspective, is to get through the  
19 voir dire process.

20 ADC [MR. THURSCHELL]: I completely understand that,  
21 Judge, and we have been pushing to have it first, too. The  
22 threshold issue for the client's ability to move forward is  
23 for him to be able to feel that the medical issues are being

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1 addressed. I mean, he -- so that's why I am proposing it, and  
2 it's really a threshold issue for the defense to be able to do  
3 its job with its own medical expert and with meaningful access  
4 to its client, given the situation in which he can barely  
5 attend when I am just speaking to him now for 30 seconds in  
6 court -- he can barely attend because of the pain he's in.

7 If we could meet with him in his -- the one place  
8 where he has the accommodations that actually help, it would  
9 allow us to have meaningful attorney-client meetings and it  
10 would move this process forward. So that is why we are  
11 requesting this.

12 MJ [LtCol LIBRETTO]: Okay. In any event, even upon your  
13 request, we are going to get through the voir dire process.  
14 So let's proceed with that. I will summarize the 802  
15 conferences that have been had. We will move right into the  
16 voir dire process, and then we will take up the other matters  
17 as we deem appropriate at the appropriate time.

18 If at any time during this process, Mr. Hadi, you  
19 need to take a break to get up, stand up, stretch, then just  
20 let us know and we will do so. Okay?

21 ACC [MR. HADI]: [Microphone button not pushed; no audio.]

22 MJ [LtCol LIBRETTO]: Mr. Thurschwell, are we ready to go?

23 ADC [MR. THURSCWELL]: [Microphone button not pushed; no

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1 audio.]

2 MJ [LtCol LIBRETTO]: Let me proceed with one -- one  
3 point, and I think it's probably appropriate in light of the  
4 defense's concerns to do so.

5 Mr. Hadi, although it's my preference for you to  
6 attend every session, and particularly that being the case for  
7 the questioning by your counsel of the military judge, I will  
8 advise you of your right to be present and your right to waive  
9 your presence at this time.

10 You have the right to be present during all sessions  
11 of the commission. If you request to be absent from any  
12 session, your absence must be voluntary and of your own free  
13 will. Your voluntary absence from any session of the  
14 commission is an unequivocal waiver of your right to be  
15 present during that session. Your absence from any session  
16 may negatively affect the presentation of the defense in your  
17 case. Your failure to meet with and cooperate with your  
18 defense counsel may also negatively affect the presentation of  
19 your case.

20 Under certain circumstances, your attendance at a  
21 session can be compelled regardless of your personal desire  
22 not to be present. Regardless of your voluntary waiver to  
23 attend a particular session of the commission, you have the

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1 right at any time to decide to attend any subsequent session  
2 of the commission.

3 For example, if you decide not to attend a morning  
4 session of the commission but wish to attend the afternoon  
5 session, you must notify the guard force of your desires.  
6 Assuming there is enough time to arrange transportation, you  
7 will then be allowed to attend the afternoon session.

8 You will be informed of the time and date of each  
9 commission session to afford you the opportunity to decide  
10 whether you wish to attend that session. Do you understand  
11 what I just explained to you, Mr. Hadi?

12 ACC [MR. HADI]: I understood very well, but I have a  
13 question.

14 MJ [LtCol LIBRETTO]: Mr. Thurschwell, if you -- do you  
15 know what the nature of the question will be?

16 ADC [MR. THURSCWELL]: I do not, but I can inquire.

17 MJ [LtCol LIBRETTO]: Please.

18 [Pause.]

19 ADC [MR. THURSCWELL]: Mr. Al-Tamir asked me to ask you,  
20 he has never missed a session except for when his health  
21 prevented him, and that he -- he wants to come. So he would  
22 like to know whether it's treated as a voluntary absence if he  
23 does not come because of his health. That was his question.

