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1 **[The R.M.C. 803 session was called to order at 0902, 1 March 2023.]**

2 MJ [COL ACOSTA]: The commission is called to order.

3 Trial Counsel, good morning. Please identify who's here on  
4 behalf of the United States, where they're located.

5 TC [MR. O'SULLIVAN]: Good morning, Your Honor. These  
6 proceedings are being transmitted via CCTV to public viewing  
7 locations in the United States pursuant to the commission's order  
8 AE 028M dated 22 November 2019.

9 All of the following personnel have the requisite clearances  
10 for being in the courtroom and Remote Hearing Room:

11 Present for the United States here at Guantanamo are myself,  
12 Michael O'Sullivan; Mr. John Wells; Major James Garrett; Major  
13 Michael Ross; Captain Jonathan Danielczyk; Mr. Pascual Tavaréz-Patin;  
14 Staff Sergeant Jaune Daniels; Mr. Forrest Parker Smith; Mr. Louie  
15 Marmo; and our linguist.

16 Present in the Remote Hearing Room in northern Virginia are  
17 Lieutenant Commander Keven Schreiber, Major Stephen Romeo, Lieutenant  
18 Tess Schwartz, Mr. Edward Ryan, Staff Sergeant Kyle Swayzee, Staff  
19 Sergeant Maria Young, and Ms. Paige McLachlan. Also present,  
20 Special Agent Paul Rude with the Transregional Criminal Investigation  
21 Unit; for the FBI, Supervisory Special Agent Mary Sonnen; and from  
22 the Office of General Counsel, Ms. Katherine Eisenreich.

23 MJ [COL ACOSTA]: Thank you.

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1           Good morning, Defense. Who is here on behalf of the  
2 defense?

3           LDC [MR. NATALE]: Good morning, Your Honor. Anthony Natale  
4 on behalf of Mr. Nashiri, who is present in the courtroom with his  
5 interpreter. Also here in the ELC is myself, Lieutenant Colonel  
6 Nettinga, Ms. Morgan, Mr. Dolphin, Mr. Bendernagel, Staff Sergeant  
7 McGuire, LN1 Wood.

8           In the Remote Hearing Room, we have Lieutenant  
9 Commander -- did I -- oh, I'm sorry, did I say "lieutenant colonel"  
10 for Mr. Nettinga?

11          MJ [COL ACOSTA]: Yes. He's here.

12          LDC [MR. NATALE]: Hold on.

13          MJ [COL ACOSTA]: Colonel Nettinga is here. I see him.

14          LDC [MR. NATALE]: Hold on.

15       **[Accused conferred with counsel.]**

16          MJ [COL ACOSTA]: Before you go into whatever that was, just  
17 finish your announcement for ----

18          LDC [MR. NATALE]: That's what I wanted to do, Judge.

19               In the RHR it's Lieutenant Commander Piette, Mr. Roy,  
20 Ms. Carmon, and Mr. Padilla.

21               Mr. Nashiri is having inter -- has need to be where he can  
22 get to facilities quickly, and what he's asked me to ask the court,  
23 if he can be there so he doesn't have to interrupt by saying that he

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1 needs that sort of a break.

2 MJ [COL ACOSTA]: Yes. As I've explained to you, Mr. Nashiri,  
3 in the past, as I do at every session, you have the right to be at  
4 every session that we hold, and you also have the right to waive your  
5 appearance in the ELC.

6 Are you asking now to be excused and to waive your  
7 appearance today?

8 **[Microphone button not pushed; no audio.]**

9 MJ [COL ACOSTA]: I can't -- no one can hear anything that's  
10 being said on the microphone, so can ----

11 ACC [MR. AL NASHIRI]: I will sit in the outside room and I  
12 would listen to all the sessions.

13 MJ [COL ACOSTA]: All right. So I'll take that as his request  
14 to be excused from within the -- his waiver of his right to be  
15 present in the ELC and to go into the other room. If he wants to go  
16 now, he may do so; if he wants to wait until later in the session, he  
17 may do so ----

18 LDC [MR. NATALE]: I think ----

19 MJ [COL ACOSTA]: ---- at a recess.

20 LDC [MR. NATALE]: I think ----

21 MJ [COL ACOSTA]: However ----

22 LDC [MR. NATALE]: I think he needs to ----

23 MJ [COL ACOSTA]: He wants to go now.

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1 LDC [MR. NATALE]: To go now. Thank you.

2 MJ [COL ACOSTA]: All right. Mr. Nashiri is going to exit, so  
3 guard force, if you could facilitate that, please.

4 **[The accused, Mr. Nashiri, withdrew from the courtroom.]**

5 MJ [COL ACOSTA]: All right. Yesterday the government filed  
6 its ex parte filing regarding the 534 motion to compel witnesses that  
7 it discussed, and then this morning the commission also received  
8 notice from the government of its intent to file two additional  
9 ex parte filings on that issue. The government asked the commission  
10 not to rule on the issue until those additional filings were  
11 received.

12 The commission is in the process right now of publishing two  
13 rulings on that issue as we speak. The first ruling is a rejection  
14 of the first ex parte fooling **[sic]** which the commission did not  
15 consider, and the -- and the second is a denial of the defense motion  
16 to compel witnesses in 534 with the caveat that for the purposes of  
17 the underlying motion in 534, the commission will assume that the  
18 statement allegedly made by the accused was, in fact, made. So for  
19 the purposes of deciding 534, the commission will assume that the  
20 statement was made.

21 The government need not file any additional ex parte  
22 pleadings on this issue.

23 The commission will hear argument on the underlying 534

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1 motion on Friday.

2 Now we're taking up the AE 461 and the witnesses there.  
3 Defense, these are both witnesses -- your witnesses, correct?  
4 There's ----

5 ATC [MAJ ROMEO]: Your Honor ----

6 LDC [MR. NATALE]: That is correct.

7 MJ [COL ACOSTA]: You may call your witness.

8 ATC [MAJ ROMEO]: Your Honor, Mr. Kelley is a government  
9 witness ----

10 MJ [COL ACOSTA]: Oh.

11 ATC [MAJ ROMEO]: ---- and I would call Mr. David Kelley.

12 MJ [COL ACOSTA]: Mr. Kelley, a government witness on this  
13 or ----

14 ATC [MAJ ROMEO]: Yes, sir.

15 LDC [MR. NATALE]: Kelley is ----

16 MJ [COL ACOSTA]: Going first?

17 LDC [MR. NATALE]: ---- a government witness. I didn't know  
18 that he was first.

19 MJ [COL ACOSTA]: Oh, added? Right. I apologize. It is  
20 invert -- I flipped them as I typed my notes and it was  
21 Bongardt -- Bongardt, pardon me, that is second and not first.

22 So Kelley is a government witness, and you may call your  
23 witness. Go ahead, Major Romeo.

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1           ATC [MAJ ROMEO]: Thank you, Your Honor. We call David  
2 Kelley.

3           Okay, Mr. Kelley. Can you stand over there and raise your  
4 right hand, please.

5 DAVID KELLEY, civilian, was called as a witness for the prosecution,  
6 was sworn, and testified as follows:

7           ATC [MAJ ROMEO]: And your name, please.

8 WIT: David Kelley, K-E-L-L-E-Y.

9 ATC [MAJ ROMEO]: Okay. Thank you. Please have a seat, sir.

10 DIRECT EXAMINATION

11 Questions by the Assistant Trial Counsel [MAJ ROMEO]:

12 Q. So, Mr. Kelley, where do you currently work?

13           A.     I am a lawyer at Dechert -- that's spelled  
14   D-E-C-H-E-R-T -- LLP, a law firm based principally in New York.

15 Q. Okay. And what do you do there?

16           A.     I'm a partner in a law firm. I am the chair of the white  
17 collar and securities litigation practice group.

18 Q. Okay. Can you for the commission give a brief overview of  
19 your professional experience prior to your current position.

20           A.       Sure. I left the -- I graduated college. I was here in  
21 Virginia at the College of William and Mary. I graduated, went into  
22 the police academy, became a police officer in New York. Went into  
23 law school while I was a police officer ----

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1 MJ [COL ACOSTA]: I just need to slow you down, Mr. Kelley.

2 WIT: Sure.

3 MJ [COL ACOSTA]: You're being interpreted in real time as you  
4 speak, so if you could just keep that in mind ----

5 WIT: Yeah, good point.

6 MJ [COL ACOSTA]: ---- as you continue, please.

7 WIT: Thank you, Your Honor.

8 A. While in law school -- or after law school, I became a  
9 federal law clerk in the District of Connecticut. From there, I  
10 became -- I went into the United States Attorney's Office for the  
11 Southern District of New York, was sworn in as an Assistant  
12 U.S. Attorney in 1988.

13 I became the chief of organized crime and terrorism in or  
14 about 1994, and I served in that position until 2002, when I became  
15 the Deputy United States Attorney. In 2003, I became the  
16 United States Attorney and served in that role until 2005.

17 At one point, on 9/11, I became the chair of the Justice  
18 Department's investigation into the attacks on 9/11 and served in  
19 that capacity until I became the Deputy U.S. Attorney in the Southern  
20 District of New York.

21 After leaving the U.S. Attorney's Office in 2005, I entered  
22 into private practice of law, first at the law firm of Cahill Gordon  
23 & Reindel, and then in 2017 I moved to Dechert, LLP.

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1 Q. Okay. Mr. Kelley, for the -- can you describe some of the  
2 terrorist cases that you worked on in your career.

3 A. Sure. So I was involved -- the first one of note was the  
4 first attack on the World Trade Center in February of 1993. I  
5 investigated that and tried that case. I also participated in the  
6 investigation of the attacks on the East Africa embassies in Kenya  
7 and Tanzania in 1998. I investigated and prosecuted the Millennium  
8 Bombing case that occurred in Seattle, part of which also occurred in  
9 New York and Canada.

10 I conducted the investigation and began the prosecution of  
11 some of the perpetrators of the USS COLE. I investigated -- as I  
12 said, I was the chair of the investigation of the attacks on 9/11.

13 I prosecuted John Walker Lindh. And in between all those  
14 cases I also conducted a whole host of investigations nationally and  
15 internationally concerning terrorism, many of which are not of public  
16 record.

17 Q. So let's shift back to the USS COLE investigation. Can  
18 you describe for us your responsibilities?

19 A. When the -- when the USS COLE was attacked in Aden, Yemen,  
20 I actually was in Cairo, Egypt, on another matter. Eventually,  
21 within the next 24 to 48 hours, I arrived in Yemen. I was on the  
22 deck of the USS COLE supervising or overseeing the investigation into  
23 that attack.



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1           For the most part, the first order of business was dealing  
2 with the Yemen authorities and had to negotiate, on behalf of the  
3 U.S. government, a memorandum of understanding as to how the  
4 investigation would be conducted, and that was a process that took  
5 quite a bit of time.

6           Q.     Were you involved on the ground in any of the interviews  
7 that went on with witnesses?

8           A.     I don't recall having actually participated in witness  
9 interviews. I did participate or oversee the kind of coordination or  
10 kind of developing investigative protocol for conducting the  
11 investigation in Yemen.

12          Q.     Okay. What was your relationship with the agents that  
13 were on the ground doing the investigation, interviews, things like  
14 that?

15          A.     So these agents were not new to me. These agents were  
16 ones with whom I had worked in many of the other preceding  
17 investigations, had known many of them for quite some time. And so a  
18 lot of what we did was things that we had grown accustomed to doing.

19                It was at the time, that period of time, which is different  
20 post-9/11 -- but pre-9/11, the government's response to terrorist  
21 threats and to terrorist incidents principally was through the  
22 Justice Department, meaning for the most part a group of us from the  
23 Southern District of New York together with the Joint Terrorism Task

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1 Force in New York to conduct these investigations. And principally  
2 the direction from the Attorney General was to kind of whatever  
3 you -- however it is that you do things here in the states, go over  
4 there and do it.

5 And so one of the challenges that we have in all of our  
6 international investigations were how do we take information that we  
7 cultivate or develop overseas and make it admissible evidence into a  
8 court in the United States.

9 Q. Do you recall if you had any involvement in suggesting  
10 whether photos should be added or deleted from photo books that were  
11 used in interrogations -- in questioning of witnesses?

12 A. I do recall from time to time being presented with photo  
13 spreads to see -- basically to validate for the agents whether or not  
14 they would be appropriate if used in a U.S. courtroom.

15 Q. Okay. Do you recall if you suggested any photos that  
16 would be removed and deleted for specific reasons?

17 A. I think whenever you're compiling a photo spread, you  
18 know, you take some and you leave some. It's not an exact science.  
19 It's kind of more of a visceral reaction to what is going to look  
20 suggestive and what is not going to look suggestive. Obviously, the  
21 goal is to prevent a photo spread that's not overly or improperly  
22 suggestive.

23 Q. Would the photograph of someone wearing a headdress, for

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1 example, would that be considered overly suggestive?

2 A. In a vacuum, no. As I approached it in this particular  
3 case, I think you need to distinguish between if -- you know,  
4 who -- to whom is the photo spread intended to be shown.

5 So if I was conducting a terrorism investigation in New York  
6 City and I was to show a New Yorker a photo spread that included  
7 somebody wearing a headdress, I would say absolutely not, because the  
8 culture in New York would be to say if somebody is wearing a  
9 headdress, then they're a terrorist, unfortunately, but that would  
10 likely be the reaction.

11 If I'm in the streets of Aden, Yemen, and I'm showing  
12 somebody a photograph that includes people -- depicted people with  
13 headdresses, that wouldn't concern me.

14 Q. So if the photograph -- if a photograph of someone in a  
15 headdress was removed in an interrogation or an interview that was  
16 used in Aden, Yemen, what would be the policy behind that?

17 A. I don't think there's a policy. Again, I think when  
18 you're approaching, you know, looking at a photo spread, you're  
19 trying to avoid there being, you know, overly suggestive of who the  
20 person of interest is. You don't want to have a photo spread that is  
21 essentially going to, in a sense, point the person, the viewer of the  
22 photo spread, to the photo of the person of interest.

23 Q. Do you recall if there were any other reasons why you

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1 would request that an FBI agent would remove or add photos?

2 A. I think generally my approach was, you know, it's kind of  
3 like Justice Stewart in Jacobellis vs. -- I forget the name of the  
4 case. It was a pornography case, when he says I know it when I see  
5 it. So when you look at a photo spread, it's just kind of a reaction  
6 whether or not you think it's overly suggestive.

7 One of the things that I was focusing on -- there's kind of  
8 two things I was focusing on insofar as I was validating or helping  
9 the agents compile photo spreads, which were first off who is the  
10 audience, who is the person -- you know, where is this going to be  
11 shown?

12 As I said, to the extent it was being shown overseas, it did  
13 not concern me that there was somebody with a headdress. But if I  
14 could avoid it, I would prefer to avoid it, because if I'm ultimately  
15 going to be using that photo spread as a piece of evidence in New  
16 York, I want to eliminate as many issues as possible so that  
17 somebody's not going to raise an issue, oh, he has a headdress, so  
18 it's suggestive of him being a terrorist.

19 That's just an issue I don't need to deal with, because if I  
20 can avoid having a headdress, I -- I'd like to have that issue off  
21 the table in New York. Because, like I said, when you're showing it  
22 overseas, it's not suggestive, but somebody looking at it under these  
23 conditions, so if I was in a courtroom, a jury may think, geez, they

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1 showed him that photograph, that's kind of suggestive.

2 So I wanted to eliminate that issue because I don't see it  
3 as a real issue, but if you can -- as you're converting information  
4 to evidence, you try to think ahead, how many issues can I take off  
5 the table before I get this into a courtroom.

6 Q. Okay. In and of itself, though, what -- would you  
7 consider it to be fatal for an investigation if that was included?

8 A. It ----

9 Q. If that photo of the headdress was included in an  
10 investigation in Yemen, would you consider that fatal ----

11 A. No.

12 Q. ---- as a -- yes.

13 A. I wouldn't consider it fatal. I wouldn't consider it  
14 suggestive.

15 Q. Okay. So to your knowledge, were sketches of suspects  
16 used in the photo book?

17 A. So we're talking 23 years ago. There may have been times  
18 where we included sketches if we didn't have pictures. And again, I  
19 didn't think that that was necessarily a problem. I don't remember  
20 if we included it or excluded it.

21 Like I said, my preference was, if we had a photograph, to  
22 use the photograph. If we had nothing else, then let's give it a  
23 shot with the sketch. But I don't recall whether we did that or not.

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1 Q. Okay. And do you recall if the photo book had multiple  
2 photos of suspects, not necessarily identical, but just different  
3 photos of potential suspects?

4 A. You're talking about a photo book or a photo spread?

5 Q. I'm sorry. In the -- in the photo books that were used in  
6 Yemen.

7 A. Photo books had sketches. They had -- you know, there may  
8 have been some composites. There may have been photographs. You  
9 know, I don't -- you know, I think photo books tend to be just a  
10 collection of a large number of photos and I don't -- typically don't  
11 look at those from a suggestiveness point of view.

12 Q. Okay. Are you familiar with photo arrays?

13 A. I am.

14 Q. Can you tell the -- what's the difference between a photo  
15 array and a photo book?

16 A. Like I said a moment ago, photo book tends to be just a  
17 complication of a lot of pictures of a lot of different people, and  
18 typically you would present that to somebody who is a potential  
19 witness or a witness, and ask them to flip through the book and tell  
20 us if you recognize anybody in there; where a photo spread is, you  
21 mentioned to us Joe Blow. Do you see Joe Blow in any of these -- in  
22 this photo spread?

23 Q. Okay.

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1           A.     And obviously, you don't want to be overly suggestive as  
2 to who Joe Blow is. Or maybe I should say John Doe.

3           Q.     Knowing that it's been a long time, do you recall,  
4 where -- do you recall where any of the photos came from when the  
5 agents sent the photo book up for your review?

6           A.     No. I know they were collected over time. I can't tell  
7 you as I sit here now. There may have been a time when I did know.  
8 I don't recall.

9           Q.     Okay. I'm going to list a few names to see if you recall  
10 these people. So I'm going to give you four names. Do you know  
11 Andre Khoury, Ali Soufan, Steve Bongardt, and George Crouch?

12          A.     Very well.

13          Q.     And how do you know them?

14          A.     They were colleagues. They were agents who worked on  
15 **[sic]** me on a number of investigations going back to, you know, all  
16 of the terrorism investigations that I mentioned. Any one of them  
17 could have been on each and every one of those investigations, but I  
18 knew them through my work for the government.

19          Q.     Okay. And did you rely on them to follow, you know,  
20 standard investigation procedures when it came to interviewing  
21 witnesses and preparing photo evidence?

22          A.     I did. And a lot of what we did was -- you know, we  
23 collaborated. You know, they were the investigators, I was the

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1 lawyer, but recognize that each one of the names you mentioned are  
2 amongst the best that the bureau ever has had. They're just all  
3 great agents.

4 Q. Okay. Do you recall if there were multiple versions of  
5 the photo books that were used in Yemen?

6 A. So -- excuse me. I recall having reviewed several  
7 different photo spreads. I don't -- I can't tell you how many, and I  
8 can't tell you how many they ultimately decided to use.

9 Q. If there were more than one photo spreads, would  
10 you -- would -- did -- as a potential prosecutor for this case, would  
11 you have an issue with that?

12 A. No.

13 Q. Okay. All right. I just have one more question before I  
14 talk to my trial team here. I just ----

15 ATC [MAJ ROMEO]: Your Honor, I ask permission to publish AE  
16 461J, excuse me, pages 30, 31, and 32. I'll put them up one at a  
17 time.

18 MJ [COL ACOSTA]: Hold on.

19 ATC [MAJ ROMEO]: The defense has a copy.

20 MJ [COL ACOSTA]: Hold on.

21 ATC [MAJ ROMEO]: Yes, sir.

22 MJ [COL ACOSTA]: 461J. Can you give me those pages again,  
23 please?



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1 ATC [MAJ ROMEO]: Yes, sir. Pages 30, 31, and 32.

2 MJ [COL ACOSTA]: I was handed a packet of exhibits earlier.  
3 There's one that says 461J, pages 29 to 32. You're only going to  
4 show the -- you're showing 30, 31, and 32?

5 ATC [MAJ ROMEO]: That's correct, Your Honor.

6 MJ [COL ACOSTA]: Is the cover sheet page 29?

7 ATC [MAJ ROMEO]: Yes, sir.

8 MJ [COL ACOSTA]: Okay. I'm only mentioning that because the  
9 pages themselves don't have numbers on them that correlate to that.  
10 I'm just trying to make sure what we're going to be seeing.

11 ATC [MAJ ROMEO]: Yes, sir.

12 MJ [COL ACOSTA]: Defense, you have this? These are the  
13 exhibits from their motion.

14 **[Counsel conferred.]**

15 MJ [COL ACOSTA]: All right. You can proceed.

16 DC [MR. PADILLA]: Yes, Judge, we do have a copy.

17 MJ [COL ACOSTA]: All right. You may proceed.

18 ATC [MAJ ROMEO]: Thank you, Your Honor.

19 Q. So, Mr. Kelley, I'm going to show you three successive  
20 pages. What I'd like you to do is take a look at the first page, and  
21 then when you're done let me know and I'll put the second page and  
22 then the third page, and then I'll have a question for you.

23 ATC [MAJ ROMEO]: So submitting to the ELMO AE 461J page 30.

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1 [The witness reviewed the evidence.]

2 WIT: Okay.

3 ATC [MAJ ROMEO]: Retrieving page 30.

4 AE 461J, page 31 submitted.

5 [The witness reviewed the evidence.]

6 WIT: Okay.

7 ATC [MAJ ROMEO]: Retrieving page 31.

8 Submitting page 32 of AE 461J.

9 [The witness reviewed the evidence.]

10 WIT: Okay.

11 Q. So my question, Mr. Kelley, is: If you -- if an agent was  
12 showing you a photo book consisting of those pictures for an  
13 investigation in Yemen, a terrorist investigation, would you consider  
14 that -- those photos to be overly suggestive?

15 DC [MR. PADILLA]: Judge, I'm going to object.

16 MJ [COL ACOSTA]: Basis?

17 DC [MR. PADILLA]: He's not an expert in this.

18 MJ [COL ACOSTA]: Government? Is he offered -- he's not  
19 offered as an expert, correct?

20 ATC [MAJ ROMEO]: Correct, Your Honor.

21 MJ [COL ACOSTA]: Okay. Your response to ----

22 ATC [MAJ ROMEO]: Well, my response is ----

23 MJ [COL ACOSTA]: ---- his opinion as to whether or not

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1 they're overly suggestive?

2 ATC [MAJ ROMEO]: Yes, sir. Well, my response is, is that  
3 Mr. Kelley already testified that he's had 35 years' experience  
4 dealing with cases that I would assume include photo identifications.  
5 So ----

6 MJ [COL ACOSTA]: That sounds like ----

7 ATC [MAJ ROMEO]: He certainly -- he certainly couldn't review  
8 this and see if this came on his desk, if he would approve it or not.

9 MJ [COL ACOSTA]: Is he being offered as an expert witness or  
10 as a fact witness?

11 ATC [MAJ ROMEO]: As a fact witness.

12 MJ [COL ACOSTA]: Okay. His opinion as to whether those are  
13 based upon his 35 years of experience sounds like you're getting into  
14 an expert opinion.

15 There's a way to ask what you -- what I think would -- the  
16 question, but it's not the way you did. Sustained.

17 ATC [MAJ ROMEO]: All right. Yes, sir.

18 Q. Mr. Kelley, are you familiar with the January 2nd, 2001,  
19 ADENBOM Photo Book?

20 A. I was. I don't think I've seen it in 23 years.

21 Q. Okay.

22 A. Or 22 years. There was a time when, yes, I was familiar,  
23 as I was familiar with the exhibits that you showed me, and I made

1 conclusions about those pictures, the ones that you showed me at the  
2 time, that they were shown to me.

3 Q. Okay. So I'll ask it this way, sir. The -- the original  
4 photo book that was presented to you back when you were involved in  
5 the COLE investigation, before you made any, you know, suggestions of  
6 adding or deleting photos. If that photo book was used, if the FBI  
7 agents said we're going to use this anyway, would you consider that  
8 photo book to be so overly suggestive that it would -- wouldn't be  
9 usable?

10 DC [MR. PADILLA]: Again, Judge, same objection.

11 MJ [COL ACOSTA]: Sustained. Government, there's -- again,  
12 there's a way to do this. You're just not doing it. If you need to  
13 consult with counsel, you -- with co-counsel, you may.

14 ATC [MAJ ROMEO]: All right. Yes. Thank you, Your Honor.

15 **[Counsel conferred.]**

16 **[The military judge conferred with courtroom personnel.]**

17 ATC [MAJ ROMEO]: Okay, Mr. Kelley, I have no further  
18 questions.

19 MJ [COL ACOSTA]: All right. Defense, cross? Mr. Padilla,  
20 you may proceed.

21 DC [MR. PADILLA]: Thank you, Judge.

22 **[END OF PAGE]**

23

**CROSS-EXAMINATION**

**Questions by the Defense Counsel [MR. PADILLA]:**

Q. Good morning.

A. Good morning.

Q. I have a couple questions for you. And I want to begin with, you mentioned that you were in Cairo when the COLE bombing occurred, correct?

A. Correct.

Q. And so I want to ask you some questions just about sort of that brief period of time before you actually arrive in Yemen, okay?

A. Okay.

Q. All right. Now, you mentioned that you were notified of the COLE bombing while you were in Cairo on October 12th of 2000, correct?

A. Correct. Well, I don't think -- if I said notified, I learned of it through CNN.

Q. Right. Okay. Through the news.

A. Right.

Q. Okay. And was it at some point after that that you were instructed or asked to go to Aden to begin what became the COLE investigation?

A. The reaction at the time was that I should immediately go from Cairo to Aden. I needed to get country clearance, and we had a

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1 deal -- you know, worked with Ambassador Bodine in order to arrange  
2 for my country clearance.

3 Q. Okay. And is it fair to say, again, at that beginning  
4 point that a team was being assembled to go to Yemen?

5 A. I don't know the answer to that. I believe a team of FBI  
6 agents was being assembled, and members of the Joint Terrorism Task  
7 Force from New York. That's what I believe. I don't recall and I  
8 don't know.