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1 MJ [LtCol LIBRETTO]: Mr. Hadi, the answer to your  
2 question in the most general sense is it will depend on the  
3 circumstances at the time. However, I will note that you are  
4 present at the session here today. There are a few things  
5 that I would certainly like to accomplish in your presence. I  
6 suspect that they will not take an overly long amount of time  
7 to accomplish; and thus, I would very strongly recommend and  
8 wish for your presence to be here during that process.

9 With that said, Mr. Thurschwell, are we ready to  
10 proceed?

11 ADC [MR. THURSCHWELL]: I am, Judge. I just need for the  
12 record to indicate that Mr. Hadi continues to, like, lift  
13 himself up out of his chair because of his discomfort, and  
14 then lower himself. It's not going to appear in the record  
15 otherwise, and I think it's critical that his current medical  
16 state be reflected as accurately as possible in the record  
17 today.

18 MJ [LtCol LIBRETTO]: Understood. Thank you.

19 Very briefly, the summary of the 802 conferences that  
20 have taken place since the last session -- since placing the  
21 commission in recess during the last session of the  
22 commission, there have been two R.C.M. 802 conferences, the  
23 first of which occurred on 25 September 2018. All parties

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1 were present. The accused was not present.

2 During that conference the government provided an  
3 update on the accused's medical status at that time, noting  
4 that the accused had a health episode in the afternoon of  
5 25 September 2018 involving muscle spasms. Subsequently, the  
6 senior medical officer recommended the accused not be moved  
7 for the commission hearing scheduled for 26 September of 2018.

8 The government indicated the accused would be  
9 evaluated again in the afternoon of 26 September 2018. The  
10 commission instructed the government to file a notice with the  
11 senior medical officer's recommendations, and to include as  
12 much additional information as is medically appropriate.

13 The commission indicated the session scheduled for  
14 26 September 2018 would not occur and the commission would  
15 issue additional guidance on the way ahead subsequent to  
16 receiving the next medical update from the senior medical  
17 officer.

18 Ultimately, in light of the accused's medical  
19 condition and based on the senior medical officer's  
20 recommendations as outlined in notices provided throughout the  
21 week by the government, the commission remained in recess and  
22 was not called back to order during the last session.

23 A second R.M.C. 802 conference was held at 1700 on 5

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1 November 2018 in AV-34. The military judge and both parties  
2 were present. The accused was not present. The commission  
3 notified the parties on the order of the issues that will be  
4 addressed at today's hearing that will be again after the  
5 accused had an opportunity to meet with his counsel for  
6 approximately an hour once he had arrived.

7 The commission informed both parties that the only  
8 AEs listed in the docketing order would be addressed with the  
9 exception of the possibility of addressing AE 128 if  
10 necessary.

11 The defense requested the commission hear oral  
12 argument on AE 121 and AE 102K first. The commission informed  
13 the parties it would reconsider the order in which the issues  
14 would be taken up and informed the parties this morning of the  
15 final order. I will do so in a moment.

16 The defense notified the commission that an AE number  
17 was requested for notice of withdrawal of Detailed Defense  
18 Counsel, Major Miller. The government inquired whether  
19 AE 126B will be addressed during discussion of other counsel  
20 issues today. The commission notified the parties that it did  
21 not intend to address AE 126B, in light of it being filed in  
22 such close proximity to the hearing, but would consider the  
23 matter further and will inform the parties this morning as to

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1 whether the court will hear the motion.

2 Despite the commission's reluctance to entertain the  
3 motion in light of when it was filed, having received the  
4 government's response yesterday evening, the commission will,  
5 in fact, take the matter up at an appropriate time later  
6 today.

7 The government advised the commission that the senior  
8 medical officer would not be able to testify today if he had  
9 been needed. The government informed the commission that the  
10 accused's neurosurgeon will arrive today and that the  
11 accused's appointment with him has been scheduled for  
12 Thursday.

13 During this discussion the defense referenced its  
14 objection they filed in AE 126G, wherein the defense objects  
15 to discussing the accused's health during 802 sessions, given  
16 its potential substantive significance during the last  
17 proceeding and possible significance during this and future  
18 sessions.

19 The commission indicated that it did not intend to  
20 discuss the health status of the accused beyond the  
21 administrative matters related to scheduling conflicts  
22 associated with his medical appointments.

23 Do counsel for either side have anything to add or

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1 correct based on the commission's R.M.C. 802 conference  
2 summaries?

3 TC [CDR SHORT]: Nothing from the government, Your Honor.

4 ADC [MR. THURSCHWELL]: Nothing from the defense.

5 MJ [LtCol LIBRETTO]: Very well. Although I placed my  
6 qualifications on the record at the previous session of the  
7 commission, I will repeat them in the presence of the accused  
8 at this time.

9 I was detailed to this commission pursuant to Rule  
10 for Military Commissions 503 on 13 June 2018 by the Chief  
11 Judge of the Military Commissions Trial Judiciary, who at the  
12 time was Colonel James Pohl.

13 I am certified and qualified in accordance with  
14 Article 26(b) of the Uniform Code of Military Justice as well  
15 as Rules for Military Commission 502 and 503, and I have  
16 previously been sworn under Article 42(a) of the Uniform Code  
17 of Military Justice and Rule for Military Commissions 807.

18 I am not aware of any grounds for challenge against  
19 me. I do not expect to be called as a witness in this case.  
20 I had previously provided a copy of my biography to the  
21 parties, marked as Appellate Exhibit 010B.

22 Does either side wish to conduct voir dire at this  
23 time?

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1 TC [CDR SHORT]: Your Honor, the government has no  
2 questions at this time but may have some questions following  
3 the defense questions.

4 MJ [LtCol LIBRETTO]: Very well.

5 ADC [MR. THURSCHELL]: The defense does have some  
6 questions, Judge.

7 MJ [LtCol LIBRETTO]: You may proceed, Mr. Thurschwell.

8 ADC [MR. THURSCHELL]: Judge, let me just preface this  
9 with this is a brand-new process for me. I haven't practiced  
10 in courts-martial. You know, changing a judge in midstream,  
11 and then the opportunity to actually voir dire them is  
12 something that's foreign to me. So I want to just make clear  
13 up front I am really -- all of these questions in my mind  
14 are -- go to your qualifications under 502, 503 and/or  
15 R.M.C. 902 bias, impartiality, some of which may be subtle and  
16 unconscious, and so -- but I would like to ask my questions,  
17 and hopefully we will get through it.

18 But, I mean, I do want to say, I mean, I don't think  
19 anything I will be asking you should give offense, but I am  
20 not used to this, and so please do not take it in that spirit.  
21 It is not intended that way.

22 MJ [LtCol LIBRETTO]: Understood.

23 ADC [MR. THURSCHELL]: It is really intended to sussing

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1 out, I think, what we are supposed to suss out in this  
2 process.

3 MJ [LtCol LIBRETTO]: Okay. Go ahead.

4 ADC [MR. THURSCHELL]: So let me just ask -- start. You  
5 mentioned at one point that you know Major Rudy on the  
6 prosecution team from Camp Lejeune, I believe. Is that an  
7 accurate recollection of mine?

8 MJ [LtCol LIBRETTO]: That was correct. I had served  
9 with -- well, I believe we ferreted out during one of the 802  
10 conferences that I was a military judge when he was serving as  
11 a defense counsel.

12 ADC [MR. THURSCHELL]: Okay. And did you have any kind  
13 of personal relationship with -- at that time beyond the  
14 professional judge-lawyer?

15 MJ [LtCol LIBRETTO]: None at all. Only saw him in court.

16 ADC [MR. THURSCHELL]: Is there anyone else on the  
17 prosecution team who you have had similar or prior contact  
18 with of a -- any kind of a personal nature that might  
19 implicate personal feelings in any way, of any kind?

20 MJ [LtCol LIBRETTO]: No, Mr. Thurschwell. The first time  
21 meeting anyone else on the prosecution team was when I arrived  
22 at Guantanamo Bay at the last session.