9 Q. Okay. That would have made sense, though, right, based on  
10 your past experience, that a team would be assembled to go to a  
11 location to begin the investigation?

12 A. Unless there were -- I don't believe that there were any  
13 people with me in Cairo who went. There may have been others from  
14 other parts of the globe who went. I don't recall. We were used to  
15 being deployed to different incidents.

16 Q. Right. And I think that that's sort of what I was getting  
17 at ultimately, was that this was -- again, based on prior  
18 investigations, that's how things worked out. Fair to say?

19 A. I believe so.

20 Q. Okay. And part of that team would have included lawyers?

21 A. No.

22 Q. Was it your understanding -- well, let me back up.

23 A. I was a lawyer.

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1 Q. Just one. Is that your memory, just you?

2 A. That's my recollection.

3 Q. Okay.

4 A. Now, I would confer and consult with my colleagues who may  
5 have been in other places, but as I recall it, I was the only Justice  
6 Department lawyer on the ground.

7 Q. Okay. And again, part of -- part of arriving at a  
8 location, and specifically arriving at Yemen, that would have  
9 included some of the agents that you just mentioned, right, also  
10 arriving at Yemen to begin the investigation of this case?

11 A. I don't recall which among those that were named were on  
12 the ground in Yemen. I believe -- I mean, I remember probably  
13 Bongardt and Ali Soufan. I actually think, but I don't -- I don't  
14 know. I think Khoury may -- may have been in Cairo, but -- and then  
15 came onto the Aden investigation later. I don't recall.

16 Q. Okay. Fair enough. And I -- and I didn't mean to ask you  
17 to commit to all the people who were there. I think my point was  
18 that, again, part of that team would have necessarily included  
19 agents?

20 A. Yes.

21 Q. All right.

22 A. There were agents and police officers from the Joint  
23 Terrorist Task Force with whom I met when I arrived in Aden.

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1 Q. And they would have been responsible for gathering  
2 evidence, correct?

3 A. Correct. Well, let me -- let me -- gathering information  
4 is the way I like to look at it. How you convert it into admissible  
5 evidence is a different kind of calculation.

6 Q. Sort of maybe down the road?

7 A. Right.

8 Q. But again, the purpose of them being in -- and by them,  
9 I'm talking about the agents specifically. The purpose for them  
10 being there was to gather, my word, or -- evidence, whether that was  
11 in the form of testimonial evidence down the road or actual physical  
12 evidence at a scene?

13 A. Two focuses, if you will, foci I guess I should say. One  
14 is to understand what happened and -- with a view toward, you know,  
15 the Navy needs to know what happened. The State Department needs to  
16 know what happened with a view toward how do you prevent it from  
17 happening again.

18 And the other part of it is how do we address this -- how do  
19 we address the wrongdoers? And to that end, you know, is  
20 your -- gathering information with a view toward making evidence  
21 toward a prosecution, as you would any criminal incident.

22 Q. Right. And again -- and I think I'm sort of going there,  
23 and again, understanding that the goal is a prosecution at some point



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1 down the road, correct?

2 A. We approached all these investigations as if they may end  
3 up in a courtroom some day.

4 Q. Okay. And again, that would have necessarily included  
5 testimony along with physical evidence, right?

6 A. Correct. Right.

7 Q. All right. And that would have involved identifying  
8 potential witnesses in this case?

9 A. Correct.

10 Q. Identifying potential suspects?

11 A. Correct.

12 Q. The interrogation or questioning of witnesses?

13 A. We didn't conduct interrogations. We conducted  
14 interviews.

15 Q. And interrogations of potential suspects as well?

16 A. I wouldn't call them interrogations. That has a  
17 connotation that I don't -- that doesn't resonate with me. We  
18 conducted interviews.

19 Q. Can you recall a time during the COLE investigation where,  
20 beyond interviews -- you know, Mr. Kelley, we want to talk to you,  
21 come on in, you know, did you see anything on such-and-such a  
22 date -- but you had potential suspects identified and agents  
23 specifically interrogated? And I'm talking about bringing that

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1 witness in, may have been in custody, full Miranda rights given, and  
2 that -- that witness -- that suspect questioned about his role,  
3 involvement in this case. Do you remember that happening?

4 A. I hate to do this, but I don't really understand the  
5 question. It sounds like there was a lot of stuff in there.

6 Q. Well ----

7 A. Is the question do I recall interviews of suspects or  
8 witnesses being conducted?

9 Q. That was part of it, and I -- I also mentioned  
10 interrogations of suspects, and that's where you said I don't ----

11 A. I mean when you say -- if I may, when you say  
12 interrogation, could you please define what you mean by  
13 interrogation.

14 Q. So as opposed to bringing in a witness who you're not sure  
15 whether that person is going to provide you with information at all,  
16 a certain -- a person who sees something on the street, I'm going to  
17 bring that person in and talk to that -- that witness, an interview  
18 of the witness, okay?

19 On the other hand, an identifiable suspect, we think this  
20 person is involved in the crime, okay, and we're going to formally  
21 interview that person about his role in the offense. And as a  
22 lead-up to that -- maybe it's about the words that I'm using. In the  
23 lead-up to the interview or the interrogation, that suspect is read

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1 full Miranda rights so he knows the implications of the statement  
2 that he's giving to law enforcement.

3 Those two things is -- is the difference that I'm trying to  
4 make.

5 A. I'll try to answer that in two ways.

6 One is I don't recall having participated in any interview  
7 or any exchange, however you want to characterize it, with any  
8 witnesses or suspects while I was on the ground in Yemen.

9 Q. What about ----

10 A. Let me -- should I finish the -- my answer, which is:  
11 Insofar as a person who is being interviewed was not -- who is being  
12 interviewed who is not in custody and who did not feel free to leave,  
13 I would expect Miranda warnings to be given. If the person was in  
14 Yemen custody beyond our control, I don't know that I would  
15 necessarily require Miranda rights be given. And in any event, that  
16 would be an issue of voluntariness that I'd have to address if I were  
17 to use those statements against that person subsequently.

18 Q. Okay. So I started this off about asking you if you  
19 remember getting statements from suspects. And then we had some  
20 follow-up there, and ----

21 A. The short answer to the question is I don't recall having  
22 conducted or participating in the conduct of interviews with  
23 individuals while on the ground in Yemen. I was principally focused

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1 on developing some protocols. But largely my time was consumed by a  
2 painstaking process with the -- either the Ministry of Justice or the  
3 equivalent of the Yemen Ministry of Justice and a principal -- I  
4 think the Minister -- or the equivalent of the Minister of Justice of  
5 Yemen in developing a memorandum of understanding about how the  
6 investigation would be conducted.

7 Q. Okay. Can you recall if you learned, after you left  
8 Yemen, that the United States was conducting interviews,  
9 interrogations, of suspects who may be involved in this case? Again,  
10 not when you were on the ground, but maybe when you had returned back  
11 to New York. Do you recall that?

12 A. So many of us had to leave Yemen because the Marine detail  
13 who was protecting us said that they couldn't keep us safe anymore.  
14 And so there was a period of time where many agents were no longer on  
15 the ground in Aden. I returned eventually -- I went to other places  
16 but eventually returned to New York and would stay in touch with  
17 agents who were continuing with the investigation. And I became  
18 aware from time to time of interviews that were being conducted.

19 Q. Do you recall either a meeting or a discussion that you  
20 had on January 13th, 2001 where, following that call or that meeting,  
21 there was a discussion about the statement of someone by the name of  
22 Jamal Badawi?

23 A. I'm sorry. I didn't hear the last part. There was a

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1 report of what?

2 Q. That there was ----

3 ATC [MAJ ROMEO]: Your Honor, I'm going to object, relevance  
4 to this motion.

5 MJ [COL ACOSTA]: Defense?

6 DC [MR. PADILLA]: Judge, we're talking about -- and  
7 Mr. Kelley has mentioned this a couple times already here, but we're  
8 talking about the admissibility of evidence in this case. This case  
9 happens to be about the admissibility of -- of evidence of -- of  
10 IDs ----

11 MJ [COL ACOSTA]: Okay.

12 DC [MR. PADILLA]: ---- and so I think that it's relevant to  
13 get into some of the background on how some of this evidence was  
14 gathered.

15 MJ [COL ACOSTA]: I'll give you some room to explore this.  
16 Overruled at this time. We'll readdress if it's not -- if it doesn't  
17 get back to the identifications and the admissibility of those as  
18 we're here to get evidence on. Thank you. Go ahead.

19 DC [MR. PADILLA]: Understood. Thank you, Judge.

20 Q. So, again, a meeting or a phone call on January 13th,  
21 2001, regarding the interview of someone by the name of  
22 Jamal al Badawi, where it was agreed that the Aden investigators  
23 should not review the statement -- and they're talking -- when I say

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1 Aden investigators, I'm talking about the Aden FBI/NCIS  
2 investigators, should not review the prior statement that Mr. Badawi  
3 gave and in effect establish a Chinese wall regarding its contents;  
4 that you, AUSA Kelley, advised the Aden investigators to request a  
5 full interview of Mr. Badawi, independent of his previous statement  
6 to the Yemenis. Further, Mr. Kelley advised regarding the rights of  
7 advice -- the full rights of advice waiver form should be used, any  
8 subject interview, and not the modified Miranda form.

9 Do you remember that meeting or that conversation?

10 A. January 13th of 2001?

11 Q. Correct.

12 A. I'm sorry, I don't recall. Obviously, I'm  
13 familiar -- familiar with the name of Badawi. I am -- I can't -- it  
14 sounds like you're reading from a report. I'd like to be able to say  
15 it's accurate. I don't know, and I don't recall.

16 Q. I can pass this up and have you look at it. Do you think  
17 that it would refresh your memory about ----

18 A. I'm happy to take a look at it. What you read did not  
19 refresh my recollection.

20 Q. Yeah, let me -- I read just about all of it, but I'll give  
21 you a chance to read it and see if it refreshes your memory, again,  
22 about -- I know we got off on sort of a little tangent here, again,  
23 but about the difference between a witness interview and a subject

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1 statement. Okay?

2 And so this is AE 461P at page 12, and it is the fourth  
3 paragraph from the top and it begins with January 13th, 2001. Okay?

4 DC [MR. PADILLA]: I apologize, Judge. If I can ----

5 WIT: Is it okay if I look at the whole document?

6 DC [MR. PADILLA]: Sure. I'm sorry, Judge, I forgot to ask  
7 permission to approach the witness.

8 MJ [COL ACOSTA]: We've been going for several days. You  
9 don't have to ask -- normally everybody asks the first time. This is  
10 not an oversight that is -- this is not a -- an issue for me,  
11 Counsel.

12 DC [MR. PADILLA]: Thank you, Judge.

13 MJ [COL ACOSTA]: You may move freely.

14 DC [MR. PADILLA]: Thanks.

15 **[The witness reviewed the evidence.]**

16 WIT: They spelled my name wrong.

17 DC [MR. PADILLA]: I did see that, yes.

18 WIT: I assume it's me, though, so ----

19 Q. Finished? Had ----

20 A. I haven't read it word for word.

21 MJ [COL ACOSTA]: Hold on. Hold on.

22 DC [MR. PADILLA]: Thank you, Judge. Judge, I have the ----

23 MJ [COL ACOSTA]: Retrieve the document. Go ahead and ask

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1 your questions.

2 DC [MR. PADILLA]: Yeah. Got it, Judge.

3 Q. Mr. Kelley, does that refresh your memory about -- again,  
4 about how some of those suspect interviews, interrogations, however  
5 you want to call them, took place?

6 A. I think that's talking about one particular interview, is  
7 it not?

8 Q. Correct.

9 A. So let's focus on just one particular interview?

10 Q. Right.

11 A. I don't have a recollection clearly of that. I have a  
12 little bit of a -- tiny little blip on my radar screen in the  
13 recesses of my feeble memory, is that I was likely being very  
14 conservative. And without having sufficient facts to know what the  
15 prior interrogation or interview, whatever it was that they conducted  
16 in Yemen, if I had the luxury of having someone else do a new  
17 interview, then I would take that luxury without opining on whether  
18 or not the previous interview was in any way tainted.

19 Q. Okay. Fair enough. I think that you mentioned that when  
20 you arrived, there were concerns about U.S. personnel safety there on  
21 the ground in Yemen; is that fair to say?

22 A. I didn't know -- when I first arrived, I didn't know  
23 enough to have that concern, but I know we had a Marine FAST team



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1 protecting us.

2 Q. Did you -- did you learn at any point while you were there  
3 in Yemen that -- Yemen that -- that there were security concerns  
4 dealing with U.S. personnel ----

5 A. The shooting at us was a pretty clear clue.

6 Q. Right? That would have been -- all right.

7 And are you aware that at some point even the FBI's Hostage  
8 Rescue Team was on scene there in Yemen to provide security for U.S.  
9 forces?

10 A. Yes.

11 Q. And you're aware that, at some point, U.S. personnel was  
12 actually moved -- I don't know if everybody was moved, but certainly  
13 some U.S. personnel were moved from Aden actually to the USS DULUTH  
14 during ----

15 ATC [MAJ ROMEO]: Objection, relevance.

16 MJ [COL ACOSTA]: Defense?

17 DC [MR. PADILLA]: Judge, again, I'm going to get there, but I  
18 think I need to set the scene, again, if we're talking about  
19 admissibility of evidence. I'm trying to paint the picture of how  
20 things were in Yemen as opposed to, again, an investigation here in  
21 the United States.

22 MJ [COL ACOSTA]: All right. Overruled at this time. I'll  
23 let you -- I'll give you a little more room, Counsel. Go ahead.

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1 DC [MR. PADILLA]: I'm getting through it, Judge. I promise.

2 WIT: It was the USS TIRU [sic].

3 Q. I'm sorry. But, yes, U.S. personnel were moved to a ship  
4 offshore for their safety, correct?

5 A. That was my understanding. I did not do that.

6 Q. Right. And again, I think that you mentioned on direct  
7 that at some point, even I think yourself included, were sent back  
8 home because of safety concerns in Yemen?

9 A. No. I had the option of remaining. I felt that whatever  
10 work I needed to do could be done remotely at that point, having  
11 completed the negotiation of the MoU, having set the protocols for  
12 the investigation, I actually left Aden and went back to Cairo.

13 Q. All right. And maybe I didn't ask that the right way.  
14 You did not return either to Cairo or to the United States because of  
15 any safety concern; is that what you are saying?

16 A. No.

17 Q. Okay. Are you aware that there were other personnel  
18 besides yourself that were sent home because of safety concerns, if  
19 you know? If you don't know, it's okay.

20 A. I don't recall. I think many agents went out on the TIRU.  
21 I don't think anybody was like, you, you and you go home because it's  
22 not safe here. I don't recall that being the case.

23 Q. Okay. Either when you got to Yemen or during your time

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1 there, did you come to learn that there were concerns in the U.S.  
2 government about the Yemen -- people in the Yemeni government being  
3 sympathetic to terrorist organizations and al Qaeda specifically?

4 A. I don't recall. I think that generally in conducting the  
5 investigations we conducted you were always -- had a level of some  
6 skepticism about the level of cooperation you were receiving from any  
7 foreign government.

8 Q. You don't -- you don't recall a time while you were there,  
9 or afterwards, learning that some high-level people in the Yemeni  
10 government were either sympathetic or actively involved in al Qaeda?

11 ATC [MAJ ROMEO]: Objection, relevance.

12 MJ [COL ACOSTA]: Defense?

13 DC [MR. PADILLA]: Judge, I think it has been the same  
14 objection, and it is my same response. Again, we're talking about  
15 admissibility of evidence that was gathered in Yemen and I think that  
16 these questions are relevant to get there.

17 MJ [COL ACOSTA]: Overruled. I will allow it. Go ahead.

18 Q. Again, either when you -- while you were there or after  
19 you left that there were concerns that people, high levels of the  
20 Yemeni government, either sympathetic or actively involved in terror  
21 organizations?

22 A. I don't recall that. I don't recall having a concern that  
23 whatever challenges there may be, that we weren't getting straight

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1 stories from the people who we were interviewing, or collecting  
2 evidence that was tainted in any way. I thought that we were doing a  
3 great job of getting the information and evidence we need.

4 I did learn at some point, quite a way -- you know, maybe  
5 months later, there was a jailbreak and that became, you know,  
6 somebody from -- in the government was complicit in that. But I  
7 don't know that we felt in Yemen that there was any greater  
8 government interference, favoritism than we might have confronted  
9 elsewhere or anything that was really impeding us, but, you know, I  
10 just don't recall that to be the case.

11 I did feel, you know, in putting together the MoU, my  
12 experience with how efficient or effective the government was, was  
13 quite different.

14 Q. Understood, and I'll get to that in a second here. So let  
15 me ask you some questions about -- I was trying to sort of stick to a  
16 timeline here sort of when you learned of the COLE and then when you  
17 got there, so my next set of questions are going to be focused on  
18 when you actually got there and sort of what you found or what you  
19 learned. Okay?

20 Now, did you learn when you arrived, again, within a few  
21 days or so or weeks, that Yemeni law enforcement were already  
22 investigating this case?

23 A. No, I don't recall that.

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1           Q.     Did you learn while you were there that the Yemenis had  
2 begun identifying potential suspects?

3           A.     I don't recall whether it was that they had identified  
4 suspects or working together with our agents had identified suspects.  
5 And when we talk about suspects, I mean there was -- it was kind of,  
6 again, on-the-ground investigation and more of an international  
7 investigation.

8                     The on-the-ground investigation focused on the beach, the  
9 safehouses, the lookout, and who was associated with them. For that  
10 we needed the assistance of local authorities. And then there was  
11 chains of information and sources throughout, you know, that weren't  
12 even in Yemen that helped feed or clue us as to who was behind the  
13 attack.

14          Q.     Understood. You mentioned witnesses in your answer there.  
15 Were you aware that Yemeni law enforcement had identified witnesses  
16 and in many cases already talked to witnesses? Were you aware of  
17 that?

18          A.     I don't recall whether or not they had identified them,  
19 and I don't recall whether or not they had spoken to them at  
20 any -- in any meaningful way before we conducted interviews.

21          Q.     Were you aware when you arrived that the Yemeni law  
22 enforcement had located potential crime scenes?

23          A.     Again, I don't know if they did that. When we talk about

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1 crime scenes, when you say crime scene, what I'm thinking of is the  
2 places I mentioned. There was a beachfront ----

3 Q. Right.

4 A. ---- launching area, a safehouse, a house where the bomb  
5 appeared to have been built, a lookout, and I don't know who or how  
6 those -- I don't recall who or how those were identified, whether it  
7 was our agents working together or alone, or whether or not the local  
8 authorities had already identified that.

9 Q. Okay.

10 A. I can't tell you.

11 Q. Right. And you're exactly right, that's what I'm talking  
12 about. I'm talking about the houses, the lookout places, the beach,  
13 and so -- all right. So you can't recall if the Yemenis had been out  
14 there before you guys arrived? Don't remember that?

15 A. I do not.

16 Q. Okay. I think you sort of touched on this a little bit  
17 ago, but I want to just ask you a couple questions. It's fair to say  
18 that when you began to have contact with Yemeni law enforcement, it  
19 was clear that the practices and the procedures that they used were  
20 not up to the standards of the FBI and what you were used to  
21 previously?

22 A. I don't believe I said that and I don't know that to be  
23 the case. My interaction with Yemeni authorities was largely, if not

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1 solely, with the representative of the ministry, or what I understood  
2 to be the ministry or equivalent of the Ministry of Justice of Yemen,  
3 in order to negotiate on behalf of the U.S. government, a memorandum  
4 of understanding.

5 Q. You're not aware of any concerns that FBI agents had on  
6 the ground about the Yemenis' ability to investigate this case? You  
7 don't recall having any concerns or conversations ----

8 A. I don't recall.

9 Q. ---- with agents about that?

10 A. Any country that we went into, there is a level of  
11 education, how we want to do things and how we're going to do things,  
12 because the way we conduct investigations are quite a bit different  
13 than wherever in the world you may see a criminal investigation, it's  
14 conducted much differently by the way we do it.

15 Q. Okay. And again, I think that's fair and I think that  
16 that makes sense. And so my question is a little bit more specific.  
17 You don't -- again, you don't remember having any conversations with  
18 the agents on the ground about concerns that law enforcement had  
19 about how the Yemeni police department was conducting their  
20 investigation? Not just that they were different ----

21 A. I don't remember it being their investigation. I remember  
22 the whole point of me -- the whole point of us being there was for us  
23 to conduct the investigation with their assistance. Had I

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1 conversations about local authorities? Probably. I spoke to the  
2 agents all the time. Nothing sticks out to me as to their competence  
3 or incompetence.

4 Q. All right. And again, is it your understanding that no  
5 real -- when I say "real," I mean talking to the witnesses and  
6 examining physical evidence, things like that, you know, all the  
7 things that you wanted to do, is it your understanding that none of  
8 that real substantive work happened until after the Bodine memo was  
9 drafted and then signed by both parties?

10 A. After the what?

11 Q. After the memo, the memorandum of understanding, was  
12 signed.

13 A. I don't recall. I believe the investigation was ongoing  
14 even during the course of the MoU. I also recall that the collection  
15 of physical evidence and so forth, I don't recall receiving any  
16 complaints or any concerns about the conditions under which that  
17 evidence was collected.

18 The only complaint I recall is the divers who were  
19 underneath the ship collecting evidence there, obviously there is no  
20 local authorities there, but essentially the FBI divers were swimming  
21 through sewage all day long and it was taking its toll on them. But  
22 beyond that, I wasn't aware of any concerns about the collection of  
23 evidence. And I believe it was ongoing while I was negotiating the



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1 MoU but I can't be sure of that.

2 Q. All right. And so that was going to be my next question.  
3 You mentioned a couple times being involved in the drafting of the  
4 memorandum of understanding in order to have a formal agreement about  
5 how the investigation was going to proceed, right?

6 A. So the memorandum of understanding was not at our behest.  
7 The memorandum of understanding was something that I think was  
8 insisted upon through the State Department, who had received concerns  
9 about us conducting the investigation kind of like a -- any way we  
10 wanted.

11 So I think that the Yemeni government wanted us to kind of  
12 spell out how and what we were going to do. I don't recall there  
13 being any inhibitions or prohibitions on how we would conduct -- or  
14 any meaningful ones. I think it was more kind of to put them at ease  
15 about -- so they could kind of see expressly what we planned to do.

16 Q. All right. So -- and again, your understanding of that  
17 what -- was that it was more of a framework of how to operate as  
18 opposed to ----

19 A. A very broad framework and not in any way a detailed  
20 protocol.

21 Q. Okay. And certainly your memory is -- is ----

22 A. And as I say that -- if I may, I haven't looked at the MoU  
23 in a very long time.

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1 Q. Right.

2 A. But that's my recollection.

3 Q. Okay. And again, your memory is that this would have come  
4 from the top of the Yemeni government as opposed to something that  
5 the United States would have asked to enter into.

6 A. I've been to many countries, and I've only had to do one  
7 MoU, and that was with Yemen. I also don't think -- I think it was  
8 more of a diplomatic decoration than it was kind of a substantive  
9 impact on the way we conducted the investigation. Excuse me.

10 Q. Just to clarify one point -- I may have asked this, and if  
11 I did, I apologize. Can you recall -- again, can you recall if you  
12 understood that Yemeni law enforcement were conducting their own  
13 interviews, without U.S. involvement, if they were already doing that  
14 before the MOI -- the MoU was signed by you, by the U.S. and the  
15 Yemeni government?

16 A. I don't recall.

17 Q. Okay. Do you recall ever getting copies of transcribed  
18 statements that Yemeni witnesses had provided early on? You don't  
19 remember reading anything like that?

20 A. I don't recall. I feel bad saying I don't recall, but it  
21 is 23 years ago.

22 Q. It's interesting. We get that lot here.

23 Were you aware of the Yemeni law enforcement practice to

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1 round up witnesses and have them held in local jails while conducting  
2 interviews?

3 A. No. No, I don't recall.

4 Q. Did you become aware that Yemeni law enforcement during  
5 those interviews were showing the witnesses photographs?

6 A. Not aware. I should say I don't recall that. I  
7 don't -- I don't know that I am aware of that. I don't recall.

8 Q. So, again, I don't want to ask you all the questions, but  
9 you have no idea what photos they were shown, how they were shown,  
10 procedures that they may have gone through during the showing of the  
11 photographs, where they were when those photos were shown, whether  
12 they were in custody or not? Any -- any details like that that you  
13 can -- that strike you?

14 A. The only thing I can say with a fair degree of certainty  
15 is that whatever photographs they may or may not have been shown,  
16 they weren't the photographs that we had in our photo spreads.

17 Q. All right.

18 A. I mean there may have -- like I said, I don't know where  
19 all those photographs came from, but I'd be quite confident that they  
20 didn't all come, if any, from within Yemen.

21 Q. Understood. So let me -- let's get to the memorandum of  
22 understanding that we've talked about a couple times. You mentioned  
23 that that was, I think you said, perhaps your focus or sort of that

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1 initial thing that you wanted to get done. Is that fair to say?

2 A. I didn't want to get it done. I was instructed to get it  
3 done.

4 Q. I don't mean you personally, but yes, that was sort of the  
5 focus in the beginning, to have that done to sort of open up  
6 your -- U.S. ability to investigate the case?

7 A. Not to parse what you said, but as I mentioned, I'm pretty  
8 certain that everybody just didn't sit around sitting on their heads  
9 while I negotiated the MoU. I think that the investigation proceeded  
10 apace while I negotiated the MoU. I can't be certain of that, but  
11 that's my recollection -- that's my recollection as I sit here now.

12 Q. All right. And so my follow-up is -- is: Do you have a  
13 specific memory of anything investigatively that you or the FBI  
14 conducted prior to signing that agreement? Do you remember anything  
15 at all about anything you would have done?

16 A. No, I think so. I think -- I think I saw pictures from  
17 the lookout. I didn't go to the lookout. I saw -- I think I saw  
18 pictures from the lookout. I think I was aware of the -- the  
19 collection of some DNA and other material from the place from  
20 where -- the walled-in yard where the boat was built, I believe, or  
21 fabricated. I believe that I saw some pictures of the beachfront  
22 where we believe, from where the -- either the first attack or the  
23 second one had been launched -- or the attempted -- I say the first.

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1 Attempted one.

2           So, yeah, I do think I saw some of that stuff. But again,  
3 the complete timeline, I -- it's hard for me to say precisely the  
4 order in which I learned all of that, but I believe so.

5           Q.     Okay.

6           A.     And I say that in some measure because I don't know how  
7 much longer I stayed after I completed the MoU.

8           Q.     Okay. So let me ask you just a couple questions  
9 about -- about the photos in particular. You have a memory of seeing  
10 photos perhaps of maybe some houses and the beach and things like  
11 that, right? Somewhere back there in your mind, memory of the  
12 photos?

13          A.     Well, the memories of those photos are different from the  
14 photos that are used in the photos ----

15          Q.     Understood. I'm just saying ----

16          A.     I believe that -- yes, I believe that I saw those or some  
17 photos while I was on the ground in Yemen.

18          Q.     Okay. Do you know who took those photos? Do you -- do  
19 you have a memory of who that was?

20          A.     Recalling, my expectation is that somebody from the bureau  
21 took them.

22          Q.     Okay. And so, again, sort of thinking back, are you  
23 thinking that in terms of investigation -- investigative work that

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1 was done, that maybe U.S. law enforcement had at least gone to some  
2 of those scenes, again, in that interim period before the document is  
3 signed?

4 A. I'm sorry. Can you repeat that?

5 Q. You know what? We'll move on. I think you answered it.

6 Beyond the photographs, do you ever -- can you recall -- I  
7 asked you about seeing documents relating to Yemeni law enforcement  
8 doing witness interviews. Can you recall during, again, that interim  
9 period before the memorandum is signed, if you saw 302s documenting  
10 FBI agents talking to witnesses? Can you recall if you saw that?

11 A. I cannot recall.

12 Q. Is it your -- or can you remember if -- let me back up a  
13 little bit.

14 Can you recall when you left Yemen to go back to either  
15 Cairo or the U.S., wherever it was?

16 A. I cannot. I -- no, I can't.

17 Q. Okay.

18 A. It was not an insubstantial amount of time.

19 Q. Okay. So after -- your memory today is at some  
20 not-too-long period after the memorandum is signed, you leave the  
21 country, correct?

22 A. I would almost guess it was, you know, within a week, a  
23 few days after the MoU was signed, and we were confronted with the

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1 safety issue. And I had the choice of going, sitting on a ship or  
2 going elsewhere. I chose elsewhere.

3 Q. Right. All right. Can you recall if, after you left  
4 Yemen, in terms of your involvement in the case, would you have been  
5 involved in reading 302s, reading memos, anything like that?

6 A. Yes.

7 Q. Okay. In terms of how the -- how you -- how U.S. law  
8 enforcement conducted interviews, are you aware or did you learn that  
9 these witnesses were provided by the PSO, the Political Security  
10 Organization there in Yemen, for U.S. investigators to interview?

11 A. I don't recall that.

12 Q. Can you recall where the interviews done by U.S. law  
13 enforcement occurred? Do you have any idea where those -- where that  
14 happened?

15 A. I don't. I don't have a recollection. My -- I probably  
16 knew when I -- when they were occurring, but I don't -- I don't  
17 recall.

18 Q. When you reviewed the 302s that the FBI produced in the  
19 COLE investigation, did you notice that the -- some of the  
20 information related to the witnesses was not included in the 302s?  
21 Let me ask a more specific ----

22 A. I don't understand the question.

23 Q. Let me ask it more specifically.

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1           In your review of the 302s that were done by U.S. law  
2 enforcement, can you recall if information related to where a witness  
3 lived was not consistently documented in a 302?

4           A.     I have no recollection of that.

5           Q.     Do you have a memory of, again, a contact -- contact  
6 information for the witnesses, like a telephone number, a landline,  
7 an e-mail address was not consistently captured in the 302?

8           A.     I don't recall that and I don't know that it would be my  
9 expectation, in an investigation internationally, to expect that,  
10 but ----

11          Q.     Can you recall if, when you reviewed the 302s done by the  
12 FBI, that they were not consistently getting the description of the  
13 witness that they were interviewing in the 302?

14          A.     Again, I don't recall that, and I don't know that that  
15 would be my expectation to see that information in a 302.

16          Q.     When you reviewed the 302s that were conducted by U.S. law  
17 enforcement, can you recall if -- can you recall that investigators  
18 never obtained a document identifying who the witness they were  
19 interviewing was?

20          A.     I don't understand that.

21          Q.     So in the 302s it mentions who the witness is. This is,  
22 you know, John Smith, we're going to be interviewing at such-and-such  
23 a date. Can you recall that a ----



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1           ATC [MAJ ROMEO]: Your Honor, I'm going to object. This is  
2 outside the scope. We're not talking about -- we're talking about  
3 the composition of evidence that should be used, not the actual  
4 interview and what happened during these interviews.

5           MJ [COL ACOSTA]: Defense?

6           DC [MR. PADILLA]: Judge, it's my same response that I've  
7 given here a couple times. I don't have a whole lot of questions on  
8 this. I think I need to get into some of this stuff, again, as  
9 background as it relates to how the investigation played out in  
10 Yemen. I think it's -- it may be taking me longer, and I apologize  
11 for that, but I have to get through these questions.

12          MJ [COL ACOSTA]: So it's -- the -- your response is that the  
13 way the interview of the person who was -- who made the photo  
14 identification using the sheets -- the photo book is relevant to your  
15 motion to suppress such identifications? Is that what you just said?

16          DC [MR. PADILLA]: Yes, Judge.

17          MJ [COL ACOSTA]: Okay. Sustained -- motion is over -- pardon  
18 me. Objection is overruled at this time, but, Defense, move on or  
19 move -- keep going.

20          DC [MR. PADILLA]: Thank you.

21          Q.       So, again, I was asking that in your review of the 302s  
22 that were conducted by U.S. law enforcement, if you recall that none  
23 of the 302s that you reviewed ever had information from an

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1 identification card, a passport, a driver's license, any sort of  
2 document confirming that the person that's sitting in front of them  
3 is actually the person that they're interviewing?

4 A. I don't recall that.

5 Q. Can you recall ever having a conversation with any of the  
6 agents on the ground there to confirm at any point the identification  
7 of a witness that was interviewed?

8 A. No.

9 Q. Do you have a memory of ever having a conversation with  
10 any law enforcement personnel about confirming details, like where  
11 the person worked or where they lived, to confirm the facts in the  
12 actual interview that the witness gave?

13 A. I don't recall having the need to confirm the facts that  
14 were set forth in the 302, and I'm -- I may have had conversations  
15 with the agents about, you know, the identity of where interviews  
16 were conducted and so forth, but that's not within my recollection as  
17 we sit here.

18 Q. The interviews of witnesses were not audio-recorded,  
19 correct?

20 A. Typically was not our practice to do that, and I don't  
21 know whether -- and I assume there were none, but I don't know the  
22 answer to that question.

23 Q. You don't have a memory of the interviews of a witness

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1 being either audio- or video-recorded. You don't have a memory of  
2 that?

3 A. I don't have a memory of that.

4 Q. You would agree that that would be -- you mentioned a  
5 couple times about getting evidence that would be admissible at a  
6 future trial, correct? You mentioned that a couple times, and how  
7 that was important from your perspective?

8 A. Yes.

9 Q. Is it fair to say that an audio recording of an interview  
10 or a video recording of an interview would be the very best way to  
11 document that interview?

12 A. Not necessarily. And recognize, I think the Bureau at  
13 some point changed their practice in 2003 or '4 or maybe even later  
14 of videotaping interviews that were, I think, principally or solely  
15 while somebody was in custody. But it wasn't my view prior to that  
16 that that was necessary. And typically, given the conditions under  
17 which we often had to conduct investigations, whether overseas or  
18 domestically, trying to turn to tape or video or audiotape interviews  
19 was not typically practical or expeditious.

20 Q. All right. You mentioned the FBI changed the policy,  
21 which is true. And that is to eliminate potential issues down the  
22 road in a trial, right?

23 ATC [MAJ ROMEO]: Objection. Speculation.

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1 MJ [COL ACOSTA]: Defense?

2 WIT: I'm sorry. Was that overruled or ----

3 MJ [COL ACOSTA]: Hold on. I'm waiting for the defense's  
4 response to the objection, sir.

5 DC [MR. PADILLA]: Well, let me maybe ask another question  
6 before I ask that, then. Let me rephrase that.

7 MJ [COL ACOSTA]: All right. Sustained at this time. Go  
8 ahead.

9 Q. Do you recall reading a memorandum that set out a change  
10 in how the Department of Justice was going to conduct interviews in  
11 early 2000s?

12 A. Vaguely.

13 Q. Okay. And do you recall that the focus of that memorandum  
14 was to have the agents record statements as opposed to simply writing  
15 down, taking notes of an interview that they were conducting?

16 A. That was the policy change, I think, for folks who were in  
17 custody. But recognize we had for years taken interviews, conducted  
18 interviews, including of defendants, and admitted them into evidence  
19 without any issue, and those were upheld on appeal on countless  
20 occasions.

21 I didn't really see the necessity -- in fact, you asked me  
22 if I recall seeing that memo. I vaguely recall it, and I -- my  
23 recollection is I said this is kind of nonsense. I -- because I just

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1 think it was -- it wasn't terribly practical, and, you know, if you  
2 want -- you know, it's fine if we need to do it, but it had worked  
3 for a long time without, and I didn't think it was particularly  
4 necessary.

5 Q. Now, as it relates to the investigation in Yemen, again,  
6 you mentioned that you weren't aware of any recordings being done.  
7 Can you recall if there was ever a discussion about asking to see if  
8 those interviews could be some way recorded? Was that ever -- can  
9 you recall ever a topic of discussion?

10 A. Never recall it being an object of -- a subject of  
11 discussion, and I don't know why necessarily we would. I don't  
12 recall it.

13 Q. Can you recall if there was any pressure from the Yemeni  
14 law enforcement agencies about not conducting recorded interviews?

15 A. Don't recall that. And to be clear, I don't know -- of  
16 the investigations I had conducted either domestically or overseas, I  
17 don't know that I had been involved in any investigation where we had  
18 either insisted upon or necessarily used recorded statements. That  
19 doesn't mean it didn't happen, but I don't recall us saying, geez,  
20 we've got to record these statements.

21 Q. Okay. You mentioned that you had regular contact with the  
22 agents on the ground there, correct?

23 A. I did.

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1           Q.     Did they ever -- again, I think we talked about this a  
2 little bit, but I just want to flesh this out a little bit.

3                     Did they ever talk to you about challenges that they were  
4 having on the ground getting anything that they may need for you to  
5 be able to prosecute this case?

6           A.     I don't recall that, and I don't recall how soon things  
7 kind of got back to normal after they were on the TIRU. I do  
8 remember being quite pleased with the level of information we were  
9 collecting, forensic stuff from the different sites, and I thought  
10 that was very productive.

11                    I don't recall having conversations about any sort of  
12 difficulties being encountered. That doesn't mean it did happen, it  
13 doesn't mean it didn't happen. I just don't recall.

14           Q.     I've asked you a couple questions here about Yemeni law  
15 enforcement and the working relationship that they had with the U.S.  
16 partners here. I want to ask you some questions specifically about  
17 some of the people that you may have had some interaction with.  
18 Okay?

19                    I think that you mentioned that there was a ministry that  
20 you dealt with, the Ministry of Interior. Does that sound ----

21           A.     I don't recall.

22           Q.     All right.

23           A.     I recall it being the equivalent of the Ministry of

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1 Justice. I don't know if that's what it was called. Could have been  
2 the Ministry of Interior. I don't recall.

3 I believe I was interacting with, in my recollection, either  
4 the minister or somebody quite high up in whatever ministry it was.

5 Q. Okay. Did you have contact with anybody from the -- from  
6 the President of Yemen's office?

7 A. I remember from time to time meeting with a contingent of  
8 representatives from the government, at least one of whom was, as I  
9 say, that either minister or high-ranking official of whatever  
10 ministry I was dealing with. I don't know if among that  
11 contingent -- I don't recall if among that contingent was a  
12 representative of the President's office.

13 DC [MR. PADILLA]: Judge, if you can just give me one second?

14 MJ [COL ACOSTA]: You may.

15 **[Counsel conferred.]**

16 Q. I want to ask you some questions about the photo book that  
17 was used, okay?

18 A. Excuse me?

19 Q. I want to ask you some questions about the photo book that  
20 was used.

21 A. Okay.

22 Q. All right.

23 A. You're talking about the photo book as opposed to any

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1 photo spread?

2 Q. Correct.

3 A. Okay.

4 Q. Yeah. Can you recall actually how that book was put  
5 together? I mean, was there a meeting? Were there agents? Was it  
6 people from Department of Justice? How did that actually come to be,  
7 if you can remember?

8 A. So my recollection, which may be faulty on this issue, is  
9 that we had a photo book that we basically used in our investigations  
10 internationally of al Qaeda. And so there's that photo book that was  
11 compiled over time as we went through these different investigations.

12 I don't recall whether or not we had a photo book for just  
13 the Aden investigation. Could be. Don't recall specifically. And  
14 so I can't answer the question of if there was one, how it was  
15 compiled.

16 Q. Okay. And that was going to be sort of my follow-up:  
17 Would there have been memos or e-mails or anything drafted formally  
18 about how that book was going to get ----

19 A. I doubt it.

20 Q. ---- compiled? Okay.

21 And, you know, as we sit here, you don't have any memory of  
22 being in meetings and discussing what -- let's use, you know, photo 7  
23 as opposed to photo 28, things like that?



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1           A.     I don't recall that. Probably didn't happen. The  
2 concerns that I had about photo books were much different that  
3 whatever any concerns I might have had about conducting, for  
4 instance, a lineup or a photo spread. I thought that, you know, kind  
5 of randomly throwing a collection, you know, of photo albums and  
6 letting people page through it didn't carry with it risk of  
7 suggestiveness that a photo spread or, for instance, a lineup could.

8           Q.     Okay. And let's talk about that for just a second. We  
9 mentioned this a couple times, but the difference between the photo  
10 book that was used and what we call a photo array or photo spread,  
11 right? The typical six-pack that you give to the witness, there's  
12 one suspect, there's five people who are not connected to the case,  
13 you know, Ms. Jones, you know, I want you to take a look at this and  
14 see if you can point someone out, right? The difference between  
15 those two things?

16          A.     So a photo book is a kind of a random compilation of  
17 photos and a lot of them, and you just kind of page through it. If  
18 somebody sees somebody they recognize, fine. Whereas a photo spread  
19 is you have a John Doe that you're -- have as a suspect, and you take  
20 a picture or two of John Doe and some other similar kind of looking  
21 pictures and you put it into a collection, maybe of a dozen to 18  
22 pictures, and see if the person can pick out John Doe.

23          Q.     Okay. Can you recall if there was a discussion among you

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1 and the Department of Justice and/or the agents about whether to use  
2 the book as opposed to a photo spread or a photo array? Was that  
3 discussed?

4 A. I wouldn't have had a discussion with the Department of  
5 Justice. I may have had discussions with the agents  
6 probably -- again, using a photo book is not something that really  
7 caused any concern with me, so I don't know that it would have  
8 warranted much discussion or signal to the agents that they wanted to  
9 discuss it with me.

10 I think the fact that the agents gave me the photo spread,  
11 these guys were just trying to be extra careful and ran it by me to  
12 see what I thought. It wasn't -- you know, they're not required to  
13 do that, but they were just looking for some validation and some  
14 direction as to what they thought was the best thing to do.

15 Q. Okay.

16 A. Or how best to do it.

17 Q. In the photo book, can you -- do you remember if all of  
18 the photos were of suspects?

19 A. Okay. So I mentioned that I don't recall there being  
20 specifically a photo book for ADENBOM. I do remember we had like a  
21 photo book generally for al Qaeda.

22 Q. What ----

23 A. I don't think -- I don't recall. We'd have to go back and

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1 look, but I don't know if it would -- various people who came up in  
2 the course of our investigations, whether they were suspects,  
3 bystanders, whoever they were, I'm not quite sure how we compiled  
4 that book.

5 Q. Beyond having some input in terms of the photos that  
6 actually made it into these -- the books, did you have discussions  
7 with agents about how those books would be shown to actual witnesses,  
8 in other words, how the actual identification process would happen?

9 A. I don't recall. And again, I didn't have concerns about  
10 photo books.

11 Q. I'm not asking whether you had concerns. My question  
12 is ----

13 A. If I didn't have the concern, then I was unlikely to have  
14 the discussion.

15 Q. Okay. So you don't remember having any discussions with  
16 any agents about, hey, this is how I think the identification or the  
17 books presented to the people should go. This is how I want it done.  
18 And I want it done this way because at some point this may be in  
19 court. You don't have a memory of having any of those discussions?

20 A. I don't recall having those discussions, which doesn't  
21 mean that they didn't occur.

22 Q. Prior to being shown any of the photos in the book, were  
23 you aware that agents provided any instruction to the witnesses? For

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1 example, the person that you may have seen may not be in the book.  
2 The photo may be different than what you saw in person due to hair or  
3 facial features, facial hair, glasses.

4 A. I don't know that I had those conversations. And I think  
5 these agents typically were trained and knew how to do a photo  
6 spread. It's not rocket science.

7 Q. All right. So is it fair to say that the books were  
8 created and then their presentation to witnesses was left up to the  
9 people in the room doing those?

10 A. The agents I was working with and detectives were very  
11 experienced. I didn't have to tell them how to wipe their nose and  
12 tie their shoes.

13 Q. So, yes, you left it up to them to do the work?

14 A. I don't know that I did, but this is not a task that I  
15 know that I would have to micromanage.

16 Q. Understood.

17 A. And on top of that, if the photo spread is one that I  
18 don't feel to be suggestive, then concerns about how it's presented  
19 diminish.

20 Q. After you got back from Aden, and maybe by this point back  
21 in the United States, can you recall a meeting in June of 2001 with  
22 FBI analysts, our intelligence partners, about -- two things. Number  
23 one, where the investigation of the COLE was at that point in June of

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1 2001, and also a discussion about the feasibility of the prosecution  
2 of a COLE case?

3 A. I have no recollection. I ultimately indicted the case,  
4 so at some point in time I had -- obviously had those discussions.

5 Q. Are you aware of the OIG report that was drafted  
6 in -- Office of Inspector General Report of FBI Handling of  
7 Information Prior to 9/11 in November of 2004? Do you remember that?

8 A. Who was the IG at the time that issued that report?

9 Q. I don't know the name of the person. I'm sorry.

10 A. The report you have?

11 Q. You know, I have the relevant pages. I didn't print the  
12 whole copy for you.

13 A. You know, I'm sure that I was either interviewed for that  
14 or I certainly had read it or an executive summary of it. I probably  
15 became aware of it. I have no recollection of it.

16 Q. All right. And so just mentioning that, you still don't  
17 have a memory of having a meeting with FBI, DoJ, intelligence  
18 partners, again, about the feasibility of a COLE prosecution at some  
19 point down the road?

20 A. I do not. But, like I said, it doesn't mean it didn't  
21 happen.

22 Q. You mentioned that at some point there was an indictment  
23 that was filed relating to some of the charges, correct?

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1 A. Correct.

2 Q. And you mentioned that there -- it makes sense perhaps to  
3 have had meetings about bringing a case. Does that make sense also?

4 A. It does.

5 Q. Right. Where you would have discussed what evidence do we  
6 have, can we actually charge somebody, right?

7 A. Correct.

8 Q. Evidence of a crime, who did the crime, right? Those are  
9 sort of normal questions that would have been asked, correct?

10 A. Correct.

11 Q. Would there have been a discussion about where the case  
12 would be charged, or was that always going to be the Southern  
13 District of New York?

14 ATC [MAJ ROMEO]: Your Honor, I'm going to object again to  
15 relevance. That is outside the scope.

16 MJ [COL ACOSTA]: Defense?

17 DC [MR. PADILLA]: Judge, I'm almost there. I think it  
18 relates to ----

19 MJ [COL ACOSTA]: Yeah. How is it relevant that they were  
20 having a discussion? They discussed it. They indicted in the  
21 Southern District of New York. It is a fact that occurred.

22 DC [MR. PADILLA]: Well, again, I'm -- those are my  
23 introductory sort of questions. But again, my questions were going

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1 to relate at the end to any discussions about evidentiary issues in  
2 charging that case.

3 MJ [COL ACOSTA]: And if there was a concern ----

4 DC [MR. PADILLA]: Correct.

5 MJ [COL ACOSTA]: ---- at the time?

6 DC [MR. PADILLA]: Correct.

7 MJ [COL ACOSTA]: You want to ask the prosecuting attorney  
8 whether or not he indicted a crime that he thought he couldn't  
9 successfully prosecute?

10 DC [MR. PADILLA]: That's not -- that's a different question.

11 MJ [COL ACOSTA]: All right. Go ahead.

12 DC [MR. PADILLA]: That's a different ----

13 MJ [COL ACOSTA]: Okay.

14 DC [MR. PADILLA]: And that ----

15 MJ [COL ACOSTA]: You said concerns, so it was a concern. So  
16 go ahead. You can ask him the question you want to ask.

17 DC [MR. PADILLA]: Thank you.

18 MJ [COL ACOSTA]: Overruled. Go ahead.

19 Q. So, again, leading up to a decision to bring a case in  
20 front of a grand jury, I was asking questions about meetings and  
21 discussions that may have happened, right? And I mentioned, you  
22 know, the evidence that we have, can we charge, what can we charge,  
23 who can we charge, right? Those are things that would have been

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1 discussed, right?

2 A. So the -- the discussions I had was not who we can charge  
3 because of the evidence I had. The question was who the Justice  
4 Department was going to let me charge, as opposed to who was not  
5 going to be brought into a civil prosecution. And I -- you know,  
6 like I indicted fewer people than I would have liked to and who I  
7 thought I could have.

8 Q. All right. Well, when you say the Department of Justice  
9 may be telling you who to charge or not, what -- was that based on  
10 policy or was that based on the evidence that you had gathered in the  
11 case?

12 A. It was not based on the evidence I had gathered in the  
13 case, as I recall it.

14 Q. Would there have been a discussion in those meetings about  
15 evidentiary issues, like a photo book, a photo array, witness  
16 statements, anything like that? Would that have been something on  
17 the radar?

18 A. No, I don't recall. I mean, look, I think I was -- I  
19 don't know if I had any other prosecutors working on it. I may have  
20 had a junior person helping me a little bit. I was -- you know, I  
21 had conversations with the agents from time to time as I pulled  
22 together all the information and the evidence. I don't recall -- you  
23 know, I would have to kind of do a calculation.



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1           So, for instance, if I was going to try to get admitted the  
2 DNA evidence collected from a safehouse, I wanted to kind of walk  
3 through to understand, you know, who my witnesses would be and how it  
4 was collected. And, you know, you -- you do a calculation for each  
5 piece of evidence, as I did -- would in any case.

6           And I did that here, and I don't think I would be sitting  
7 down with a group of agents to discuss those issues. If I had an  
8 issue I'd probably pick up the phone and say, hey, on this piece of  
9 evidence, you know, what happened with X? I just want to make clear.

10           So I don't -- the meeting you're referring to, I just don't  
11 recall it, and I don't -- I couldn't guess what it -- the subject  
12 matter was that we discussed.

13       Q.     Okay. Let me ask maybe a better way. Would it be fair to  
14 say -- I think you've answered it, but would it be fair to say that  
15 certainly, whether it was in that meeting, but leading up to an  
16 indictment, those are normal sorts of questions that you would have  
17 discussed either internally or with the agents in the case as  
18 part ----

19       A.     I don't recall having discussions with that either  
20 internally or with the agents. I recall kind of spelling it out and  
21 I think I drafted a complaint, which is kind of almost akin to a pros  
22 memo where -- a prosecution memo, where I kind of spelled out all my  
23 evidence. And, in fact, I might have not put everything into that

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1 document because I knew from my discussions at very high levels at  
2 the Justice Department that I was going to be limited in terms of who  
3 it was that I could charge.

4 Q. All right.

5 A. Not because of the evidence. Because of a decision that  
6 was made.

7 Q. Okay. Were there concerns about -- let me back up a  
8 little bit. You've been involved in prosecuting cases in the  
9 United States with witnesses who reside outside the United States; is  
10 that fair?

11 A. Correct.

12 Q. Okay. In terms of preparing this case for a potential  
13 prosecution, were there any discussions or concerns about getting  
14 witnesses from Yemen into the United States to be able to testify at  
15 hearings or at trial in the case? Do you remember having those  
16 discussions?

17 A. Not at all. Don't recall that.

18 Q. Following those meetings that you may have had, can you  
19 recall if you instructed any agents to go to Yemen to identify  
20 specific witnesses so that they would be easier to locate and easier  
21 to make available if there was a trial?

22 A. I don't recall that.

23 Q. Beyond contacting witnesses in another country to locate

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1    them, did you ever instruct the FBI at any point just to reach out,  
2    you know, and sort of touch base? Was there anything at all ----

3           ATC [MAJ ROMEO]: Objection. Outside the scope.

4           MJ [COL ACOSTA]: Overruled.

5           ATC [MAJ ROMEO]: And relevance.

6           MJ [COL ACOSTA]: Overruled. Go ahead.

7           A.     I don't recall that. And, typically, you know, look, the  
8    indictment wasn't so long after the events that I needed to do that.  
9    And I think if I had, I probably wouldn't have really started that  
10   process unless and until the fugitives that had been indicted had  
11   been captured.

12          Q.     Can you recall if Mr. Nashiri was included in that  
13   original indictment in New York?

14          A.     I wish he was. I could have. I remember feeling as  
15   though I could have, and the decision was made that I wasn't  
16   permitted to indict him. It's not because of the evidence, but  
17   because of other reasons.

18          Q.     Do you know what those reasons are?

19          A.     I would have to kind of guess and speculate and call upon  
20   my memory, so I don't know that I can accurately say exactly what the  
21   concerns were. But I think one of the -- one of the issues was -- is  
22   why we're sitting here today.