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

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1 I want to turn to the defense side. You know  
2 Lieutenant Colonel Tom Jasper, correct?

3 MJ [LtCol LIBRETTO]: I do.

4 ADC [MR. THURSCHWELL]: And as you know, I think, he  
5 was -- actually represented Mr. Al-Tamir for a  
6 year-and-a-half, two-year period, 2014-2015 period. You are  
7 aware of that?

8 MJ [LtCol LIBRETTO]: I learned that when reviewing some  
9 of the filings associated with the session. I didn't know  
10 that independent of the documents in the record.

11 ADC [MR. THURSCHWELL]: And you actually -- my  
12 understanding is that you essentially worked for him or under  
13 his supervisory position for a period of about a year in 2010,  
14 2011?

15 MJ [LtCol LIBRETTO]: That sounds correct.

16 ADC [MR. THURSCHWELL]: And just to get all the facts out,  
17 if we can do that, I believe at the time he was a major and  
18 regional defense counsel at Camp Lejeune?

19 MJ [LtCol LIBRETTO]: That's correct.

20 ADC [MR. THURSCHWELL]: All right. And you were at that  
21 time a captain and a defense counsel under his command?

22 MJ [LtCol LIBRETTO]: That's correct. I think I got  
23 promoted at some point while we were serving together.

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1       ADC [MR. THURSCHWELL]: Okay. Now, he -- he wrote at  
2 least one FITREP for you; is that accurate?

3       MJ [LtCol LIBRETTO]: He was the reviewing officer, I  
4 believe, on one fitness report.

5       ADC [MR. THURSCHWELL]: Okay. And my understanding from  
6 him and other sources is that like you -- your FITREPs at that  
7 time were outstanding. Do you recall getting an outstanding  
8 FITREP in that period from him?

9       MJ [LtCol LIBRETTO]: I believe it was a good fitness  
10 report, yes.

11       ADC [MR. THURSCHWELL]: And he actually told us that you  
12 were -- he thought you were in at least the top five percent  
13 of FITREPs that he ever wrote at that point. Did he ever say  
14 anything like that to you himself?

15       MJ [LtCol LIBRETTO]: He did not.

16       ADC [MR. THURSCHWELL]: Okay. I assume you will be happy  
17 to hear that then.

18                You also, apart from your professional  
19 relationship -- my understanding is that people did socialize  
20 in the defense office at that time and that you actually had  
21 social contact with Lieutenant Colonel Jasper also?

22       MJ [LtCol LIBRETTO]: Social only in the professional  
23 sense, I mean, if there was a work office function. I don't

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1 believe I ever socialized with him outside of the work  
2 environment.

3 ADC [MR. THURSCHWELL]: If he recalled that he had been  
4 golfing with you a few times, does that ring a bell?

5 MJ [LtCol LIBRETTO]: It doesn't. But, again, it's  
6 possible that we golfed together a few times. I would suspect  
7 that it was as a result of a work golf outing, but I don't  
8 recall the specifics.

9 ADC [MR. THURSCHWELL]: Okay. Well, then, let me -- I  
10 don't know if you will or not, but do you recall any  
11 racquetball, playing racquetball with him?

12 ADDC [Maj MILLER]: Your Honor, I'm sorry to interrupt.  
13 If we could break for a second?

14 MJ [LtCol LIBRETTO]: Sure. In place, or would you like a  
15 recess at this time?

16 ADDC [Maj MILLER]: We might need a recess, but if I could  
17 just talk to my client.

18 MJ [LtCol LIBRETTO]: Go ahead.

19 ADC [MR. THURSCHWELL]: Excuse me, Judge, I am going  
20 to ----

21 [Pause.]

22 ADDC [Maj MILLER]: Your Honor, it appears that  
23 Mr. Al-Tamir is having a spasm, so we might need to have a

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1 recess.

2 MJ [LtCol LIBRETTO]: The court is in recess.

3 [The R.M.C. 803 session recessed at 1019, 6 November 2018.]

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