23          Q.     Are you referring to the military commission?

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1 A. Yes.

2 Q. Okay. And you were not involved in those discussions?

3 A. I was involved in discussions.

4 Q. I'm sorry. You were?

5 A. I believe I was involved in discussions. I don't recall  
6 them specifically.

7 Q. Okay. And your memory is you were involved, but people,  
8 let's say, in higher positions within the Department of Justice or  
9 maybe even outside the Department of Justice had made the decision to  
10 bring Mr. Nashiri here as opposed to New York?

11 A. I probably was involved in discussions at high levels of  
12 the Department of Justice and perhaps other agencies. I don't  
13 recall.

14 Q. All right.

15 A. I mean, those are conversations that I had had for years  
16 on others, so ----

17 DC [MR. PADILLA]: I -- Judge, just, I think I have just one  
18 question left here.

19 Q. I asked you some questions about U.S. law enforcement  
20 going out to some of the scenes that were identified. Can you recall  
21 if you learned, while you were in Yemen, that Yemeni law enforcement  
22 had actually gone to scenes, taken evidence away, and then put  
23 evidence back at those scenes once U.S. investigators arrived?

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1           A.     Don't recall that. I do recall kind of walking through  
2 chain of custody on, as I said, some of the forensics. I think, for  
3 the most part, I was sanguine in how much of that evidence had been  
4 collected, if not all of it.

5           So I can't -- I can't tell you whether or not there was  
6 pieces of it or things that I didn't like, but I ultimately was  
7 sufficiently comfortable with it that I -- you know, as I said, I  
8 wouldn't have indicted the case if I didn't feel like ultimately I  
9 could take that information and convert it into admissible evidence  
10 at trial, if there were one.

11           DC [MR. PADILLA]: Judge, one second.

12           MJ [COL ACOSTA]: Yes.

13   **[Counsel conferred.]**

14           Q.     Just one follow-up, and it involves a date, so I'm already  
15 letting you know that it's going to -- you may have a hard time  
16 remembering.

17           You mentioned that there was some discussions about whether  
18 to indict Mr. Nashiri here in the United States, right?

19           A.     Yes.

20           Q.     Okay. Can you recall if that was prior to 2007?

21           A.     I was out of the department in 2005.

22           Q.     So before 2007, before 2005?

23           A.     It was at -- it was at or before the time I indicted the

1 case.

2 Q. Okay. Good enough.

3 DC [MR. PADILLA]: Thank you, Judge.

4 MJ [COL ACOSTA]: All right.

5 Government, any cross? Any redirect? Pardon me.

6 ATC [MAJ ROMEO]: Yes, Your Honor.

7 **REDIRECT EXAMINATION**

8 **Questions by the Assistant Trial Counsel [MAJ ROMEO]:**

9 Q. Okay. Just a couple follow-up questions, Mr. Kelley.

10 Although Yemeni authorities were conducting their own  
11 investigation, to your knowledge, were the U.S. investigators able to  
12 conduct their own investigation while the Yemenis were doing theirs?

13 A. I don't recall what the Yemenis were doing. I don't  
14 recall the extent to which we were working hand in hand with them,  
15 which I think was extensively. But in any event, I felt very  
16 comfortable with the evidence that was being collected and the manner  
17 in which it was being collected and the information that was being  
18 gathered.

19 Q. Okay. You testified on cross that you didn't have  
20 knowledge of what photos Yemenis -- Yemeni authorities showed  
21 witnesses. Do you recall saying that?

22 A. I do.

23 Q. Is it safe to say then, then what photos, if any, were

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1 shown had no bearing on the composition of the photo book in this  
2 case, the one that our agents used?

3 A. Can you repeat that?

4 Q. Sure. So it -- is it safe to say, then, that if any  
5 photos were shown by Yemeni authorities, those photos, if they were  
6 used in the photo book that our FBI agents used, it had no bearing  
7 on -- on the composition of the photo books that they would put  
8 together?

9 MJ [COL ACOSTA]: Hold on. You don't need to answer that. I  
10 don't think anybody can understand that question. The -- just start  
11 over.

12 ATC [MAJ ROMEO]: Okay. I'll reword it, Your Honor.

13 MJ [COL ACOSTA]: Just be -- the question is -- I believe what  
14 he's trying to ask is: You're unaware of the Yemenis using photos,  
15 correct, sir?

16 WIT: Correct.

17 MJ [COL ACOSTA]: Okay. So you are unaware -- or are you  
18 aware of any of the photos that the Yemenis did or did not use being  
19 used in the photo book used by U.S. investigators?

20 WIT: I'm not aware, and I don't think it would have mattered  
21 to me.

22 MJ [COL ACOSTA]: Okay.

23 ATC [MAJ ROMEO]: Thank you.

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1 Q. So I'd like to talk about the photo books again, just very  
2 briefly. What was your experience with photo books and photo arrays  
3 in investigations and in court?

4 A. So in court -- well, let me first say I don't recall a  
5 specific ADENBOM Photo Book. There may have been one. I don't  
6 recall it. I do know that we had a general book that we used for  
7 al Qaeda internationally.

8 And concerns about, typically, photo books are not subjects  
9 that come up at trial. Typically we're talking about photo arrays,  
10 where the concern would be over -- overly -- a photo spread being  
11 overly suggestive. That's how that typically comes up in a court.

12 Q. Okay. And how often have you used photo books and photo  
13 arrays in your career?

14 A. In law enforcement -- I was in law enforcement a long  
15 time. I couldn't even begin to give you a guesstimate. A lot. But  
16 like I said, typically, you know, in trying cases, photo books don't  
17 come up. You know, and oftentimes even photo arrays don't come up.  
18 They come up typically in pretrial hearings.

19 But anyway, I don't really -- like I said, typically I don't  
20 really have much concern about what's in a photo book so long as it's  
21 got a lot of pictures in it.

22 Q. Do you recall if there were multiple photos of the same  
23 person in the photo books that were used in Yemen, and do you have



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1 that recollection at that time?

2 A. So my recollection recently was refreshed when I looked at  
3 the photo spread and saw that there were two of three pictures of the  
4 same person in an array -- in a photo spread of, you know, 18  
5 pictures or so.

6 Q. Do you recall having any objections at the time to that?

7 A. No, because I reviewed it at the time. I didn't have  
8 objections.

9 Q. Okay.

10 ATC [MAJ ROMEO]: One minute, Your Honor.

11 MJ [COL ACOSTA]: Okay.

12 **[Counsel conferred.]**

13 ATC [MAJ ROMEO]: No further questions. Thank you.

14 MJ [COL ACOSTA]: All right. The commission has a couple of  
15 questions for you, sir.

16 **EXAMINATION BY THE MILITARY COMMISSION**

17 **Questions by the Military Judge [COL ACOSTA]:**

18 Q. You've used the term photo array and photo book at  
19 different times. You're using them as separate terms, correct?

20 A. Yes, Your Honor. A photo book, in the way I've used that  
21 term today and have always used it, is a collection of kind of  
22 randomly collected photos of just a bunch of different people in no  
23 particular order. As opposed to a photo array, which I would use in

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1 connection with the -- an attempt to identify a particular person by  
2 a particular witness. And the goal there is to lay out photographs  
3 of people who include the John Doe as well as those who may look like  
4 John Doe in a situation where it's not overly suggestive as to who  
5 the person is, who the John Doe is.

6 Q. Okay. You are unaware of whether or not an ADENBOM Photo  
7 Book exists; is that correct?

8 A. I don't recall there being a particular ADENBOM book. As  
9 we ----

10 Q. Okay.

11 A. ---- are having this conversation today, it vaguely  
12 resonates with me, but I do remember there being a large photo book  
13 that we used in all our investigations.

14 Q. Okay. And you are unaware of how any such photo  
15 book -- any photo book, whether it be the al Qaeda general book or a  
16 specific ADENBOM book, you are unaware of how it was composed,  
17 correct?

18 A. Yes. Well, generally, I know there were pictures taken  
19 from various sources throughout the globe, that pictures ended up in  
20 the photo book.

21 Q. Right. But you did not -- you did not choose or reject  
22 photos for that book?

23 A. I don't recall having done so.

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1 Q. Okay. And you are unaware of how that -- any such book  
2 was used during witness interviews conducted by U.S. investigators in  
3 their investigation of the -- of the COLE bombing?

4 A. I either don't know or I don't recall knowing.

5 Q. Okay. All right.

6 MJ [COL ACOSTA]: Government, any questions based on mine?

7 ATC [MAJ ROMEO]: No, Your Honor.

8 MJ [COL ACOSTA]: Defense?

9 DC [MR. PADILLA]: No, Judge. Thank you.

10 MJ [COL ACOSTA]: Okay. All right. Government, permanent for  
11 the purposes of this hearing?

12 ATC [MAJ ROMEO]: Yes, permanent, Your Honor.

13 MJ [COL ACOSTA]: Any objection, Defense?

14 DC [MR. PADILLA]: No, Judge.

15 MJ [COL ACOSTA]: All right. Mr. Kelley, you're permanently  
16 excused from this hearing. While the case is in session do not  
17 discuss your testimony or your knowledge of the case with anyone  
18 other than counsel for either side of the accused. You may step down  
19 and return to your day.

20 WIT: Thank you, Your Honor.

21 **[The witness was warned, was permanently excused and withdrew from**  
22 **the RHR.]**

23 MJ [COL ACOSTA]: All right. Now next up, Defense, we have

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1 Agent Bongardt, correct?

2 DC [MS. CARMON]: Yes, sir.

3 MJ [COL ACOSTA]: What we'll do is we'll recess -- we'll take  
4 our longer recess now until 1215, and then we'll come back and we'll  
5 start with Agent Bongardt at 1215. It's 11:00 now. We'll take the  
6 lunch recess now. We'll come back and start at 1215 and begin from  
7 there.

8 Any objection -- Government, is there any issue with that?

9 TC [MR. O'SULLIVAN]: No, Your Honor.

10 MJ [COL ACOSTA]: Defense?

11 LDC [MR. NATALE]: No, Your Honor.

12 MJ [COL ACOSTA]: All right. The commission is in recess  
13 until 1215.

14 **[The R.M.C. 803 session recessed at 1103, 1 March 2023.]**

15 **[The R.M.C. 803 session was called to order at 1217, 1 March 2023.]**

16 MJ [COL ACOSTA]: The commission is called to order.

17 Government, all parties present as before?

18 TC [MR. O'SULLIVAN]: Yes, Your Honor.

19 MJ [COL ACOSTA]: Defense?

20 LDC [MR. NATALE]: Yes, Your Honor.

21 MJ [COL ACOSTA]: All right. Defense?

22 DC [MS. CARMON]: Yes, Your Honor. The defense calls Agent  
23 Steve Bongardt. And just for the court's notice, we're going to

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1 start with AE 461, wrap that up, and then move on to AE 482.

2 MJ [COL ACOSTA]: Okay. Thank you.

3 ATC [MAJ ROMEO]: If you can stand and raise your right hand,  
4 please.

5 **AGENT STEVE BONGARDT, civilian, was called as a witness for the**  
6 **defense, was sworn, and testified as follows:**

7 ATC [MAJ ROMEO]: Thank you. State your name, please.

8 WIT: Steve Bongardt.

9 ATC [MAJ ROMEO]: Okay, thank you.

10 DC [MS. CARMON]: May I, Your Honor?

11 MJ [COL ACOSTA]: You may.

12 DC [MS. CARMON]: Thank you.

13 **DIRECT EXAMINATION**

14 **Questions by the Defense Counsel [MS. CARMON]:**

15 Q. Good afternoon, Agent Bongardt.

16 A. Good afternoon.

17 Q. I am Katie Carmon. I am the voice on the phone when we  
18 spoke in July of 2022.

19 A. Okay.

20 Q. Okay?

21 A. Yep.

22 Q. So I may refer to our conversations, just to remind you of  
23 topics that we talked about, but that was me. So nice to meet you in

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1 person.

2 A. Sure. Nice to meet you.

3 Q. I want to start with your background. And just so, you  
4 know, you're here for two different issues for the commission's  
5 consideration. One is sort of what was going on in Yemen and the use  
6 of the ADENBOM Photo Book to get identifications from witnesses, so  
7 we're going to start with there. We will finish that up, and then we  
8 will move on to your investigation into Mr. Owhali and the 1998  
9 embassy bombings.

10 A. Okay.

11 Q. Okay? So let me start just with your background. You are  
12 an Annapolis graduate; is that right?

13 A. I am.

14 Q. And what year did that happen?

15 A. 1985.

16 Q. Could you give us a brief overview of your naval career.

17 A. So I was a -- selected to go pilot and wanted to be a  
18 pilot, so went to Pensacola after a short temporary duty at NASA.  
19 And then flight training was about two years. I was in Corpus  
20 Christi, Beeville, Texas, and then got my wings out of there and went  
21 to Miramar.

22 I wanted to fly F-14s. I was lucky enough to be selected to  
23 fly Tomcats. I went to Miramar probably in 19 -- 1987, went through

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1 the training squadron there, and then went to the VF-114 Aardvarks  
2 off the USS ENTERPRISE and the USS LINCOLN. And then out of that,  
3 went to Fallon, Nevada; I was an adversary pilot. And then out of  
4 there, got out of the Navy in 1993. It would have been March of  
5 1993.

6 Q. And once you were out of the Navy, what was your first  
7 civilian career?

8 A. I was a bond trader and salesman. I went to one of these  
9 headhunters that specialize in former military officers and -- Lucas  
10 Associates, and ended up getting a job at Smith Barney as part of  
11 their capital markets training program and was on the trading floor  
12 for Smith Barney, starting in bond sales and then moved over to  
13 equity derivatives and did that for two years.

14 Q. And from there, it's my understanding that you joined the  
15 FBI; is that right?

16 A. Yep. About a year into it, I put in the application to  
17 become an FBI agent. It takes about a year. In December of 1995 is  
18 when I went to Quantico.

19 Q. Got it. And as part of being brought on board with the  
20 FBI, did you attend the Federal Law Enforcement Training Center in  
21 Glynco?

22 A. Not in Glynco, we don't. The FBI has their  
23 own -- everyone goes through the FBI Academy down in Quantico.

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1           Q.     And as part of that academy, what -- just a brief  
2     overview, if you will, about the types of things you were taught for  
3     your career.

4           A.     Yeah.   So we have probably a -- I called it like an  
5     applied law degree type of course that we -- that we take.   We  
6     probably take -- I think there's a Law 1 and a Law 2 course.   We take  
7     some behavioral courses that are taught by the profiling group down  
8     there.

9                     We take evidence collection-type training.   We get some  
10    evidence collection training.   A lot is firearms, because people have  
11    never shot a firearm before, so we do a lot of firearms training.   A  
12    lot of defensive tactics, is what they call, hand-to-hand combat and  
13    handcuffing and things like that.

14                    In addition to that, there's a lot of role play type  
15    scenarios that go on at Hogan's Alley, which is the little makeshift,  
16    fake movie set, if you will, where a lot of the training that we do  
17    goes on down there.

18           Q.     Let me ask you specifically about some training you might  
19    have received in the criminal investigator realm.   What about  
20    interviewing and/or interrogating a witness or suspect?

21           A.     Yeah.   So there's a basic -- I think a basic interview,  
22    interrogation-type school that we all go to.   And it's not really a  
23    school; it's a class.   We have somebody come in and teach us.   And



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1 that might have even been part of some of the behavioral training  
2 that we get when we were there.

3 Q. And with regards to the evidence collection that you  
4 mentioned, safe to assume that that was how to safeguard evidence,  
5 maintain the integrity of the evidence?

6 A. Correct.

7 Q. And so after that training, did you attend any sort  
8 of what we call continuing legal education, but did you receive any  
9 further training during your tenure with the FBI?

10 A. I did. So in addition to the basic -- I want to say it  
11 was 17 weeks when I went through. In addition to that, probably  
12 within a two-year period I went back for a counterterrorism school,  
13 an in-service, and I think that was maybe a week to two weeks, where  
14 we also talked about -- and learned about investigating  
15 terrorism-type cases.

16 Q. And with that training specific to investigating terrorism  
17 cases, can you think of any points of contrast from just a regular  
18 criminal investigation class you would have taken?

19 A. So I remember -- what I remember at the time was one of  
20 the first things they had told us was that it was a blend of  
21 intelligence and criminal; that you -- and most of the cases that we  
22 were going to work -- and having -- so before that time when I  
23 actually went down, I actually got involved in TWA Flight 800

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1 investigation.

2           So I was a former pilot. They thought a missile had brought  
3 down TWA 800. Initially I was put on as one of the lead  
4 investigators looking at the missile theory for TWA 800. So it was a  
5 while before I actually got a chance to go to the -- to the  
6 in-service. That's why I think it was two years as I roughly  
7 remember now.

8           But having spoken to some of the terrorism investigators,  
9 both NYPD detectives and other agents that I worked hand in hand with  
10 on TWA 800, you -- I also learned that there were basically two sides  
11 to most of the intelligence-type investigations. There was an  
12 intelligence side, and then there was also a criminal side of an  
13 investigation. And generally, you would try to -- you get whatever  
14 information you can from one side to inform the other.

15           And there were -- during the process of that training as  
16 well they talked about the difference in -- and we had some of this  
17 in the basic legal -- the basic legal training that we had, which  
18 discussed the difference between criminal search ----

19           MJ [COL ACOSTA]: Okay.

20           A.       ---- warrants and ----

21           MJ [COL ACOSTA]: Sir ----

22           A.       ---- intelligence search warrants.

23           MJ [COL ACOSTA]: ---- I don't mean to interrupt you, but we

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1 are having live simultaneous translation of what you're saying.

2 WIT: Oh, sorry about that.

3 MJ [COL ACOSTA]: That requires you to slow down.

4 WIT: Yep.

5 MJ [COL ACOSTA]: And to ----

6 WIT: Okay.

7 MJ [COL ACOSTA]: Allow for that. Thank you.

8 WIT: My apologies.

9 A. So that's what I remember that training as being  
10 predominantly about too, what -- what is a FISA versus what is a  
11 criminal wiretap and those types of tools that would be available to  
12 us.

13 Q. Got it. Tell me about your first assignment within the  
14 FBI.

15 A. So my first assignment was probably -- my very first one  
16 was executing a search warrant in south -- let's see, where was  
17 it? -- south -- southern Manhattan for a -- for a mafia case when we  
18 were looking for -- we were looking for a ring from a made man that  
19 had left an imprint on someone, and that was the first, like,  
20 specific assignment other than that.

21 And then I did background checks, I would say was the first  
22 thing. And then the very first case that I worked was TWA  
23 Flight 800.

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1 Q. And you were receiving these assignments as part of being  
2 part of the New York Field Office; is that right?

3 A. Correct.

4 Q. Okay. How long were you with the New York Field Office?

5 A. Let's see. I was there probably for seven and a half  
6 years. Let's see. From there, from April 1st -- I remember April  
7 Fool's Day -- 1996, until December of -- December of 2000 -- no, I'm  
8 sorry. Yeah, it was -- no, December of 2003, I think. That  
9 was -- that's -- that's the time I was on the -- the New York Field  
10 Office.

11 Most of that time was on the JTTF. I think the final seven  
12 months was on a cyber squad, C-37.

13 Q. And so in the relevant time periods that we're going to  
14 discuss today, the 1998 bombings and then the -- your experiences in  
15 Yemen after the COLE bombing, you were at all times assigned to the  
16 New York Field Office; is that right?

17 A. That's correct.

18 Q. Okay. And also part of the Joint Terrorism Task Force?

19 A. That's correct.

20 Q. Now, it's my understanding that you became the criminal  
21 case agent for both Tawfiq Bin'Attash, who we also call Khallad, and  
22 Mr. al Nashiri beginning in 1998; is that right?

23 A. That would have been -- yeah, that probably would have

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1 been the right time period because of the -- August 1998 and right  
2 around that time period, yeah, that would have been -- that time  
3 period sounds right, correct to me.

4 Q. And how long did you remain the criminal case agent for  
5 both of those men?

6 A. So there might be something better that might help me  
7 remember, but I would say up through -- I would say until I left to  
8 go to the cyber squad in 2003, I was probably connected to them in  
9 some capacity.

10 Can I go -- so there were different squads. The one thing  
11 that would happen is there -- when you'd be on one squad, and then  
12 when something happened, like the USS COLE attack, you would transfer  
13 to -- to another squad that -- you would stay within the JTTF but  
14 instead of being on ADENBOM/TANBOM -- or, I'm sorry, KENBOM/TANBOM,  
15 we transferred over to the USS COLE squad.

16 And even before that, I had been transferred after  
17 KENBOM/TANBOM -- after, I want to say a year, year and a half,  
18 approximately, I went back to the al Qaeda squad, that was the  
19 broader squad that looked at a lot of the al Qaeda individuals that  
20 we had had cases and files opened on. And then when the USS COLE  
21 happened, I went and became part of the ADENBOM team.

22 So it was very flexible in there, and that was one of the  
23 things of the task force is they would draw on the different

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1 resources based on whether they had KENBOM/TANBOM experience,  
2 al Qaeda experience or -- and then ADENBOM experience.

3 Q. And when you're saying KENBOM or TANBOM, we're talking  
4 about the investigation into the 1998 embassy bombings, correct?

5 A. Correct.

6 Q. Okay. Great.

7 A. Correct, yep.

8 Q. So it sounds like you were a very experienced criminal  
9 investigator and, specifically, counterterrorism investigator?

10 A. Yes.

11 Q. If you could put a number on it, how many witness  
12 interviews would you say that you have conducted over your career?

13 A. That's a good question. I think if I said 200, that would  
14 be wrong, but I would probably say a hundred. Like, you  
15 could -- I -- so -- if I still had access to the system, I'd go in  
16 and search my name and 302 and tell you exactly how many that either  
17 I was part of as either, you know, as the main lead or somebody else.

18 But I would say hundreds, perhaps. Hundreds.

19 Q. Suffice it to say a lot?

20 A. Yeah, I would say a lot. I mean, you could say TWA 800 I  
21 went out and interviewed every witness that thought they had seen a  
22 missile, right? So there was probably 80 right there that I consider  
23 would be terrorism. Overseas there were a lot of different ones that

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1 I was part of as well, and then even in -- in the United States.

2 Q. And what about administering a photo lineup? You have a  
3 witness sitting in front of you, you've got your photo spread, and  
4 you would administer that lineup to the witness. How many times have  
5 you done that over your career?

6 A. So I think the first time I did it was probably over -- or  
7 was part of it was KENBOM/TANBOM. I did not do it as part of  
8 TWA 800. Other than training at the academy was probably  
9 KENBOM/TANBOM, and it was specifically using the photo book.

10 Q. And that would have been the KENBOM/TANBOM Photo Book,  
11 correct?

12 A. Correct. Correct. Before it might have even been called  
13 that, before -- when we were just initially building a book and  
14 trying to cast a wide net.

15 Q. Now, you mentioned the academy. Am I correct that you  
16 would have discussed how to administer a photo lineup at your time at  
17 the academy?

18 A. We did. I remember some of the training. And then since  
19 then, I was a profiler in the FBI, so I was down in Quantico dealing  
20 with witness identifications and things like that, so I've learned a  
21 lot in the last 24 years about this, 25 years, about it.

22 But initially at Quantico, we were taught the basics of  
23 doing a photo array. And the concept of a photo book was not

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1 something that we're -- we are trained on or -- or taught about.

2 Q. Let's talk about the difference between the two.

3 A. Yep.

4 Q. You said certainly were trained on a photo array and how  
5 to administer that. What is the difference between a photo array and  
6 a photo book?

7 A. A photo array would be six or eight photos specifically.  
8 When you were looking for one particular individual in -- and to me,  
9 as I always remembered it, it would be very subjective.

10 If I was held up by a certain individual who fit a general  
11 description and -- and I provided a description of that individual  
12 and the context was that very, very specific engagement that I had  
13 with that individual, I would use a photo array because it could be  
14 very subjective as to what I have in there.

15 And I would try to find an individual -- I would like to  
16 have the individual who was a suspect in there, but I would also have  
17 pictures of individuals that were similar characteristics, similar  
18 ethnicity perhaps, same color of skin, similar hair, just to try to  
19 get a better idea as to who the -- it -- to get a good idea of if  
20 there's an identification, that it's a real identification, because  
21 the subjectivity is an issue.

22 Q. And ----

23 A. And the photo book would be different.



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1 Q. And let me interrupt you ----

2 A. Yeah, please.

3 Q. ---- right there, just for a minute.

4 A. Yep.

5 Q. When you're talking about finding what we call fillers,  
6 the person that's not the suspect to look like the person that is the  
7 suspect, why is that important?

8 A. Because people can be -- when they're identifying  
9 individuals, they can be -- they can -- it can be very subjective  
10 when -- with regards to identification. There might be something  
11 about another individual that -- that they identify that -- that  
12 might have nothing to do with the matter at hand, because I think we  
13 think witnesses, all witnesses are good, but generally  
14 they're -- they're generally not very good at identifying individuals  
15 and it can be -- become a problem.

16 Q. Now, switching to the photo book.

17 A. Yep.

18 Q. How is it composed and how is it different from the photo  
19 array you just described?

20 A. So the photo book became a growing, ever-growing  
21 collection of photographs that -- of individuals that we had received  
22 information from that might have been part of ADENBOM or -- I'm  
23 sorry, KENBOM or TANBOM.

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1           So it could be individuals that were -- might have rented a  
2   safehouse, individuals that might have helped someone out renting a  
3   safehouse that we got pictures of, that we received pictures of, and  
4   it could be pictures of -- I remember at one point in time, we had  
5   the very basic picture that had been shown in very -- a lot of  
6   newspapers with Usama bin Laden. So Usama bin Laden's picture was in  
7   there.

8           And that always usually got a chuckle from whoever -- who we  
9   were talking to. They'd be like, oh, yup, this is Usama bin Laden.  
10   I know who this is. I mean, every individual we talked to generally  
11   knew who -- who -- who that individual was.

12           And so usually it was -- it would grow. It could be  
13   intelligence. We could get intelligence pictures from -- from an  
14   intelligence source that we would put in there. But the main purpose  
15   was to try to get an idea as to if any of these individuals  
16   were -- were complicit in what we were investigating.

17           And what we would generally try to do is either, without any  
18   predisposition that we believed whatsoever, either at the very  
19   beginning of an interview, or if we were going to interview somebody  
20   over a series of days during a time period at the beginning of the  
21   next interview, we would show them the photo book. We would try not  
22   to specifically talk about one particular aspect, like, who rented  
23   the safehouse and then say, okay, can you go through the photo book

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1 now and find somebody who -- who rented the safehouse.

2 We tried to make it objective in that -- give them the book,  
3 which at one point in time I think had over a hundred photographs in  
4 there, and say could you please go through here. You seem like  
5 you're cooperating with us.

6 We would try to try to get some element of cooperation too  
7 before we would give it to them and then have them go through the  
8 photo book and see if they recognized anyone in the photo book.

9 Q. So I think what I'm hearing you say is you wouldn't want  
10 to show it to the same witness multiple times; is that right? You  
11 would just want to show it to them the once?

12 A. Correct. There -- it -- there would be times when we  
13 would go back and it would be -- we thought somebody was helping us  
14 out and being cooperative on some level, which is why we'd show it to  
15 them. And then when we finally got to the truth, or some element of  
16 the truth, then they would say can I see that book again. There are  
17 some people in -- in there that I -- that I knew that I did not tell  
18 you when I was first talking to you a few days ago. So that -- that  
19 was when we would generally show them.

20 Or if we got new photos, we might show them new -- new  
21 photos to them. But we wouldn't try to do it very often. We tried  
22 to have more than just, hey, do you recognize this guy or this  
23 individual. We tried to have more photos if we were going to show it

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1 to them.

2 Q. Was the photo book a useful investigatory tool on the  
3 ground overseas?

4 A. It was. It -- and it -- it helped us understand -- so  
5 resources are incredibly limited, even when we're doing something  
6 like that overseas, and there's a lot of us over there, and we don't  
7 have a lot of time. We're always thinking that we want to be as  
8 efficient as possible because we're always after the next boom,  
9 right? We're always trying to get left of boom, left of the -- the  
10 next attack, and who could be out there that is either planning  
11 something again, against us, or another country. So it -- I would  
12 say it's -- it -- it's efficient. You know, it's very efficient for  
13 us to do it.

14 It's -- it's not -- it's one of those things that I think as  
15 we -- as we move forward -- in going back to this counterterrorism  
16 class that I took, they -- that we had to go down and get certified,  
17 you know, it was -- it was in the '90s, it was this new era of laws  
18 being passed that if -- if an individual threatens or kills Americans  
19 anywhere in the world, we could try to prosecute them, the FBI could  
20 here, in the United States.

21 So we knew that new investigate -- new investigative  
22 techniques in this particular case would -- would have to be used. I  
23 mean, looking back on it now and even at the time, we were trying to

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1 do the best -- the best job we could with what we had available in  
2 order to try to find the truth.

3 Q. So in that vein, let's jump, then, to your investigation  
4 in Yemen. We are going to come back to the Kenya investigation.

5 But just sort of as a setup, when we were talking on the  
6 phone, you discussed the difference between your relationship with  
7 the Kenyan investigators and the Yemeni investigators.

8 Sort of move into Yemen. Tell us about the differences that  
9 you encountered.

10 A. Yeah, so we were in -- when we were in Kenya and Tanzania,  
11 we pretty much worked hand in hand with the Kenyan and Tanzanian  
12 Criminal Investigative Division, the Kenyan citizens that were police  
13 detectives and Tanzanian citizens that -- their job was to be a  
14 detective.

15 And we would go on interviews with them, fresh  
16 interviews -- canvasses, which was like we -- we thought that this  
17 individual might have been in this particular neighborhood so we  
18 would go and we would talk to people to see if they could identify  
19 that individual. And so we ran -- we would say run hand in hand with  
20 them literally during the course of that investigation.

21 We felt like it -- whether -- it was almost like we were in  
22 the United States. We -- we -- we were -- we were very respectful.  
23 They were very respectful of us. They let us know when we would do

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1 something that maybe -- and I don't remember any specific instances  
2 of this, but they would tell us how -- what the Kenyan way was, or  
3 the Tanzanian way, how they would do interviews. And then -- and it  
4 was really a cooperative environment.

5 In Yemen, it was completely different.

6 Q. I think the comment you made to me was that you didn't  
7 know how good you had it with the Kenyans. Does that ring a bell?

8 A. In some -- we knew we had it good, but we didn't know how  
9 good we had it. And in some ways in the very beginning I think the  
10 blueprint that we used in Kenya and -- in Kenya and Tanzania, we  
11 thought it was going to happen in Yemen as well.

12 Now, having understood a little bit about Yemen at the time  
13 from having worked this target for a while, al Qaeda, we knew that it  
14 was -- it was -- it was going to be difficult. But I think we  
15 initially thought we would be running more like we were an  
16 investigation in -- in Kenya -- Kenya and Tanzania with -- with the  
17 Yemenis.

18 Q. When is the first time that you set foot in Yemen after  
19 the USS COLE bombing?

20 A. So this is a good question. So I had blown -- I had  
21 thrown my back out lifting. So I remember parts of this really  
22 well -- right? -- trying to get on a plane and fly over there, doing  
23 squats and -- and hurting the whole time and being on Advil.

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1           But I would say it was within 48 hours -- 48, 72 hours, we  
2   were -- we were there.

3           Q.     And then am I right that you did three TDYs to Yemen  
4   during your investigatory period?

5           A.     That would have been probably correct. That's probably  
6   during the time period of -- so when I first went over there I was  
7   there until just after Thanksgiving, I believe.

8           Q.     And so this would have been, you said, 48 to 72 hours  
9   after 12 October through Thanksgiving?

10          A.     Correct.

11          Q.     Okay.

12          A.     And at some point in time, there -- we believe that the  
13   investigation was -- could have been under attack or there was a plot  
14   to attack us. And so a lot of the investigative squad, except for  
15   myself, everyone else went off to a ship that was off the -- out at  
16   the harbor there and I actually went up to Sana'a. So I stayed on  
17   land, went up to Sana'a, and I was working out of the embassy at that  
18   point in time.

19                 But I would say I was on the ground there until sometime  
20   after Thanksgiving, and then I came back and then went back after  
21   Christmas, and then I was probably there for two months back, and  
22   then it -- that's probably -- probably right, three times. I  
23   would -- I would say three times.

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1 Q. And what was your role as part of that investigative team?

2 A. So initially, because I was limping around with a back  
3 injury, I was the intelligence officer for -- for ADENBOM -- or  
4 ADENBOM. So my job was to try to read the intelligence that was  
5 coming in and try to fuse that, for lack of a better term, with the  
6 criminal investigation information that the case agent -- I was the  
7 co-case agent. The case agent was Ali Soufan.

8 And at the time, Bob McFadden -- and I think there was  
9 another NCIS agent had been there -- tried to fuse the intelligence  
10 that we were getting with the criminal investigative information, as  
11 well as use the information that I had from Kenya, Tanzania, and also  
12 having worked the al Qaeda target for the previous couple years. We  
13 tried to infuse all that information.

14 Q. And diffuse and then put together, I'm assuming with an  
15 eye towards bringing someone to justice in the future; is that right?

16 A. Correct.

17 Q. Let's talk about the relationship, the working  
18 relationship with the Yemenis, and how that either aided or did not  
19 in your investigation. Talk to me a little bit about your experience  
20 running that investigation in Yemen.

21 A. So one of the -- so a lot of times I would -- I want to  
22 say I only went to one or two meetings directly where members of the  
23 Yemeni investigative group, people from Yemen, Yemen citizens who



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1 were being part of the investigation were part of that, or their  
2 head, and John O'Neill at the time who was our assistant -- he was  
3 our SAC at the time, special agent in charge who was -- went over  
4 there and was basically our ultimate boss, and Ali Soufan.

5 I only went to maybe one -- I remember one or two meetings.  
6 I remember going to the search of the -- where they found a house  
7 that they believed was the -- where the bomb was made, the bomb  
8 factory; and then perhaps one or two interviews in Yemen myself.  
9 That -- those were the times that I interacted, if I interacted at  
10 all.

11 It was really a -- John, and often Barbara Bodine, who was  
12 the -- the diplomat, the ambassador over there at the time -- it was  
13 either John or Barbara Bodine or -- and/or Ali or Bob McFadden or one  
14 of the other agents, Arabic speakers, would go to a meeting. They  
15 would exchange information, then they would come back to the command  
16 post, and they would tell us -- they'd give us a debrief on what  
17 was -- what was passed.

18 We would try to fuse some of that information if it -- if it  
19 made sense. And then I would take that information and put it into  
20 the -- put it into our overall knowledge of -- of what we knew or  
21 what we believed was -- was happening.

22 So I can give an example ----

23 Q. Go ahead.

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1           A.       ---- if you want, and I think we might have discussed  
2 this.

3                   So early on -- and it was within the first 48 hours, I want  
4 to say, we were given a picture of who the Yemenis believed was one  
5 of the individuals on the boat that conducted the attack against the  
6 USS COLE, that were actually on the boat, al Khamiri.

7                   And what I remember when we got that -- the picture of him  
8 was how do they have a picture -- and again, we're -- we're  
9 interviewing -- in a way, we're kind of interviewing John O'Neill and  
10 Ali who had just come back from this -- because we're trying to get  
11 the -- the story, and they were very, very good about passing it.  
12 And I don't know if -- if John got this directly from the Yemenis or  
13 the Yemenis gave it to Ambassador Bodine and she actually then gave  
14 it to John and we got it.

15                   But the story was -- and this was very early on, which is  
16 why it sticks out. The story was that -- and we had already been  
17 down to the boat to see the boat -- right? -- when we had got there.  
18 Now, not on board the boat, but to see the -- I'm an aviator, so we  
19 call ships boats if they are anything less -- just -- that's just one  
20 of the things. But we were down to the ship.

21                   And so remembering what Aden Harbor looked like, the story  
22 that we got when we got that information -- and again, I don't  
23 remember if it came from Barbara Bodine, the Yemenis passing to

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1 Barbara -- Ambassador Bodine, to John in -- in that meeting, I don't  
2 remember that now, but the story was immediately following the attack  
3 on the USS COLE the Yemenis did a canvass of every boat in the  
4 harbor, and they compared every boat in the harbor with the existing  
5 registrations. And the registration that was missing was  
6 this -- only this registration. And this is why this boat had to be  
7 the attack boat.

8           And I remember being flabbergasted to the point of we could  
9 not do that in the United States. Kenya/Tanzania had some of the  
10 best paperwork that -- for -- for a country that was not in -- the  
11 1998 not -- not fully along with regards to digital, and they would  
12 have a hard time doing it. And it just seemed preposterous to me  
13 that this could even be a possibility.

14           So that was -- so it became, early on, very clear to me that  
15 this was going to be a completely different type of investigation  
16 than what we had in Kenya and Tanzania, to answer your question. It  
17 was going to be a -- they're going to be doing some investigation,  
18 probably had already done some, and they would be telling us what we  
19 could do. And then we would be negotiating, trying to get our  
20 investigators there to do the same kind of interviews that we had  
21 conducted a few years earlier in -- in Kenya and Tanzania.

22           Q.     As it relates to that narrative about the boat being  
23 found, I think when you and I discussed this on the phone, what it

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1 led you to believe is that the Yemeni government knew where to look  
2 and sort of were -- knew who was going to be involved; is that right?

3 A. That -- that was my -- my belief, is that -- for -- for  
4 two reasons. That was -- that was the main -- that was one of the  
5 main reasons, is that they were -- they knew to -- where to round up  
6 the usual suspects. Who -- who was -- who was likely going to be  
7 part of this, was -- was our thought. Which caused us pause on some  
8 hand, especially because we had had such a great relationship in  
9 Kenya and Tanzania with the investigators. We could trust them  
10 implicitly in everything that we did. But we were really going to  
11 have to verify every bit of information that -- that we had gotten.

12 The other thing was early on in -- in asking what do  
13 they -- a lot of times when you're -- you're trying to figure out  
14 what do they want, what are they asking for? What information ----

15 Q. They being the Yemeni government?

16 A. The Yemenis, what were they asking for. And one of the  
17 things that they were very interested in was any phone records that  
18 we had, that we had gotten through any of our agencies, about phone  
19 calls that were placed in Yemen that -- that -- that might have  
20 something to do with -- or germane to the -- the fact at hand. Who  
21 did this? So they seemed very interested in the phone records, and  
22 that was something every day that they were interested in, to the  
23 point where we had had a conversation -- I think Ali and I did at one

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1 point in time, or even John, I vaguely remember it being, well,  
2 they're probably worried about their phone  
3 number -- somebody -- their phone number in the government. Either  
4 they were running somebody as a source here and the source went  
5 sideways. They thought they had a situation contained and they did  
6 not and they're probably concerned with the fact that somebody in or  
7 around the government is going to be complicit on some level with  
8 allowing this to happen.

9           So it was -- it was more of almost fear, I think, is  
10 what -- is what was conveyed to me as I tried to -- remember  
11 the -- you know, the -- the conversations that we had.

12         Q.     And specifically with that concern that you're sharing,  
13 did you become aware, in the course of your investigation, there  
14 were, in fact, terrorism or al Qaeda sympathizers in the Yemeni  
15 government? And when I say government, I mean Ministry of the  
16 Interior or the Political Security Organization.

17         A.     So there's no specifics I think that I can talk about  
18 specifically with regards to this, but with -- without a doubt.  
19 With -- without a doubt there -- there were individuals that were  
20 sympathizers towards al Qaeda, and there was a little bit of a  
21 struggle going on within the government itself to -- to both be  
22 accommodating to the west and also turn away from the west.

23           And this brought all of this to -- to a head to a certain

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1 extent. And they were concerned of U.S. reaction I -- my belief was  
2 the overall thing is they were concerned of U.S. reaction had there  
3 been any complicity at all of -- of Yemen. I hope that answers. Did  
4 that ----

5 Q. It did.

6 A. Yeah, yeah.

7 Q. It actually brings me to a meeting that you and I  
8 discussed, I believe where a high-ranking Ministry of the Interior  
9 officer, your meeting I believe with also Ambassador Bodine is  
10 present. And this officer gives you a photograph also of Khamiri.  
11 Do you recall this meeting?

12 A. I do. That was in Sana'a, and that was during this period  
13 when I think everybody else had left and I was with another SWAT  
14 agent who I knew really well, actually two -- two SWAT agents, as I  
15 remember, really well, that were helping me and us three as I  
16 remember, I think it was three of us -- there might have been another  
17 one there -- were the ones that went to this particular meeting.

18 I don't remember that picture specifically, but I think it  
19 might have been Khamiri but under a different, slight -- slightly  
20 different name as we're talking about it now. And I don't know if we  
21 talked specifically about that before, the name, but it -- I think it  
22 was -- might have been Khamiri.

23 Q. So let me put a pin in the meeting ----

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1 A. Yep.

2 Q. ---- for one moment.

3 What I want to do is show you a couple of photographs of  
4 Mr. Khamiri that ended up in the ADENBOM book and ask if you can  
5 identify which one might have been given to you by the PSO ----

6 A. Okay.

7 Q. ---- versus which one might have been given to you in this  
8 meeting that we'll circle back to, okay?

9 A. Okay.

10 DC [MS. CARMON]: Your Honor, this is AE 492, page 5. If I  
11 may make use of the document camera just amongst the court personnel.

12 MJ [COL ACOSTA]: You may.

13 Q. Thank you. Agent, do you have that on screen?

14 A. I do.

15 Q. Okay. I'm going to zoom in to the photographs that are  
16 identified to Mr. Khamiri, which are the bottom row here. And so if  
17 you can take a look at not the first one on the second row to the  
18 left but the remaining six photographs here, do you have any memory  
19 as to which photograph might have been supplied by the PSO versus  
20 this MOI official from the meeting that we're about to discuss?

21 A. So the very first photograph that came off the  
22 registration, as I remember the boat registration, I don't think it's  
23 in this group. Are there any other photos that we have?

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1 DC [MS. CARMON]: Let me retrieve this document. Your Honor,  
2 I'm going to place page 6 of AE 492 onto the document camera.

3 MJ [COL ACOSTA]: You may.

4 DC [MS. CARMON]: There we go.

5 Q. Agent Bongardt, this is the second page, and so let me  
6 zoom into the final two photographs we have ----

7 A. Yep.

8 Q. ---- identified as Mr. Khamiri.

9 A. So the upper -- the upper left one -- and if you have  
10 something that might help me -- if you have a copy of the -- I would  
11 have put a -- put this in a report, then -- along with the photo.

12 But going from memory now, 23 years ago, I would say it's  
13 the -- it's -- the upper left one looks more like the one that I  
14 recall on the registration.

15 Q. And that would have been passed to the FBI by the PSO; is  
16 that right?

17 A. That would have been -- in Aden, it would have been  
18 passed -- it would have been passed in Aden. However, the MOI when  
19 it -- in Sana'a -- and I hope I'm not confusing the -- the PSO versus  
20 MOI. When I met with an individual up there, they -- they gave us  
21 another -- another photograph, and that looks -- that's probably one  
22 of the other ones that we had.

23 But the one on the left is -- as I remember, was -- was the



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1 one that -- I think was the one that was given in -- given to us in  
2 Aden first.

3 Q. And for the record, that is first row, top left  
4 photograph; is that right?

5 A. Correct.

6 Q. And that is page 6 of AE 492.

7 DC [MS. CARMON]: I'll retrieve the document.

8 Q. So let's skip back to the meeting that we had put a pin in  
9 just a moment ago. There, I believe, is a crosswalk in front of you  
10 where we have some directions about how to refer to Yemeni members of  
11 the government.

12 A. Okay.

13 Q. And so if you can take a look at MOI number 3, without  
14 saying the person's corresponding name, but confirm to me that this  
15 is the person that you met with during the meeting that we're  
16 discussing.

17 A. You know, I -- I can't remember if that was his name. The  
18 rank seems like -- no, that -- I don't -- I don't know if that's the  
19 name or not. I wouldn't be able to tell you.

20 Q. Understanding ----

21 A. Would you -- do you have my report? Would you have a  
22 report that I wrote out of that? That would have it.

23 Q. I do. Would that help refresh your refresh your

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1 recollection?

2 A. It would, yeah, that would probably help me.

3 Q. And I'm going to tell you the report that I'm going to  
4 show you has an overlay, so this person's name is not in it ----

5 A. Ah. Okay.

6 Q. ---- but it is a corresponding overlay that you'll see  
7 there.

8 A. Yep.

9 DC [MS. CARMON]: Your Honor, may I approach with AE 461Q,  
10 page 1 and 2?

11 MJ [COL ACOSTA]: You may, and you may move freely.

12 DC [MS. CARMON]: Thank you.

13 **[The witness reviewed the evidence.]**

14 A. Okay, so.

15 Q. Thank you.

16 A. Thank you. I just was reading the first -- so ----

17 MJ [COL ACOSTA]: Just wait for the question.

18 DC [MS. CARMON]: One second, Agent. Your Honor, I have  
19 retrieved that document.

20 Q. Agent, did that refresh your recollection as to this  
21 meeting?

22 A. It did, just -- just because the -- the acronyms of the  
23 different entities that we're talking about in different -- other

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1 government organizations within Yemen. Even though you'd swear you'd  
2 never get them confused, you could probably get them confused 23  
3 years later.

4           So what I recall about that meeting too was  
5 I -- this -- this particular meeting was called by an individual that  
6 was part of the Minister of Interior and not -- or it was called by  
7 one entity within the Yemeni government, versus the main entity that  
8 we had been working with down in Aden.

9           Q.     And that would have been the PSO in Aden?

10          A.     That would have been PSO in Aden ----

11          Q.     Okay.

12          A.     ---- as opposed to being in Sana'a with an MOI. And they  
13 were concerned that we were not getting all the information from PSO  
14 in Aden because of the fact that there were sympathizers within the  
15 groups that primarily had the control of -- of southern Yemen  
16 that -- that might not be telling us all that we wanted to know.

17          Q.     And so at this meeting where it's expressed that the MOI  
18 or this individual within the MOI is concerned that you're not  
19 getting the full story from the PSO, this photograph of Khamiri is  
20 passed to you along with some information about Khamiri; is that  
21 right?

22          A.     That's correct. Now, did that -- did you just show me  
23 that? And I apologize. Did that have a photograph?

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1 Q. No photograph was with the report, no.

2 A. No, no photograph with the report. Okay.

3 Q. And I -- again, I have the report obviously for your  
4 review.

5 A. Sure.

6 Q. But I do want to ask you some questions about the meeting  
7 and some of the discussions that you were having.

8 This meeting mentions the Yemeni Investigative Committee  
9 which is working with the United States in this investigation. Who  
10 is part of that committee? Is that a Yemeni governmental committee?

11 A. I don't -- I don't recall. I do remember, much like our  
12 JTTF, where we would have different individuals, concerned  
13 individuals that were all trying to solve the problem, it was their  
14 version of that but more -- if I could say, more politicized.

15 Anyone who had an equity in what was going on in that  
16 investigation from the Yemeni perspective were -- my -- my  
17 recollection is, were part of that -- were part of that committee,  
18 and certainly the -- probably the people that were the ones that had  
19 the equity to be able to be a seat at the table when they were  
20 talking to Ali Soufan and John O'Neill and Ambassador Bodine.

21 Q. Understood.

22 DC [MS. CARMON]: Your Honor, I am going to make use of the  
23 document camera, again, with page 2 of AE 461Q. If I may place that

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1 on the document camera.

2 MJ [COL ACOSTA]: You may.

3 DC [MS. CARMON]: Thank you.

4 Q. Agent, this is page 2 of your report. I just want to zoom  
5 in to some language and ask you a question about it.

6 A. Sure.

7 Q. The marking ----

8 MJ [COL ACOSTA]: Will you give me the exhibit number again.

9 DC [MS. CARMON]: Yes, sir. 461Q ----

10 MJ [COL ACOSTA]: There it is. Sorry.

11 DC [MS. CARMON]: ---- page 2.

12 MJ [COL ACOSTA]: It was just small and at the bottom, so ----

13 Q. And let me zoom in for you here, Agent Bongardt.

14 A. Okay.

15 Q. What I am interested is the paragraph that begins with  
16 "additionally," where this representative of the MOI is telling you  
17 that they have information about Mamun Ahmad Muhammed al Sowi as  
18 being the mastermind of the person who perpetrated the attack on the  
19 COLE. And so my question is, receiving that information from the  
20 MOI, was a photograph of this person ever received and placed in the  
21 ADENBOM book, to your knowledge?

22 A. So my recollection is al Sowi was an a/k/a for  
23 al Khamiri -- or at this point in time, we believed it was the

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1 same -- was the same individual. But I -- but I could be -- that's  
2 just my recollection. If -- if you have ----

3 Q. So let me show you page 1 of this report, 461Q, and I'll  
4 remove page 2. So on page 1, it looks like there -- and there's the  
5 marking, sir.

6 MJ [COL ACOSTA]: Thank you.

7 Q. On page 1 it looks like there's a pretty in-depth  
8 discussion between MOI #3 and the parties about Mr. Khamiri.

9 A. Uh-huh.

10 Q. And so if I can draw your attention here ----

11 A. Right.

12 Q. ---- to the paragraph that ----

13 A. Yep.

14 Q. ---- begins with the overlay MOI #3?

15 A. Yep.

16 Q. So ----

17 MJ [COL ACOSTA]: The last two paragraphs that -- in fact, all  
18 three paragraphs do this. This is the second from the bottom of the  
19 page for the record. Thank you.

20 DC [MS. CARMON]: Thank you, sir.

21 Q. MOI #3 stated that the individual -- and he's discussing  
22 al Khamiri. Is it your recollection that he identified Mr. Al Sowi  
23 as Mr. Al Khamiri as well?

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1 A. No, I'm probably mistaken in that.

2 Q. And, sir, if I can retrieve page 1.

3 I'm going to go back to AE 461Q, page 2, and the language  
4 about Mr. Al Sowi.

5 Any recollection of receiving any more information about  
6 this man or a photograph that could be included to show witnesses,  
7 given at least this individual's naming him the mastermind?

8 **[The witness reviewed the evidence.]**

9 A. I'm reading the paragraph.

10 Q. No, go ahead.

11 A. Yeah, just read -- and trying to jar some ----

12 **[The witness reviewed the evidence.]**

13 A. The name al Sowi is very familiar to me. And now reading  
14 what I had -- what I had written -- I think I did write this. Were  
15 my initials on that first page? Because I know I went ----

16 Q. I'm placing page ----

17 A. ---- with Pat -- Pat Patterson. I would have written it,  
18 Pat wouldn't have read it. He would have been there with me. At the  
19 bottom if you just ----

20 Q. Yes, sir.

21 A. ---- scroll up a little bit -- it -- my initials SAB at  
22 the bottom?

23 Q. Yes, I'm going to replace page ----

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1 A. Yes, so I would have written it ----

2 Q. Just give me one second, agent.

3 I'm going to place page 1 ----

4 A. Sorry. Sorry.

5 Q. That's okay. And I'll direct you to the bottom there with  
6 your name and ----

7 A. Yeah, so I would have been the one to -- that wrote this.

8 So al Sowi is familiar to me. But I -- and it does seem  
9 like it's a separate individual. It -- and again, we would have  
10 tried to fuse this information into what we knew or what we thought  
11 we were learning, because we knew we had one -- we -- I think at this  
12 time in January we were pretty confident that al Khamiri, in the  
13 photograph that we were given in Aden, was one of the individuals.  
14 But there was some confusion whether it was two or three individuals  
15 total in the boat. I think we believed there were a total of two  
16 individuals in the actual boat that -- that attacked the ship, and we  
17 were ----

18 MJ [COL ACOSTA]: I just need you to slow down ----

19 A. ---- we were still trying to identify that second person.

20 MJ [COL ACOSTA]: ---- a little bit.

21 WIT: Oh, sorry.

22 MJ [COL ACOSTA]: Because you're going -- I appreciate your  
23 answering all of the questions completely and fully.



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1           WIT:  Yep.

2           MJ [COL ACOSTA]:  I just need you to take an occasional  
3  breath.

4           WIT:  Yeah.  Yeah.  Yep.  Yeah.  Okay.  Yep.

5           A.     So I would -- at this point in time, we had a -- I think  
6  we felt like we -- when it comes to the truth, we felt al Khamiri was  
7  one of the individuals.

8                 We were still looking for who the second individual was.  
9  And I don't think that was nailed down yet.  And we were -- we  
10  had -- the -- at this point in time as well, we had some forensic  
11  information.  I think we had some DNA back with regards to  
12  al Khamiri.  I don't know if we had a DNA match, other than the fact  
13  there was separate DNA from the bomb with regards to al Sowi.

14                So al Sowi sounds familiar.  He could be a -- an alias for  
15  the other individual we were looking for.  And so it would make sense  
16  that I would come back and put this into our -- our -- our  
17  investigative information and try to figure out who it was, and if  
18  what they were telling us was accurate because of what I had told  
19  your earlier, that we had had some, at least, concern that we need to  
20  validate everything that PSO was telling us with other sources of  
21  information.

22          Q.     Got it.

23          DC [MS. CARMON]:  I'm going to retrieve AE 461Q, page 1 and 2.

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1           Q.     Agent Bongardt, let me ask you some specific questions  
2     about the development of the ADENBOM Photo Book.  Am I right that  
3     there were multiple versions of this book over the investigatory  
4     period?

5           A.     Correct.

6           Q.     Okay.  I want to begin with the first version, what  
7     I've -- I think is the first version, and I'm going to show you the  
8     front of that book.

9           DC [MS. CARMON]:  If I may place on the document camera  
10  AE 492, page 1.

11          Q.     Does that date look correct as far as the first version of  
12     the book?

13          A.     It does.  It does to me -- it -- it does -- well, except  
14     for the fact that it -- I think we would have tried to document some  
15     part of this book.  And that -- another book had existed prior to  
16     this date.  But it very well could be the first time that we got  
17     around to doing the documentation of it.  But it strikes me as being  
18     a little long, from October, November, December to -- to this point  
19     in time.

20                 We would have done a -- maybe a upgrade or a memorialization  
21     type of document at this time, based on what I -- what I recall.  But  
22     it looks like the font that I recall as being the font that we  
23     used -- type of font that we used in -- in coming up with the ADENBOM

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1 book.

2 Q. And the memorialization that you're talking about is when  
3 photographs are either taken away or added to. You would memorialize  
4 those changes in an FBI document; is that right?

5 A. Yes, we would. We -- and we would try to make it  
6 concurrent with what we were doing. At different times, when the  
7 workload allowed us to do it, we would try to update it  
8 and -- especially if we noticed there were different people around  
9 the world that were working for us, agents in different offices that  
10 might have a walk-in in -- in an embassy somewhere else, that -- that  
11 would try to show different photos, reach back out to the case squad.  
12 So we knew at times we might not have the photo book exactly  
13 capturing every photo that had been shown to every -- anyone in -- in  
14 the country. So we were trying to do a better job of that.

15 Q. How were the photos that went into the ADENBOM book, how  
16 were they selected? Were you part of that process?

17 A. I was part of that process but probably not part of every  
18 single time that a book was added to the -- the -- the photo  
19 book -- every time a photo was added to the photo book. But I  
20 was -- I was part of that process, and it was part of my job, as well  
21 as the co-case agent, trying to take over the -- a lot of the  
22 administrative issues and trying to make sure that we were trying to  
23 do everything the best we can.

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1           Q.     And as part of your duties, would you have overseen that  
2 process or directed that process? What would your specific  
3 involvement have been?

4           A.     So it -- it would have been reading everything -- so as a  
5 co-case agent you try to read everything that would come into the  
6 file, intelligence and also from the criminal side just -- in  
7 particular. So it would be trying to read every report, every 302  
8 that would come in and be submitted, and then, based on that, to put  
9 out administrative things that we needed to get done.

10                So if all of a sudden I read from a 302 that a picture had  
11 been shown and I'm like, well, where did this picture come from? Or  
12 a series of pictures had been shown and where did those pictures come  
13 from? I would then put out tasks of recontacting the agent, where  
14 did you get the photos from, and then probably trying to put it all  
15 together and come up with some kind of memorialization of what is the  
16 current ADENBOM Photo Book.

17                But generally on a day-to-day basis, it would be reading  
18 every piece of paper that was being created regarding this case. Ali  
19 as well would be doing that. And then we would be discussing it and  
20 trying to figure out where do we need to go to administratively make  
21 ourselves as -- as good as we could and -- and then move forward.

22           Q.     In your role there, do you recall having a discussion with  
23 your agents on the ground and David Kelley, the former AUSA, who was

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1 there as well, about putting together a photo book to be shown to  
2 witnesses once those interviews were beginning, pursuant to the  
3 memorandum of understanding that was signed between the two  
4 countries?

5 A. I do based on -- and I've had some recollection because a  
6 couple documents have been shown to me, that around this time period  
7 specifically some of our Arabic-speaking agents were on the ground in  
8 Yemen and invaluable to what we were doing. And one in particular  
9 and I had a conversation around this time of the date of this one to  
10 try to get our photo book at that time memorialized, what we liked  
11 and what we didn't like.

12 And with regard to David Kelley, we would periodically have  
13 different conversations, especially if I traveled overseas with Dave.  
14 And when we came back, definitely he was available to discuss  
15 different concerns we might have, how we could make the investigation  
16 as best as we could for prosecution in the future. And it would make  
17 sense that I had different conversations with him, and I remember  
18 having different conversations with him about this.

19 DC [MS. CARMON]: I'm going to retrieve the photo book,  
20 AE 492.

21 Q. Agent, I have a couple of electronic communications that  
22 you sent to folks that I would like to show you and then go through  
23 some of the language that you were using and have some questions

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1 about those.

2 A. Okay.

3 DC [MS. CARMON]: Your Honor, this is AE 461Q, page 3.

4 Q. I'm just going to place the cover sheet onto the document  
5 camera, Agent, and have you just verify a couple of things here  
6 before we go into the substance of it. And there is the marking,  
7 sir.

8 A. That's my printing.

9 Q. And this would have been a copy of your ----

10 A. Yep.

11 Q. ---- card, it looks like?

12 A. That was the easy -- yep, that was the easy way for me to  
13 document it when I was sending it over.

14 Q. Right. And if you could just verify the date here for me?

15 A. The date is December 28th, 2000.

16 Q. And would this have been a communication from you in  
17 New York to Andre Khoury, who is in Aden?

18 A. It -- it almost certainly was, yeah. I would say yes.

19 DC [MS. CARMON]: Okay. I'm going to retrieve page 3.

20 Q. Agent, I'm going to place page 4 on the document camera.  
21 And if I can just have you, just so we're all clear, verify the date  
22 on this communication for me?

23 A. 12/28/2000, time 1300 Eastern Standard, and it's to

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1 Andre -- I can say his name, correct?

2 Q. Yes, you can.

3 A. Andre, Andre Khoury, yep.

4 Q. And there's the marking, sir. Okay.

5 I want to ask you about -- and I'm going to just zoom in on  
6 the pertinent language here.

7 A. Okay.

8 Q. The -- the paragraph that begins with we received a fax EC  
9 about the photo book. So here you're expressing some concerns to  
10 Agent Khoury about sketches being included in the photo book and  
11 multiple photos of the same individual being included in the photo  
12 book. Can you elaborate on those concerns for us?

13 A. Yeah. So having been part of -- having been part of  
14 Kenya/Tanzania -- initially with Kenya/Tanzania and -- at that time I  
15 think it was Pat Fitzgerald, who was the Assistant United States  
16 Attorney with us that was over there. Initially there was a sketch  
17 that was done by one of the guards at the embassy in Kenya of the  
18 individual who ran away from the -- the -- the bomb truck. And that  
19 sketch, which turned out to be incredibly accurate, was initially  
20 used as part of the KENBOM/TANBOM PHOTO BOOK. But there are issues  
21 in using a sketch versus using a photograph. And it wasn't ideal,  
22 but at the time it helped us find al Owali, and then when we finally  
23 did find al Owali, it looked very similar to him.

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1           So sketches, to me, were far away from photo arrays that I  
2   was trained on at Quantico, right? So I -- if we had to use them to  
3   try to get leads and valuable leads, I was all for doing it. But at  
4   a certain point in time I wanted to try to get the sketches out of  
5   there, as well as -- even though the photo book was a new type of  
6   array that we were using, relatively new in the types of  
7   investigations we were doing internationally, I have always tried to  
8   guard against the false positive, right?

9           And if I have seven photos of an individual that are in  
10   there out of 21, I'd rather just have one or two good photos, unless  
11   there was a real reason to do it because, chances are, statistically  
12   if they pick out the individual, it could -- it could be an issue.

13           So generally, I was trying to get multiple photos out of  
14   there if I thought they were redundant, unless there was something  
15   significant about them.

16           Q.     Now ----

17           A.     So it was -- it was kind of a tradeoff, and it was  
18   something I tried to weigh, and I think Ali did, and even Andre.  
19   In -- and that's one of the reasons why I think -- I brought this up  
20   in this paragraph.

21           Q.     And if I could just refer you back to ----

22           A.     Yeah.

23           Q.     ---- the ----



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1 A. Yeah.

2 Q. ---- 2 January photo book.

3 DC [MS. CARMON]: Your Honor, this is AE 492. I'm just going  
4 to place page 5 on the document camera quickly.

5 Q. And so, Agent, just to take you back, you're expressing  
6 some concerns about sketches. You can see here that photo number 4  
7 or slot number 4 here is a sketch; is that right?

8 A. Correct.

9 Q. And again, multiple photographs of the same person. Nine,  
10 10, 11, 12, 13, 14, these are all of Mr. Khamiri; is that right?

11 A. Correct.

12 Q. And so these are the types of things you would have been  
13 expressing some concerns about; is that right?

14 A. That is correct.

15 Q. Okay.

16 A. But -- and level of concern is just to try to make it as  
17 perfect as we can, right? That's -- that's my recollection.

18 Q. And again, this is with an eye towards a prosecution at  
19 some future point; is that right?

20 A. Correct.

21 Q. And so the concern is around the admissibility of any  
22 evidence that would be brought into court?

23 A. Correct.

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1 Q. Okay. If I may retrieve AE 492, and we are back to  
2 AE 461Q. And I'm going to zoom in just a little bit more here.

3 The -- the next line after multiple photos of the same  
4 individual is your question: Has anyone given AUSA input? And  
5 that's obviously Assistant United States Attorney, right?

6 A. Yes.

7 Q. Is that correct?

8 A. Yes.

9 Q. Did you get an answer to that? Do you know if there was  
10 DoJ input about the use of this photo book?

11 A. I -- I vaguely remember having a conversation with Dave  
12 Kelley at different times -- or would have had the opportunity to  
13 bring this up at different times, but I can't specifically remember.

14 There's -- there's one meeting I had with him that happened  
15 in June of that year, later on in June that year,  
16 that -- that -- that my memory is -- is very clear on, but not this  
17 particular one.

18 Q. Okay. And let me just ask you another question about just  
19 a little bit of language here. We should include some bogus  
20 throwaway photos. And you say individuals who have nothing to do  
21 with the case; this helps make it more of a photo spread.

22 Is this -- these are the fillers that you and I sort of  
23 discussed ----

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1 A. Sure.

2 Q. ---- earlier?

3 A. Sure.

4 Q. And that -- those are people who look like the suspect but  
5 are not the suspect; is that right?

6 A. Correct. The term "bogus," good FBI term there.

7 Q. Is that a technical term?

8 A. Yep.

9 Q. Okay. I'm retrieving page 4. Thank you.

10 A. One -- can I add one thing?

11 Q. Yes, go ahead.

12 A. So we were talking about AUSA input. So a lot of times we  
13 would have different conversations and then we would try to -- like  
14 Ali and I would try to back-brief each other.

15 And so it sounds like when I'm -- when I'm writing that was  
16 hey, we've had different conversations with the AUSAs. Has that  
17 information gotten over to the individuals that are on the tip of the  
18 spear over in Aden so that they can incorporate some of that stuff  
19 and they're thinking about it as we were doing it.

20 That's what my -- is that we would have gotten that input  
21 and tried to get it back there or make sure that we got it back there  
22 between Ali or I or George or Joe Ennis or Russ Fincher or Brian  
23 Getson or any of the individuals that were on the case.

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1 Q. And are you aware if any of that information or any of  
2 those suggestions did make it to the investigators to make some  
3 different decisions?

4 A. I would be surprised if it -- if it did not, because we  
5 generally were very communicative with our squad mates back there,  
6 what they needed, how things were going, what was the relationship  
7 like with the Yemenis. Especially from a standpoint of safety, we  
8 were always concerned, because we did have that scare a couple months  
9 earlier. So I would be very surprised if that did not get back.

10 Q. Now, you mentioned earlier memorializing any changes to  
11 the ADENBOM book as it went through different versions. One of your  
12 agents on the ground, was that George Crouch?

13 A. It was.

14 Q. And were you working hand in hand with Agent Crouch on  
15 these issues?

16 A. I was.

17 DC [MS. CARMON]: Your Honor, I am looking at page AE 461P,  
18 page 92. If I may make use of the document camera?

19 MJ [COL ACOSTA]: You may.

20 DC [MS. CARMON]: Thank you.

21 Q. So this is -- if you'll look here, this is a  
22 communication, again, memorializing the contents of the ADENBOM Photo  
23 Book. And I note that on the bottom, it's George Crouch with his

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1 signature.

2 Would you have seen this document or been apprised of it as  
3 the co-case agent?

4 A. I -- I would have. I should have seen it. I'm not saying  
5 there aren't any documents out there that I never saw.  
6 There -- there probably was. But it -- part of my job, depending on  
7 where I was at the time, and when it was sent to the case file.

8 If -- if I was back in New York, I would go through the case  
9 file hard copy stuff every day and take a look at it. If I was  
10 overseas, which I very well could have been -- George was kind of  
11 over -- overlapping. He would go with Ali sometimes ----

12 MJ [COL ACOSTA]: Sir, I just need you to slow down.

13 WIT: I'm -- I'm sorry.

14 A. George sometimes was with me over in Yemen and then at  
15 other times was with Ali. So it's possible that this hard copy went  
16 to the file without me seeing it. But if I was back in New York at  
17 the time, I would have taken a look at it.

18 Q. Now, suffice it to say this is the type of memorialization  
19 that you were discussing about changes within the book; is that  
20 right?

21 A. Correct. Correct.

22 Q. And I'm pointing here to the second paragraph that begins  
23 with "after review," and it mentions AUSA Dave Kelley here. Does

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1 that indicate to you that there was at least some discussion about  
2 how the book should evolve?

3 A. Yes.

4 Q. Okay.

5 A. Yes.

6 Q. And then I will show you pages 93 and 94 to complete the  
7 report here. Removing page 92. This is 93.

8 And so this is a listing of the updated version of the  
9 ADENBOM book -- is that right? -- where -- where number 15 is going  
10 to be Mr. Al Khamiri, but now 16 is going to be blank, for example?

11 A. Yes. Correct. That -- that is how I recall the 302s  
12 reading after -- for the -- the key, the answer -- the answer key, so  
13 to speak, of -- of who -- the list of who was in there, after we had  
14 removed them.

15 Q. Okay. And I'll note here 20, 21, and 22 in that first  
16 book were Mr. Al Nashiri, but it looks like here, one of the  
17 modifications is now that photograph 21 has been removed. Do you  
18 recall that happening?

19 A. I do -- I do recall at least one photo of his being  
20 removed from -- from the photo book.

21 Q. Got it. And I'll show you page 94, just to complete the  
22 report.

23 Now, 34 is the last number here that I see. Does this

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1 indicate to you that there were 41 pages in the book for the witness  
2 to go through, even though some of them may have been blank, as -- as  
3 is noted in 34?

4 A. Correct.

5 Q. And are you aware, did the photo book, throughout its  
6 iterations, did it remain about this size, about 34 photographs in  
7 each one -- or 34 pages, rather, in each one?

8 A. So looking at the date of this 302, this seems a little  
9 skinny to me, like there would be more photos than 34. But -- but I  
10 would say it never got to the size of KENBOM/TANBOM, which got to  
11 over a hundred at one -- at one point in time.

12 Q. And so the ADENBOM book remained smaller; is that right?

13 A. Correct.

14 Q. Okay. I'm retrieving the document.

15 Now, you were aware that sketches were done. And I believe  
16 an FBI sketch artist was used; is that right?

17 A. We used one in Kenya/Tanzania, and also in ADENBOM.

18 Q. And so specifically to ADENBOM, can you describe that  
19 process for us, about how those sketches came to be?

20 A. So I -- as I recall, initially we had witnesses -- and I  
21 think it was a -- I think one of them was at least a younger boy that  
22 had helped or assisted the bombers, the attackers, the suspects,  
23 removing the -- or helping get the boat off the dock, and maybe his

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1 father, an older man, was with him. I remember more than one. It  
2 wasn't just a boy being there. But they had a pretty good  
3 eyewitness -- we believed a pretty good eyewitness to be able to  
4 describe the attackers.

5 And so I do not believe the sketch artist was on the  
6 original -- he could have been. I think it was a he. He could have  
7 been on that original flight with us, but very early on within the  
8 first -- once we realized we were looking for a boat and we had the  
9 registration and we knew Khamiri, very early on I think we identified  
10 the Yemenis -- we -- when I say we, I mean us and the Yemenis.

11 Primarily the Yemenis first identified these witnesses, and  
12 then we tried to get them to do a sketch based on their eyewitness  
13 experience of -- of who the -- who the attackers were.

14 Q. Were you present when any of the sketches were done or  
15 were you apprised of the process at all?

16 A. A little bit. I would have been apprised back at the  
17 command post, but I was not -- we weren't -- I was not part of that  
18 process.

19 Q. Did you become aware -- or as being at the command post,  
20 were you aware that the sketch artist was not allowed direct contact  
21 with the -- the witness who was providing the details?

22 A. No. It would -- it would have surprised -- direct would  
23 be I would imagine they would have to go through a translator.



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1 Q. And meaning they were not seated in the same room?

2 A. No, I don't recall that.

3 Q. All right. Now, you were in -- you were still in  
4 Aden -- or still in Yemen, rather, 22 November 2000; is that right?  
5 I believe that was before Thanksgiving.

6 A. Yes, I think so. I -- yep. That would make sense.

7 Q. I am going to show you a document that describes the  
8 merging of some photos and ask you if you're familiar with these ----

9 A. Okay.

10 Q. ---- images, okay?

11 A. Sure.

12 DC [MS. CARMON]: Your Honor, that is AE 461P, page 106, if I  
13 may use the document camera.

14 MJ [COL ACOSTA]: You may.

15 DC [MS. CARMON]: There is the exhibit marking.

16 Q. I'm going to zoom in just a little bit so you can see  
17 the language here, agent. There we go.

18 So this is an electronic communication and it details the  
19 merging of a sketch with a photograph, and these are both from the  
20 ADENBOM book.

21 And what I'm interested in here is it says: This  
22 information concerning the merger of the sketch and the photograph  
23 was passed to the Yemenis on 25 November 2000 during an

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1 investigators' meeting.

2 Do you have a recollection of this?

3 A. I don't. I would -- I would not be surprised that we  
4 might give them a sketch and a photograph done this way.  
5 They -- overall they were very impressed with what we could do, and  
6 they -- certainly seemed like they watched lot of movies where they  
7 thought we could do a lot more.

8 But -- so we would -- in trying to broker the relationship,  
9 we would try to give them different things that we thought would  
10 help -- would help them ----

11 Q. And let me ----

12 A. ---- as they were giving us different things back.

13 Q. And let me show you the actual -- the images that ----

14 A. Okay.

15 Q. ---- were merged, and that is ----

16 DC [MS. CARMON]: I'll retrieve page 106, and I'm going to  
17 show the witness page 111 here. Again, there is the AE marking.

18 Q. And so it seems as if this photograph and this sketch were  
19 merged here. Would this have been something that you used in your  
20 own investigation, or do you recall just giving it to the Yemenis for  
21 their own use?

22 A. So I think it -- it helped us on some level. I remember  
23 being confused -- as -- as I've thought about this, I remember being

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1 confused by this. This was one of the things, and this might have  
2 been when I was traveling that came up, and I was like  
3 what -- what -- what was this? What were they trying to do here with  
4 regards to how it -- it -- how it was put together and what  
5 was -- what was its purpose? But it would have been something we  
6 would have -- we would have given them.

7 I probably would have wanted the context of it a little bit  
8 better, just to be able to nail it down for purposes of 23 years  
9 later now, taking a look at it and trying to figure out what exactly  
10 we were -- they were thinking.

11 But they were not necessarily as sophisticated as -- as we  
12 were with regards to using different tools. And we were probably,  
13 again, trying to negotiate with them and navigate, broker the  
14 relationship and try to -- try to tell them, hey, these are different  
15 things we're thinking of and this might be one of the reasons why we  
16 were looking to pursue Nashiri, right, this individual.

17 So a lot of times it was convincing them as to which way we  
18 would prefer to take the investigation based on our sum total of  
19 information.

20 Q. And do you have a memory of the United States using this  
21 composite photo in any way in its investigation?

22 A. I don't.

23 DC [MS. CARMON]: I'm going to remove page 111 of 461P.

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1           If I may have the commission's brief indulgence?

2           MJ [COL ACOSTA]:   You may.

3           DC [MS. CARMON]:   Thank you.

4   **[Counsel conferred.]**

5           DC [MS. CARMON]:   Thank you.   Okay.   Agent Bongardt, for the  
6 purposes of discussing Yemen and the photo books, I have no further  
7 questions for you.   But we'll start again on Mr. Owhali once we're  
8 done here.

9           WIT:   Okay.

10          DC [MS. CARMON]:   Thank you.

11          WIT:   All righty.   Thank you.

12          MJ [COL ACOSTA]:   All right.   Before we go into the government  
13 cross, we're going to take -- we'll take a brief recess for the cross  
14 on ----

15          Government, you have cross on this topic, yes?

16          ATC [MAJ ROMEO]:   Yes, Your Honor.

17          MJ [COL ACOSTA]:   All right.   We're going to take a 15-minute  
18 recess before we do that.

19          And Agent Bongardt, I just remind you that you remain on the  
20 stand, you remain under oath.   Don't discuss your testimony with  
21 anybody during this recess.   And I expect to see you back on the  
22 stand when we come back on the record.   Can you follow that  
23 instruction?

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1           WIT: Yes, sir.

2   **[The witness was warned, was temporarily excused and withdrew from**  
3 **the RHR.]**

4           MJ [COL ACOSTA]: All right. The commission is in recess for  
5 15 minutes.

6   **[The R.M.C. 803 session recessed at 1332, 1 March 2023.]**

7   **[The R.M.C. 803 session was called to order at 1349, 1 March 2023.]**

8           MJ [COL ACOSTA]: The commission is called to order.  
9 Government, all parties present as before?

10          TC [MR. O'SULLIVAN]: Except for Mr. Smith and Mr. Tavaréz,  
11 Your Honor, and they'll be in shortly.

12          MJ [COL ACOSTA]: Okay. Defense?

13          LDC [MR. NATALE]: Yes, Your Honor.

14   **[The witness, Agent Steven Bongardt, resumed the witness stand.]**

15          MJ [COL ACOSTA]: All right. Government, you can begin your  
16 cross.

17          ATC [MAJ ROMEO]: Thank you, Your Honor.

18          MJ [COL ACOSTA]: And sir, I remind you you remain under oath.  
19 Go ahead, Government.

20          WIT: Yes, sir.

21          ATC [MAJ ROMEO]: Thank you.

22                               **[END OF PAGE]**

23

**CROSS-EXAMINATION**

**Questions by the Assistant Trial Counsel [MAJ ROMEO]:**

Q. So, Agent Bongardt, I have a question for you involving Yemeni involvement with your investigation. I believe you testified that there was some involvement with Yemeni authorities.

Would you say their involvement hindered your investigation or were you still able to complete the mission, so to speak?

A. I would say overall we were able to complete the mission. Overall I'd say we were able to complete the mission. Sometimes we completed the mission and then they would let them out, right? From my knowledge of a couple of the suspects that we had that we thought were incarcerated in -- in Yemen, that we thought at least on some level were at least brought to justice and put in the Yemeni prison. And I do know there's a couple that were set free.

But -- but my thought was trying to get to who done it, right, is the prime truth type thing, I think -- I think we -- I think we did that. I believe we did that.

Q. Okay. So as far as the basic blocking and tackling, you were still able to do the -- handle that for your investigation?

A. Yes.

Q. Okay. Based on your perception from when you were down in Yemen at the time in 2000-2001, why did you think the Yemenis acted the way they did?

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1           A.     My -- my thought was what they were afraid of is, because  
2     of the fact that the U.S. had responded with missiles in Afghanistan  
3     after the embassy bombings, that they were afraid that the same type  
4     of thing might -- might happen in -- to Yemen if they were seen as  
5     complicit in any way.

6           And -- but my thought was that they weren't hiding anything  
7     from us per se, eventually they would -- wanted us to know the truth  
8     and reveal the truth because they felt we'd get to the truth with or  
9     without them, and so they were more acting out of fear of what we  
10    knew, when we knew it that might involve them.

11           And it could be something as they had a source that went  
12    sideways that they thought they had control over, to something  
13    leading back to maybe somebody higher up in -- in the government  
14    that -- that had something to do with it. It could have been any one  
15    of those things.

16           But I think overall, they didn't steer us in the wrong  
17    direction or anything like that. I never got that feeling. They  
18    might have been able to reveal things faster to us at different  
19    times, but -- but they were not trying to point us in the wrong  
20    direction.

21           Q.     So the -- the defense showed you a -- some documents and  
22    some photographs involving a composite photo. Do you recall who that  
23    photo was?

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1           A.     I think that the composite photo was -- I think that was  
2     supposed to be -- there was some confusion at one point in time  
3     whether Nashiri and the second boat -- as I recall now -- or  
4     the -- the second attacker that was on the boat -- second suspect  
5     attacker were the same person. And when I look at that photograph,  
6     the -- now, I think more that the original sketch was of the second  
7     attacker and not al Nashiri. But -- but I do remember having some  
8     confusion over that.

9           And you're -- Major, you're talking about the three sketch,  
10    right? The three individuals that -- that -- the overlay with the  
11    picture and the drawing and that third -- that third picture?

12          Q.     Yes.

13          A.     Yeah. That was -- yep.

14          Q.     Do you know the name for that was **[sic]**?

15          A.     I remember seeing at the bottom of it al Nashir or Nashir  
16    and that was -- in a way that was -- it brought back the confusion as  
17    to whether that was believed to be Nashiri and whether Abdul Rahim  
18    al Nashiri had been one of the attackers or -- and no longer with us  
19    or not.

20                 But I don't -- I thought that sketch originally -- the  
21    sketch was of perhaps the second bomber, as I -- as I try to recall  
22    now what that was. If you have something that could jar my memory,  
23    that might be -- might be helpful so I can give you a better -- a



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1 better answer.

2 Q. Yes.

3 ATC [MAJ ROMEO]: Your Honor, I would like to ask permission  
4 to ----

5 Q. I'm going to -- before I ask the question, Agent Bongardt,  
6 I'm going to -- I'm going to provide, if the judge allows me, a full  
7 copy of the EC related to that.

8 A. Okay.

9 ATC [MAJ ROMEO]: Your Honor, permission to allow the -- to  
10 present to the witness pages 100 through 111 of AE 461P.

11 MJ [COL ACOSTA]: You may.

12 ATC [MAJ ROMEO]: Thank you, Your Honor.

13 WIT: Thank you.

14 Q. Just take your time to review those documents ----

15 A. Thank you.

16 Q. ---- and then when you're ready, I'll retrieve them from  
17 you.

18 **[The witness reviewed the evidence.]**

19 A. Okay. So ----

20 MJ [COL ACOSTA]: Don't answer. Don't say anything. Let him  
21 get it back and then answer the questions he has.

22 WIT: Yes, sir.

23 ATC [MAJ ROMEO]: Retrieving the document, Your Honor.

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1 MJ [COL ACOSTA]: Just a reminder, Agent Bongardt, slow and  
2 steady on the answers, please.

3 WIT: Yes, sir.

4 So reviewing that, that ----

5 MJ [COL ACOSTA]: There's no question yet, so go ahead.

6 WIT: Oh.

7 MJ [COL ACOSTA]: Ask the question.

8 Q. After reviewing those documents, do you recall who's  
9 photograph that was?

10 A. The photograph was from -- of a suspect that we believe  
11 was the second attacker -- or could have been the second -- the  
12 second bomber suspect on the -- on the boat that morning,  
13 October 12th, 2000.

14 Q. All right. So it wasn't Mr. Nashiri?

15 A. No. No.

16 Q. Okay.

17 A. It reminds me of -- we would go around and round with  
18 Khallad and Khalid several times, different names in -- in -- and  
19 then the last name, al Nashiri, being -- being as a last name, and  
20 Nashir then, and people getting confused, as well as we would get  
21 confused with the names.

22 And so when I see Nashir like -- like that, some people that  
23 weren't familiar working the target -- and even those of us that

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1 were, sometimes the names would -- would get the better of us when we  
2 were trying to think of who the suspects were.

3 And if I was talking about Nashiri versus Nashir,  
4 there -- was it the same guy or the same individual. So some of that  
5 confusion, I think, might account for at least my recollection of  
6 what that had to do with and the -- the -- the -- trying to see how  
7 the -- in that particular case had nothing to do with Nashiri but had  
8 to do with a sketch and whether the sketch was similar to the picture  
9 of the individual that we had received that was close enough to the  
10 sketch that we were on the right trail.

11 Q. Okay.

12 A. Sorry if that was fast.

13 MJ [COL ACOSTA]: It was.

14 WIT: That was ----

15 MJ [COL ACOSTA]: You need to slow down.

16 WIT: Yep.

17 Q. So I have a -- I'd like to talk about the EC that the  
18 defense showed you to -- that you made on December 28th to Andre  
19 Khoury.

20 Was your concern about the original ADENBOM book -- was your  
21 concern that it was so subjective as to make it unsuitable as a tool  
22 for witnesses? Or was it more that you wanted to take a serviceable  
23 product and make it better?

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1           A.     The -- the latter, without a doubt; that we would make our  
2 photo book better than it -- than it had been and that we would be  
3 able to insulate it from attack and if -- in a -- in a future court,  
4 some kind of future court.

5           We had limited resources, so we definitely wanted to make  
6 sure that if somebody identified somebody from a photo book, it was  
7 useful as to try to pursue that lead as -- as opposed to trying to  
8 follow leads elsewhere.

9           Q.     And the -- the defense also showed you some 302s that  
10 indicated later versions of the photo book. Are you aware that some  
11 of those versions had multiple photos?

12          A.     I'm sure they did. I -- my hope -- I'm sure they did. My  
13 hope is that they had less multiple photos, and as we moved along in  
14 the investigation, the number of multiple photos of what we believed  
15 was the same individual decreased. I was happy to see the  
16 "Intentionally Left Blank" and -- and -- in the list of -- the answer  
17 key as to who was -- who was who in that -- in that particular book.

18          Q.     So it's safe to say that as the investigation wore on,  
19 just in the normal course of your investigatory work, there would be  
20 revisions to the photo book, not because of anything that was  
21 seriously wrong, and they would have been documented, but because  
22 you're just improving a product as new information comes in?

23          A.     Correct.

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1           Q.     Okay.  So jumping back to a memo that the defense went  
2     over with you -- excuse me -- that you had drafted regarding a  
3     meeting back in November of 2000 where the -- the Yemeni officials  
4     had presented you with a photograph and said, you know, this might  
5     be, you know, a person of interest.  While all of this was going on,  
6     was the FBI still able to conduct an investigation on their own?  I  
7     mean it wasn't you were waiting for the Yemenis to say, okay, do  
8     this; is that correct?

9           A.     That is correct.

10          Q.     Okay.  Okay.  I just have a few loose ends I want to tie  
11     up -- tie down.

12                 So I believe you had testified as to the difference between  
13     a photo array and a photo book.  I know in the defense's examination  
14     of you, you also brought up a photo lineup and your training  
15     regarding that.

16                 Can you explain the difference between a photo lineup versus  
17     a photo array versus a photo book?

18          A.     So my recollection is that the photo array and a photo  
19     lineup are basically the same thing.  One of them is kind of the  
20     vernacular jargon of what we would call an array, a lineup, because  
21     it just makes -- makes more sense.  But the big difference is between  
22     a photo lineup or photo array and the photo book.  But a photo lineup  
23     and a photo array, I don't recall any difference -- that term being

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1 used differently.

2 Q. Okay. But they're both different than a photo book?

3 A. Yep, absolutely, both different than the photo book.

4 Sure.

5 Q. And you didn't use a photo array here because at the time  
6 you didn't know who was involved in the attack, right?

7 A. Correct.

8 Q. You just wanted to cast a wide net?

9 A. That is correct. We didn't -- we did not -- the way we  
10 were doing our investigations and trying to be very -- very  
11 open-ended questions and asking questions about individuals that were  
12 seen around different spots, we were trying to be as open as we  
13 could, and we felt like that was an accurate way to try to pursue  
14 suspects in this case ----

15 Q. Okay.

16 A. ---- by just using the photo book versus a lineup.

17 Q. Okay. Did the -- did the Yemenis -- did they influence  
18 the creation of the photo book?

19 A. Not at all. They may have requested a copy at one time,  
20 but we weren't prepared to give them a copy of -- of it. We could  
21 talk to them about it. I'm sure at some point in time, a Yemeni  
22 investigator was present when Ali or Bob McFadden  
23 were -- were -- were doing the interviews and may have actually seen

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1 it. But I -- we would -- it would have been -- I would be very  
2 surprised if one was turned over to them or if they had any input  
3 whatsoever on what we were putting together.

4 Q. Okay. Okay. So just a few more questions.

5 How many photo books have you used in your career?

6 A. Wow. For -- so there was a -- that's a great question.  
7 So we -- there was a -- with the KENBOM/TANBOM -- and I want to say  
8 the KENBOM/TANBOM and the al Qaeda Photo Book are probably similar.  
9 They're probably -- we started using the photo books in  
10 KENBOM/TANBOM. There was probably an al Qaeda Photo Book when I went  
11 back to the al Qaeda squad that we used which -- which was more  
12 general in nature -- nature, talking about -- or trying to find  
13 individuals that were connected to al Qaeda. And then there was an  
14 ADENBOM Photo Book.

15 So I would say categorically there were probably three, and,  
16 within each one, there were probably several different versions  
17 of -- of each one.

18 Q. Okay. So -- and I know one of my colleagues in the  
19 defense counsel, they're going to talk more about the East Africa  
20 bombings in a little bit. The question I have is just based more on  
21 how it affects the ADENBOM Photo Book.

22 So in your EC you mention -- there was a line that the  
23 defense pointed out, we had -- said something to the effect of we had

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1 these problems with the KENBOM/TANBOM Photo Book. What were those  
2 issues?

3 A. As I recall, there was at least one issue with regards to  
4 a sketch remaining in there, especially after we had found al Owhali,  
5 and maybe at a later date there was a -- there was a photo or a  
6 sketch in there, but it was mainly a photograph of a sketch and  
7 having more than one photo of -- of anyone, trying to reduce that as  
8 much as we could.

9 And that was mainly just conversations. I don't remember it  
10 coming up during the KENBOM/TANBOM trial. It might have. I  
11 don't -- I don't remember. I didn't -- I didn't testify as part of  
12 that. It might have come up, but I don't remember it being a big  
13 issue, but it was just an issue of lessons learned going forward,  
14 what to do better, what to try to do differently, because we thought  
15 we were going to be doing lot of these investigations overseas moving  
16 forward, unfortunately.

17 Q. And once again, when -- when you were doing the  
18 KENBOM/TANBOM investigation, you were working hand in hand with the  
19 authorities down there, the foreign authorities?

20 A. Correct, yeah.

21 Q. Okay. Meaning the ----

22 A. The Kenyan CID and Tanzanian CID.

23 Q. All right, and you had a pretty good working relationship



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1 with them?

2 A. Yeah, we had a great working relationship with them.

3 Q. Okay. And even then though, the sketches in the photo  
4 book, it wasn't enough to jeopardize the investigation?

5 A. Not an all.

6 Q. Okay.

7 A. Yep. No.

8 Q. How many photo book -- versions of the photo book do you  
9 recall were used in Aden? How many ADENBOM Photo Books?

10 A. So I don't remember the specifics, but I would say at any  
11 one time we were -- especially initially over the first three or four  
12 months as we added photographs -- it depends on how you want to parse  
13 it, but there -- but officially, there were probably no less than  
14 three, no more than six. And at different times some of the photos  
15 would slip in there, and then we would memorialize it at a date as  
16 soon as we could, right?

17 They were just -- it wasn't as clinical as we probably -- to  
18 be perfect, would have liked, where we were like, nope, you cannot  
19 show that photo to this individual until we memorialize it, get it  
20 into the book and have a 302 and that -- that picture is in there.  
21 So pictures were probably added, and then at a certain point in time  
22 we said, all right, let's memorialize what we have in there now.

23 The individual photos should be -- should have been

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1 identified all the time. Whenever the -- whenever an individual that  
2 we were interviewing identified that photo, we would have said this  
3 is a photo, put a copy of it in the 1A, and then probably put that  
4 photo in the photo book.

5 Q. And that was common, right, because ----

6 A. It was common.

7 Q. ---- just as your investigation is going on and you're  
8 receiving new information?

9 A. It was. The investigators did the best job they could  
10 with working overseas. When one of us was back in the United States,  
11 either Ali or me, letting us know what they did and when they did it  
12 and trying to let one of the case agents know, either Ali Soufan or  
13 myself or even Bob McFadden that -- that -- that they were -- that  
14 they had been doing it, so adding a photo or certainly taking one  
15 out. But it was -- I would say it was fairly common.

16 Q. Okay. So I just want to backtrack. We had some  
17 discussions, some questions about the -- the creation of that  
18 composite photo, which you said was not Mr. Nashiri.

19 To your knowledge, were any composite photos of -- of the  
20 accused, al Nashiri, in any of the photo books, to your knowledge?

21 A. Not -- not that I recall.

22 Q. Okay.

23 ATC [MAJ ROMEO]: Your Honor, if I may have one moment -- one

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1 moment?

2 MJ [COL ACOSTA]: You may.

3 **[Counsel conferred.]**

4 ATC [MAJ ROMEO]: Agent Bongardt, thank you. I'm done, Your  
5 Honor.

6 MJ [COL ACOSTA]: All right. Defense, any redirect?

7 DC [MS. CARMON]: No, thank you.

8 MJ [COL ACOSTA]: All right. Are you prepared to begin your  
9 direct on 480 -- is it 582? I apologize.

10 DC [MS. CARMON]: 482.

11 MJ [COL ACOSTA]: 482. Sorry. I'm running out of numbers in  
12 my head to use, so I apologize. Go ahead.

13 DC [MS. CARMON]: Thank you, sir. Just one moment.

14 **DIRECT EXAMINATION CONTINUED**

15 **Questions by the Defense Counsel [MS. CARMON]:**

16 Q. Okay. Agent Bongardt, we are going back to 1998. Tell me  
17 how you first became involved in the investigation -- and we're going  
18 to stick to Nairobi for the ----

19 A. Okay.

20 Q. ---- purposes of this ----

21 A. Sure.

22 Q. ---- testimony. But tell me how you first get to Nairobi  
23 and become involved in the investigation.

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1           A.     So as a relatively new agent on the JTTF, you could put  
2     your name on a fly list that -- since the New York Office was one of  
3     the biggest JTTFs, along with Washington Field, I think LA,  
4     San Francisco might have been at that time.

5           And I, being single and wanting to work as much as I could  
6     and work overseas, put my name on the fly list of the -- in case  
7     something were to happen overseas I'd be on the list to give my  
8     family -- my closest family member a list of checks signed so they  
9     could pay the bills for me, and I would be on the bus as soon as I  
10    could to go wherever I was going to go, and stay there an indefinite  
11    amount of time. And that's how I got involved in the -- the embassy  
12    bombings.

13          Q.     And how soon are you on the ground after the bombings?

14          A.     So we -- we took a bus down to -- which is a whole story.  
15    We took a bus Friday night. It was Friday night after the embassy  
16    bombings. And through the night we drove a New York metro bus with a  
17    55-mile-an-hour governor all the way from New York down to -- I think  
18    it was -- pretty sure I remember it was Andrews Air Force Base and  
19    then took a military flight out and got there -- I'm going to say  
20    within -- within 36 hours. I think we got there on Sunday afternoon.

21                 So it happened on a Friday as I recall. Bus Friday night,  
22    by the time we got there, waited around Andrews Air Force Base -- it  
23    was sometime Sunday afternoon we got there. So within -- within 48

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1 hours.

2 Q. And who was on the investigative team with you that  
3 arrives?

4 A. So it was myself. I remember Debbie Doran, Steve Gaudin,  
5 Wayne Parola, John Anticev, Abbey Perkins, Meghan Miller. I'm trying  
6 to remember some of the other agents at the time that -- Wayne -- I  
7 think I said Wayne Parola.

8 Q. Do you have a DoJ representative with you?

9 A. Oh, we had -- I want to say, I think Pat Fitzgerald was  
10 with us at the time. And another -- there was another -- there was  
11 another attorney, and I can't recall his name but he was from -- I  
12 think he was from FBI OGC, I want to say.

13 Q. If you would, just give us an overview of how the  
14 investigation evolved until the moment where you are in the paddy  
15 wagon going to find who -- the person that's ultimately Mr. Owali.

16 A. Okay. So we got there. I remember going directly from  
17 the airfield to the bombing site, the embassy downtown. And after we  
18 were there for -- to get a sense as to what happened.

19 And then we went to a meeting room at a building that wasn't  
20 too far away from -- from the embassy. I don't remember which  
21 building that was, but I think it was some government organization  
22 that had lent us that, where we got an initial brief as to  
23 what -- what had gone on and what we had learned in the last 48 hours

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1 since we had been on the bus and on the flight.

2 And then almost immediately after that meeting, I remember  
3 going up to the Kenyan CID Headquarters, which was just outside of  
4 Nairobi where, when we walked into the room -- this was a conference  
5 room -- there was a host of Kenyan investigators that had been  
6 gathered, and we were paired up pretty much initially right off the  
7 bat with some Kenyan investigators.

8 Initially, I was working with one particular investigator,  
9 an individual named Amos Combo **[sic]**, and then later on, another  
10 investigator, Mr. Sammy Wakesa. But we ----

11 MJ [COL ACOSTA]: Sir, can you slow down a little bit.

12 WIT: Oh, I'm sorry. Yep.

13 MJ [COL ACOSTA]: You have a lot of information. It doesn't  
14 all need to come out at the same time.

15 WIT: Yeah.

16 MJ [COL ACOSTA]: Just slow it down, please.

17 WIT: Okay.

18 A. We -- the first thing that we were trying to do, as I  
19 recall, is do interviews of anyone that thought that they had  
20 seen -- that had survived the attack. And my -- my initial -- and  
21 then later on that night I think we went to the hotel. But we were  
22 told initially what we knew from an intelligence perspective about  
23 what happened -- what happened during the attack and what we

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1 also -- we were briefed on, obviously, Tanzania, the -- the bombing  
2 in Dar es Salaam. Initially, I'm trying to remember the very first  
3 thing that I worked on. What I remember is trying to be more open  
4 ears than -- than -- than talking and just trying to volunteer for  
5 everything. I might have went to my first -- I might have went to  
6 immigration out at the Kenyan airport, the Nairobi airport, and for  
7 an initial lead of trying to track down within -- so historically,  
8 we -- we kind of knew based on the al Qaeda playbook that within a  
9 week, two weeks prior they would bring somebody in that was going to  
10 be the execution cell.

11 So that was my first tasking, as I recall, was to try to get  
12 to the airport and pull the -- the immigration documents for who  
13 might have come into the -- who might have come into the country in  
14 Kenya at least within the last 14 days.

15 Q. When does the tip come in that there is a man who may not  
16 belong who's ultimately Mr. Owhali?

17 A. Yeah, so that -- that was within -- I'm going to say  
18 within 48 hours of us being there. And I could be wrong, plus or  
19 minus 48 hours. But within a certain period of time, I think it was  
20 Debbie Doran was -- was running the intel part of it. So Debbie is  
21 an incredible agent and had the mind to remember everything.

22 And so she was -- she did a really good job. But there was  
23 one call that came in that sounded to her like it could be -- could

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1 have some veracity behind it, and it was from an individual  
2 that -- that had some information about an individual that was  
3 staying at the hotel that he was located at that was part of  
4 the -- that had been around the embassy when the bombing happened but  
5 was -- had acted suspiciously since then. And one of the things was  
6 he had all injuries and refused to really get care regarding  
7 those -- those injuries.

8           So Debbie gave the lead to myself and Steve Gaudin, and we  
9 grabbed -- Steve was working with another Kenyan officer, his first  
10 name was John -- I don't remember his last name -- and Wayne Parola.  
11 And we decided to go to -- and it was a hotel called the Ramada Inn  
12 or the Ramada. I'm sorry. It was just the Ramada, and it was in  
13 Eastleigh, which is a little enclave of primarily Somalian  
14 individuals, ethnicity, just outside of Nairobi.

15       Q.     And so you arrive at this location. Am I recalling from  
16 our conversation that you and Agent Gaudin are in the back of what  
17 sort of looks like a paddy wagon and that the Kenyan agents are  
18 driving in the front?

19       A.     I think all of us -- so we had a driver, one of the  
20 other -- I think Amos might have been in the back with us and maybe  
21 even John. And there might have been an official driver that the  
22 Kenyans had that was driving this paddy wagon. But we had a -- our  
23 vests on because we didn't know what to expect and we all had drop



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1 holsters, I believe, and we didn't want to cause too much of trouble.

2 But at the same point in time, we realized that we didn't  
3 know what we were going to run into. And we were in the back and the  
4 paddy wagon pulled up to the hotel, and Amos and John told us to wait  
5 in the -- in the -- in the paddy wagon, and we waited. And then they  
6 went into the hotel to try to make contact with this -- with this  
7 individual.

8 Q. Now, are you -- when you say you have your vest and your  
9 drop holsters, you're armed; is that right?

10 A. We are.

11 Q. Okay.

12 A. Yep. And we had -- I don't know if one of the Kenyan  
13 officers might have been able to requisition a sidearm when -- when  
14 he was part of it, but we had our MP-5s that we had taken with us on  
15 the flight and -- or had them available to us, at least some, and at  
16 least we had one MP-5 with us at this -- at this period of time.

17 Q. Okay. And am I correct that the Americans are made to  
18 wait in the vehicle while the Kenyan officers go into this hotel; is  
19 that right?

20 A. That's correct.

21 Q. Okay.

22 A. Yep.

23 Q. They ultimately come out with a man. When you first see

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1 this man, is he in handcuffs or restrained in any way?

2 A. So there's a slight difference to that story.

3 Q. Okay.

4 A. And just to make sure I got -- because it's a little -- so  
5 while we were waiting for Amos and John -- I'm pretty sure his name  
6 was John -- to come out -- all of a sudden an individual right next  
7 to the paddy wagon started talking to us in perfect English, and we  
8 were just like well, who -- who -- you know, who is this?

9 It turns out he was the individual who was -- he was a  
10 Kenyan of Somali descent and he started talking to us in -- and the  
11 first thing he said was what are you guys doing here? You're going  
12 to get killed, or words to that effect.

13 And very quickly, Wayne built a rapport with him and said,  
14 oh, you must have been the individual that called us -- and I'm  
15 paraphrasing the conversation. What is your name? And he said he  
16 wasn't going to tell us what his name was.

17 And so at the time Wayne I think was a basketball fan ----

18 MJ [COL ACOSTA]: Can you just slow down again.

19 WIT: Sorry. Yep.

20 A. Wayne ended up saying, well, why don't we call you  
21 Michael. And so we -- he said, okay, that's cool. Call me Michael.  
22 And in a matter of, like, three to five minutes, Wayne had built a  
23 rapport with him and he told us that the individual we were looking

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1 for was no longer there. He went to another hotel. He had moved.

2 So we asked how we could get back in touch with him. I  
3 can't recall if he gave us a number or if he said he would call back  
4 to the same number that he called before and talked to Agent Doran.  
5 But we felt like we could get back in contact with him.

6 And as all this was transpiring, the two CID officers came  
7 out of the Ramada hotel, got into the paddy wagon and said he's not  
8 here anymore, he moved. And we said we think we know where he is.  
9 And I don't know if Wayne knew the address or knew the name at that  
10 time -- I can't recall that -- or if Amos and John also knew that,  
11 but a short distance away, maybe three to four minutes away from that  
12 address, we went to -- to the hotel.

13 Amos and John then got out again. Again, I think it's John.  
14 I apologize for not knowing his name exactly, remembering it. But  
15 they went up. And within a minute, minute and a half -- it seemed  
16 like it was very quick this time -- they had brought Kahlid, which  
17 was the initial name that he gave us, down. And as soon as we saw  
18 him on the back of the paddy wagon, we pulled him in because we had  
19 already started a crowd at the last place we were at, the first  
20 Ramada Inn, and this one it seemed like either part of the crowd had  
21 tried to follow us or the word had spread, so already there was a  
22 crowd starting to form in the front of this hotel.

23 So we grabbed Mr. Owali as best as we could and get him

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1 into the paddy wagon as quick as we could and we -- I remember Steve  
2 Gaudin doing a quick pat-down, as best as we could, to make sure he  
3 didn't have any weapons. But he was not handcuffed, and I don't  
4 remember us handcuffing him at the time. We felt -- between Steve  
5 and I, we were both on the -- well, we both eventually -- we were  
6 both on the SWAT team. We felt pretty comfortable about what we were  
7 doing. Wayne too had been a detective, so we felt like it wasn't  
8 ideal but we weren't going to put him in cuffs. We were going to try  
9 to get out of there.

10 **[Technical malfunction.]**

11 A. ---- would have been to restrain him in some capacity  
12 because then our knowledge, training and experience. That's what I  
13 remember now. And so he had -- looking at Steve and him looking at  
14 me had made some motion as to his wrist like, hey, check his -- you  
15 know, he's got some injury on his wrist so, you know, be careful,  
16 because we were all concerned about, you know, just making sure.

17 And that is what I remember in that ride, is realizing he  
18 had some injuries on -- his cloths looked new and he looked exactly a  
19 lot like this sketch that the sketch artist had created.

20 Q. When he is brought into the paddy wagon, is he restrained  
21 by the American law enforcement in any way?

22 A. No. No. In fact, we were trying -- especially in those  
23 days, early on and even later, we would default to the Kenyans,

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1   however they wanted to detain him, however their thought was. If he  
2   had gotten out of hand, we felt like we would restrain him. If there  
3   was a danger to self or others, we would take whatever action we had,  
4   but we were going to go by how they were handling the situation. And  
5   they looked like they could handle themselves as well. They weren't  
6   necessarily large individuals but they looked like they had been  
7   around.

8           Q.     And this is -- just for orientation sake, this is  
9   12 August; is that right?

10          A.     It would have been -- that would have been -- if you have  
11   a document that says it's 12 August, Steve or Wayne's 302, then that  
12   would make sense. That would be about the right time period.

13          Q.     If I represent to you that that was the first day of  
14   interviewing Mr. al Owhali, would that have been the same day he was  
15   taken into custody?

16          A.     Yes, yes.

17          Q.     Okay.

18          A.     And I want to say it was early afternoon. Could have been  
19   late morning, early afternoon. It wasn't late and it wasn't bright  
20   and early. It was a time of day when there were a lot of people in  
21   Eastleigh, Nairobi.

22          Q.     And where is Mr. Owhali taken in the paddy wagon? Where  
23   do you go?

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1           A.     We go right back to Kenyans -- we take him right to, back  
2 to Kenyan CID. And the headquarters had cells, holding cells at the  
3 base. And I believe, as I recall, he went -- he went there. I  
4 recall walking him back to -- with Wayne and Steve, walking him back  
5 to the cell and he was going to be processed. And I believe somebody  
6 stayed with him. It was not me, but I think Steve stayed with  
7 him -- Steve and Wayne stayed with him as he was being processed at  
8 that time, whatever that process was.

9           And I went up to report back to command post, hey, okay, we  
10 have this individual. He looks like he fits the sketch. We met this  
11 individual that we think is the one that turned him into us and  
12 called you up. And again, I'm unclear as to whether we had the  
13 number or he was going to call back. But there was some -- some  
14 conversation I remember talking to Debbie Doran; said Debbie, you hit  
15 a home run here. This probably is an individual that had something  
16 to do with it. It just felt right -- right -- I don't know  
17 what -- but it just seemed like it was the right guy.

18          Q.     The processing that you're discussing, this is the Kenyan  
19 CID officers processing Mr. Owhali at the holding cell; is that  
20 right?

21          A.     Correct.

22          Q.     Okay.

23          A.     Correct. I don't -- we could have done -- we could have

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1 done fingerprints. Steve might have done fingerprints. We could  
2 have done fingerprints, but my -- they were trained primarily by the  
3 British, Kenyan CID, and they were generally really sharp with  
4 whatever process they were doing. So my thought is they probably did  
5 fingerprints themselves, they didn't need Steve to do it, but I don't  
6 know.

7 Q. Were you present for the first-attempt interrogation where  
8 only English was spoken, there was not yet a translator that had been  
9 brought in?

10 A. I don't think so. And so my immediate tasking was -- as I  
11 try to remember it, the first -- the first ones I remember going to  
12 were -- because initially my tasking was to reconnect with Michael.  
13 That was my job was to ----

14 Q. And Michael is the source ----

15 A. Is the source, right, that helped us out. That was my  
16 initial tasking, was figure out how to do that. That is why it's  
17 crazy to me that I don't remember exactly whether we had his number,  
18 and, here, call this number, or whether he called back. But I don't  
19 remember a delay between that time period.

20 So what I -- my initial tasking was trying to figure out how  
21 do I meet up with Michael again and talk to him to get more details  
22 as to what Kahlid's behavior, Mr. Al Owthali -- how would you like me  
23 to refer him just so I'm not -- does it matter? Mr. al Owthali?

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1 Q. Mr. al Owhali.

2 A. Okay. Mr. al Owhali, how his behavior was during the time  
3 period, and I don't remember being part of those initial interviews,  
4 or being outside. And I was never part of them initially. I was  
5 always just outside, the way that it was set up, the partition. They  
6 had taken a bigger room and made it into a partition area. And my  
7 thought now is that they did that because they had to get a  
8 translator. We didn't have a translator. That's why they had to  
9 make a partition.

10 So the first couple of interviews probably weren't even  
11 partitioned. They were probably in one of the rooms there at Kenyan  
12 CID, one of the interrogation rooms, interview rooms that they had,  
13 but I don't know.

14 Q. Do you recall being a part of not directly, but observing  
15 an interview where a female interrogator -- or, excuse me, a female  
16 interpreter was used who was seated behind the partition that you've  
17 described? Were -- did you observe any of that?

18 A. Yes. So I don't know if I saw every interview. I don't  
19 think I saw every interview. But what I would try to do is listen to  
20 what was being said and then use that information when I was talking  
21 to the source to try to get a better idea whether he was telling us  
22 the truth or not by asking open-ended questions of the source, in  
23 trying to figure out if he was lying or not, not telling us the



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1 truth, not being candid. So I was -- I tried to catch as many as I  
2 could.

3 The other thing is John and Wayne were kind of a -- they  
4 were kind of like the stars in the JTTF. And so to hear John doing  
5 an interview or Wayne do an interview would have been a good learning  
6 experience for me as well, so that's one of the things I was trying  
7 to take advantage of his time, as a -- as a pretty new agent, hearing  
8 how they went about the interviews, how they did what they did. So I  
9 tried to make as many as I could, but I know I did not make all of  
10 those interviews.

11 Q. Let me get some more detail from you about the room and  
12 how it was set up. We have a partition hanging that is separating  
13 one room into two, for lack of a better description. Who is where to  
14 your memory?

15 A. Yep.

16 Q. And it doesn't have to be specific ----

17 A. Yep.

18 Q. ---- people, names if you don't remember them, but were  
19 the Americans in one place and Mr. Owhali and the Kenyans in another?  
20 Who was where?

21 A. So the partition I remember is one of the partitions that  
22 has actually the base on the floor, like a -- you know, like you see  
23 in restaurants where they have a big -- kind of a partition. And it

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1 wasn't hanging from the top. That could have been it, but that's not  
2 how I recall it.

3           What I remember is the -- almost five of them sitting around  
4 the table: Wayne, John, Amos -- John Anticev, the other John, Steve  
5 Gaudin, and al Owali, and then a -- the partition, and then  
6 eventually the -- I remember from the very beginning, at least of the  
7 ones that I saw, that they already had a translator, and then the  
8 translator being on the other side of the partition.

9           So it was -- it was like they could have been playing poker.  
10 I mean, it was that kind of -- you know, it was casual. I don't  
11 remember -- I don't remember him being handcuffed. I'm trying to  
12 think of any of the interviews that we -- that we talked to.

13           Certainly when I took -- when I started interviewing him, I  
14 don't remember him being handcuffed. Again, we felt like we could  
15 control our -- we could control the situation should anything go  
16 sideways.

17           Q.     In the room where the table is that you have described,  
18 what I heard you say is there were two Kenyan agents, three  
19 United States agents, and then Mr. al Owali. Does that sound  
20 correct?

21           A.     Correct.

22           Q.     Okay. Do you ever recall an interrogation or interview  
23 that happened of Mr. al Owali where there was not Kenyan CID

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1 present?

2 A. I don't.

3 Q. And so they were present in each of the sessions?

4 A. As I remember, yes.

5 Q. Okay. The partition is up. There is someone on the other  
6 side. Do you recall, along with the translator, anyone else being on  
7 the translator side of the partition?

8 A. I don't. I don't recall anyone else being on the other  
9 side ----

10 Q. The ----

11 A. ---- other than myself. And I was actually separated from  
12 her, the way the partition was. She was translate -- she was kind of  
13 behind him on a partition. There was a little gap, as I recall, and  
14 then there was the partition that I was behind, and then on the other  
15 side of that was the table.

16 Q. And so it's your memory that the translator is separated  
17 from the -- the folks at the table and that you were also separated  
18 from the translator?

19 A. Yes. Correct.

20 Q. And you don't recall anyone else being in the room with  
21 the translator?

22 A. No. I don't recall that. No. Not -- not that I was  
23 there. The -- could there have been somebody else behind that

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1 partition with her? Perhaps there -- there could have been, but I  
2 didn't -- didn't see them or if they came in or out.

3 At one point in time maybe -- I'm trying to think of when  
4 the doctor might have checked him. At one point in time, I think Rob  
5 Mowry was our medic, our SWAT medic, and he might have -- during one  
6 of the interviews had been there in the very beginning to check on  
7 him and see how he was doing, and I think that might have been early  
8 on. I remember Rob being there. But he wouldn't stay for the whole  
9 interview. He would come in at the beginning or come in at the end  
10 just to check on him.

11 Q. The -- the partition that we're discussing between the  
12 folks at the table and the translator, would it block sight  
13 completely, meaning the two rooms could not see each other?

14 A. If you didn't walk by the little gap where you walked in,  
15 yeah, you wouldn't be able to see. You would not be able to  
16 see -- as I recall it, I wouldn't be able to see. And I couldn't  
17 peek in, if I wanted to, to see, you know, oh, what is he really  
18 showing them, if he's showing them something at the time or whatever.  
19 I don't remember.

20 No, you'd have to -- if I walked by the gap and looked to  
21 the right, I could look in and see that. But my understanding was  
22 Mr. Owhali had -- did not know I was there ----

23 Q. Okay.

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1           A.     ---- at all. Because I could come into the room and go up  
2 to the partition as well, as I recall.

3           Q.     Do you recall Agent Gaudin hanging anything to be a  
4 partition? Does that ring a bell to you?

5           A.     Hanging anything on the partition or hanging the  
6 partition?

7           Q.     Hanging a partition. Using ----

8           A.     I don't ----

9           Q.     ---- something to make a partition.

10          A.     Yeah. No, I don't. I don't remember that, but I do  
11 remember there was a solid partition that -- that -- and then there  
12 was -- there was more of a draped area. Because trying to talk  
13 through the partition, was -- it was more of a -- you know, like if  
14 we were at a restaurant and we really wanted a partition, talking  
15 through that would have been difficult.

16                 So I do remember there was -- where she was talking through,  
17 almost maybe curtains or something or some type of a partition, but  
18 it was no longer solid. It was more of a drape. That might have  
19 been a lighter color, where the other -- my memory in my brain tells  
20 me that it was lighter color perhaps and the partition was like a  
21 gray-type thing.

22          Q.     Of these ----

23          A.     But I don't remember seeing Steve hanging that or create

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1 that.

2 Q. Okay. Of these first five or six days as interrogations  
3 are happening, how often would you say that you are observing or  
4 listening?

5 A. I would -- I would say 60, 70 percent of the time. That's  
6 a great question. I'm just guessing because I know I was out -- I  
7 would meet with the source during -- during the times that the source  
8 was -- could get -- could get away from where he was and would meet  
9 with him and talk to him, and that was the priority, and then I would  
10 try to get back-briefed.

11 But I would say I would try to catch as much as I could.  
12 And -- but I'm going to guess two hours a day, two and a half, three  
13 hours a day, maybe, when they were talking to him. And that would be  
14 max with breaks.

15 I remember -- I remember when I was in the partition -- or  
16 around the partition at one time, when they broke for prayer, getting  
17 out of there quickly because I didn't want him to see me on the other  
18 side of the partition for whatever -- whatever reason. I  
19 didn't -- so I, you know, ran out and he was -- it was before.

20 But I would guess maybe of that two hours a day if they were  
21 talking to him, and I'm trying to think of when -- you would know  
22 based on the 302, when the 302 was from that first interview to the  
23 next one, if that was two days or three days.

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1           The -- and the other thing that came up at this point in  
2 time was a lead regarding the bomb factory where -- the safehouse and  
3 the bomb factory that I started running on as well, realizing that he  
4 had probably been there and using that information to try to help him  
5 to confess.

6           Q.     Let me ----

7           A.     I would say 50 to 60 percent ----

8           Q.     Okay.

9           A.     ---- roughly.

10          Q.     Let me ask you about what your duties were when you were  
11 not able to observe these interviews. It's my understanding from our  
12 conversation that you were running down leads on the ground while the  
13 interrogations were continuing; is that right?

14          A.     Correct.

15          Q.     Okay.

16          A.     Correct.

17          Q.     And I believe you told me that, in fact, you didn't have a  
18 whole lot of backup from Kenyan CID because they were mostly  
19 observing these interrogations.

20          A.     That -- that's correct. I was using -- like when I would  
21 meet with a source, we told the Kenyans what we were doing and where  
22 we were going, but I had a -- another FBI agent that would follow me  
23 and -- and sit apart from me so he knew -- so first, we

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1 didn't -- even though we -- our rule tries to be we only meet with a  
2 source, two of us, so if he says something, I can -- he can back me  
3 up.

4           It would have been intimidating to this potential source if  
5 we -- two white Americans are meeting with him in the middle of a  
6 restaurant in the middle of Kenya. So he would watch me while I was  
7 meeting with him, and -- but we tried to let -- as I remember, I  
8 would have conversations periodically with Amos, because he was part  
9 of these interviews and interrogations as well, and let him know what  
10 I did, and he would tell me what he was doing during the day or  
11 if -- while we tried to share information along with the interview  
12 group.

13       Q.     Let me focus our energy here ----

14       A.     Yep.

15       Q.     ---- on those first days before you become involved in  
16 the -- in the interviews.

17           Am I correct that the consensus was amongst the agents that  
18 this man is lying to you?

19       A.     Without a doubt.

20       Q.     Okay.

21       A.     Yep.

22       Q.     I want to talk about some of the items of information that  
23 are coming from these interrogations and then what you're doing on



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1 the ground to either prove or disprove this information, okay? So  
2 some of the -- the information that's coming from the man we come to  
3 know as Mr. Owhali is that that's not his name. He gives you a fake  
4 name, right?

5 A. Right. Correct.

6 Q. And you discussed with me the narrative where you find a  
7 card at the airport that proves where he was going after the bombing.  
8 Do you recall this?

9 A. I -- I don't remember. Was it one of his  
10 immigration -- was it the immigration card ----

11 Q. This ----

12 A. ---- that we found?

13 Q. ---- involved the hotel that he was going to be staying  
14 at.

15 A. I don't remember. And that was -- that was -- we talked  
16 within the last, what, eight months. Nine -- eight months, right?  
17 Seven months. I don't remember that card. Could you refresh my  
18 memory?

19 Q. Sure.

20 A. Kind of a ----

21 Q. Let me give you just a little bit more context.

22 A. Yep.

23 Q. I believe that one of the lies that the man was telling

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1 you is that he had gotten picked up by a taxi after the bombing and  
2 told the taxi just take me anywhere. Do you remember this?

3 A. I do. I do remember, yeah, I do remember parts of this.

4 Q. And that you were able to find his immigration card at the  
5 airport that actually listed the hotel, so it looked like a choice, a  
6 preplan of his. Do you recall that?

7 A. Yeah. That -- so that makes sense to me. Again, I don't  
8 make -- I don't remember clearly, but I do, yep.

9 Q. And I go through this just to show ----

10 A. Yep, sure.

11 Q. ---- that while the interrogations were going on, you were  
12 hitting the ground and bringing back information of your own to  
13 confront this man with; is that correct?

14 A. That's correct. That is correct.

15 Q. Okay. And that includes, again, finding the bomb factory;  
16 is that right?

17 A. Correct. Yeah. We had -- so I do remember telling the  
18 story about how phone calls are made, collect calls in Kenya. And at  
19 the time, when you made a collect call in Kenya, they -- the operator  
20 would ask for your -- for your first name. At least your first name,  
21 and I think it was the full name, which I think the full name, as I  
22 recall, might have been Kahlid Saleh that he was using.

23 And another agent, a good agent, Jacques

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1 Baptiste -- Baptiste was from Washington Field was in charge of  
2 trying to track down the phone calls. And so he was the liaison with  
3 the local Kenyan phone company. And so what we were able to get  
4 original -- was a list of phone records that actually had the collect  
5 calls with the name of whoever was making that collect call  
6 internationally. And there was a list of calls that said Kahlid  
7 Saleh during that time period. That's an example.

8           And then tracking that -- that phone line down almost  
9 physically to find out where those calls were coming from, not only  
10 the ones from the Ramada hotel but before the bombings, where those  
11 phone calls were coming from. And it was that kind of tedious work  
12 where he was tracing back on the ground.

13           So I was working with Jacques a lot on that, and -- and then  
14 the I-94 card I remember somewhat, and then -- and then just general  
15 information about whether he was staying at the hotel, moving around,  
16 if he ever left to go down to make a phone call, that the source was  
17 telling me and things like that.

18           Q.     And so I don't want to ----

19           A.     Yep.

20           Q.     ---- jump ahead quite yet ----

21           A.     Okay. Sorry.

22           Q.     ---- but these are ultimately pieces of evidence that you  
23 are confronting Mr. Owhali with?

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1 A. Correct.

2 Q. Okay.

3 A. Correct.

4 Q. Let me ask you -- go back to the first couple of days  
5 where the translator is still the female we have not swapped out for  
6 the male translator yet. Do you recall those days?

7 A. Yes.

8 Q. Okay. Is it your memory that the female interrogator  
9 never saw Mr. Owhali?

10 A. That's my impression ----

11 Q. That ----

12 A. ---- yes.

13 Q. That she always remained behind a partition hidden from  
14 sight?

15 A. Correct.

16 Q. Were you present the day that she ran out of the room?

17 A. I don't remember being present. I do remember -- I have a  
18 memory of this occurring, but I don't know if I was there or not.  
19 But -- but my understanding -- my understanding was that John  
20 had -- this is how I remembered whatever happened happened.

21 John put a book down or threw a book down or slapped a book  
22 that was on the table -- I wouldn't have been able to see it -- and  
23 that she got upset with that and ran out of the -- ran out of the

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1 room after he slapped -- slapped the book on ----

2 Q. And that information would have come to -- if you weren't  
3 there ----

4 A. Right.

5 Q. ---- watching, it would have come from one of the  
6 interviewers, maybe John?

7 A. It would have come from John. It would have come  
8 from -- it would have come from John or Steve or maybe even Amos  
9 or -- or maybe one of the other Kenyan officers.

10 I do think there's a chance that I was there. I have a  
11 vivid memory of it happening and wondering -- I also know, being a  
12 profiler, and doing -- talking about memory, how memory can -- it  
13 can -- is a very, very -- an interesting thing.

14 But my memory is that there was a loud noise and that  
15 she -- she got upset and ran out, and there was -- there was -- then  
16 we -- then a break was taken. Again, I don't know if it's because  
17 I've relived it -- I -- it's -- in my brain, but that's what I  
18 remember happening.

19 And every once in a while, I would talk to the translator.  
20 I do remember having a conversation, at least on one time, with the  
21 translator after one of the interviews.

22 MJ [COL ACOSTA]: Counsel, hold on one second.

23 DC [MS. CARMON]: Yes, sir.

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1 MJ [COL ACOSTA]: Agent Bongardt, you keep referring to  
2 somebody, to John. Which John are you referring to?

3 WIT: Oh, I'm sorry. John -- so John Anticev -- I'll just  
4 use, again, I'm sorry. I'll use Anticev from now on ----

5 MJ [COL ACOSTA]: Slow down. Which John where were you  
6 referring to?

7 WIT: Which -- which John?

8 MJ [COL ACOSTA]: In the story you just related about John  
9 being at the interviews.

10 WIT: I'm sorry. Yeah, John Anticev. It would have been John  
11 Anticev. And my -- my -- John Anticev, Your Honor.

12 MJ [COL ACOSTA]: Was the person that was at -- that was doing  
13 the questioning of Mr. Owhali?

14 WIT: Correct.

15 MJ [COL ACOSTA]: Okay. Thank you.

16 WIT: It ----

17 MJ [COL ACOSTA]: I'll remind you to slow down.

18 WIT: Yep.

19 MJ [COL ACOSTA]: And then we keep going from there. Counsel,  
20 go ahead.

21 WIT: I ----

22 MJ [COL ACOSTA]: You don't need to answer anything else. I  
23 just needed to clarify.

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1 WIT: Okay.

2 MJ [COL ACOSTA]: Which you were talking about. Go ahead.

3 Q. And so every -- the folks in that room when this would  
4 have happened would have been John Anticev, the FBI agent, correct?

5 A. Correct.

6 Q. And then Wayne Parola, Steve Gaudin, both U.S. law  
7 enforcement, correct?

8 A. Correct.

9 Q. And then you said, I believe, Amos and John, both CID  
10 agents?

11 A. Correct.

12 Q. Okay. Do you recall or did you become aware that the  
13 female translator translated or heard Mr. Owhali say words to the  
14 effect of "Sister, help me" or "Sister, they're hurting me"? Did you  
15 ever hear that?

16 A. No.

17 Q. Did you become aware of that litigation that was happening  
18 later?

19 A. No.

20 Q. You were not called ----

21 A. No.

22 Q. ---- as a part of that?

23 A. No, I don't ----

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1 MJ [COL ACOSTA]: Counsel, if you could let the -- just for  
2 help with the translation and with the transcription, if you can wait  
3 for the question to be finished before you start answering ----

4 WIT: Yes, sir.

5 MJ [COL ACOSTA]: ---- and slow it down, that would be  
6 helpful. Again, thank you.

7 Q. So let's backtrack just a minute.

8 Not aware or did not become aware that the female translator  
9 had heard Owali say "Sister, help me" or "They're hurting me"?

10 A. No.

11 Q. Were you called to testify or called as a witness as part  
12 of that litigation that happened later in the Southern District of  
13 New York about this instance?

14 A. No.

15 Q. Ever have any discussions amongst your colleagues that  
16 would have been in the room about this instance -- or this incident?  
17 Excuse me.

18 A. I'm sure I did. I'm sure I did, but I don't remember  
19 anything nefarious about it. I -- I do remember what I believe the  
20 subject of the photos were in the book -- or when he slapped the book  
21 down, it was photos of the victims from the bombing.

22 Q. That were being shown to Mr. Owali?

23 A. That were being shown to Mr. Al Owali.



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1           Q.     Okay. Let me ask you some questions about Mr. Al Owhali  
2 and where he was kept during this time period. And the time period  
3 I'm thinking of is from 12 August, when he is taken into custody,  
4 until you become involved with the interviews, and I believe that's  
5 22 August. Does that sound right?

6           A.     That would be -- that would be correct. That would be  
7 about the right time, I think.

8           Q.     Okay. Am I correct that he remains in Kenyan custody  
9 during that time?

10          A.     That is correct.

11          Q.     And was he held in that holding cell that you've described  
12 that was in the CID building?

13          A.     As I recall, yes.

14          Q.     Were there any American law enforcement agents that stayed  
15 overnight in that building or were watching Mr. Al Owhali as he was  
16 held?

17          A.     I don't recall that. I don't think so.

18          Q.     And so would it be correct that the -- the folks that are  
19 there after the interrogations are over for the day and the folks  
20 that are running the building with custody of Mr. Al Owhali would  
21 have been the Kenyan CID officers?

22          A.     That -- that's correct.

23          Q.     The times that Mr. Al Owhali asked for prayer breaks, did

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1 the Kenyan CID officers lead him out in order to take those, or were  
2 the Americans a part of that?

3 A. I think it was both. Steve was in the process of building  
4 up rapport with him, so I don't think he -- I think he would walk him  
5 down because that would be some of the time when he would just, you  
6 know, hey, I'm a normal person. I'm just trying to, you know,  
7 interact with you. Let me help you go down there.

8 So I -- my recollection is Steve escorted him as well as  
9 perhaps one of the Kenyan CID officers.

10 Q. Are you aware if anyone observed Mr. Owhali during his  
11 prayer breaks or if he was left alone, or was he monitored by  
12 someone?

13 A. I think Steve probably stayed with him.  
14 I -- it -- it -- someone would have had to stay with him because  
15 obviously he's -- he wasn't handcuffed, and he's -- as I recall, and  
16 he's alone in CID headquarters. So it would have been -- it would  
17 have made sense to me that he wasn't left by himself to go down  
18 there. It -- maybe it was John initially or Wayne.  
19 Wayne -- Wayne -- Wayne could have also fulfilled that -- that role  
20 at times.

21 Q. Did the American law enforcement agents there ever have a  
22 doctor or a medic come to see Mr. Owhali's injuries?

23 A. Yes. I remember very -- I think it was the first morning

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1 after the day of the arrest that we had a doctor come talk to him.  
2 And then I remember two things. I remember a doctor, a real doctor  
3 and then Rob Mowry who was -- I think it was Rob, one of the SWAT  
4 medics or one of the other medics that were there check on him as  
5 well.

6 Q. And do you recall the extent of the injuries that were  
7 treated by these two medical professionals?

8 A. I remember there was an issue with his wrist. There was a  
9 cut on his wrist that was -- that was -- that was -- I don't know if  
10 it had been infected yet, but it could be infected. And then I think  
11 also on his back or his upper back, probably closer to his neck, that  
12 there was a -- there was an issue with that. But I haven't thought  
13 of these things in 25 years. But I think that was an -- an issue.

14 Can I add one thing?

15 Q. Yes, go ahead.

16 A. So the one thing interesting about Kenyan law is you get  
17 no food unless somebody from your family brings you food. And so one  
18 of the things that we tried to do was make sure we brought him food  
19 at the end of the night, and then the next morning we brought him  
20 food for -- for breakfast. I do remember specifically that  
21 being -- as well as just making sure that he was okay in -- the first  
22 thing in the morning when we would -- when we would start, which was  
23 generally pretty early.

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1           But I do remember that being a thing and being concerned,  
2 especially because it had leaked -- obviously it was out there that  
3 we had somebody that -- that probably -- or was being suspected of  
4 killing 212 people, mainly Kenyans, around the U.S. embassy, and we  
5 were concerned about safety.

6           So there -- it could have been that SWAT might have been  
7 protecting him, the SWAT guys that we had there at the time. I just  
8 don't recall that. But I do know we were very concerned about his  
9 safety and making sure that he was okay and that medically he got  
10 whatever issue -- issues taken care of and treated.

11           And first thing last night was the issue -- just because the  
12 food, the food issue, that sticks out to me, that if your family  
13 doesn't bring you food, you don't -- you starve in a -- in a Kenyan  
14 jail.

15           Q.     Any indication, through either your conversations with  
16 these medics or your own observation, about Mr. Al Owhali's wrist  
17 being broken?

18           A.     No, I don't remember that at all. I would be surprised at  
19 that.

20           Q.     So ----

21           A.     Yeah.

22           Q.     ---- it would surprise you that when he was -- when he was  
23 processed into MCC in New York that he had a broken wrist?

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1           A.     Yeah. I think he was -- he was protecting it, as I  
2 recall, maybe somewhat, but I thought that was just because of  
3 the -- the -- the cut or whatever it would have been.

4           Q.     Let me orient you to 21 August 1998. Do you recall that  
5 being the first day that you officially joined in the interviews?

6           A.     It could have been. My thought is it was around that time  
7 period, but I don't -- I don't -- I don't -- I don't know. I'd have  
8 to see the 302 to see, but when my name is first on the 302, as  
9 documented by Steve.

10                  Steve was taking the notes, which means that the way we  
11 are -- we try to be is that I try not to take notes unless I write  
12 something down, a question to go back to, and then I would hand Steve  
13 my notes just so we don't have two sets of notes with two different  
14 ideas. So -- but he would have documented when I first started being  
15 in there.

16                  So if you're telling me it's the 21st, then it  
17 probably -- that makes -- it could be then.

18           Q.     Let me orient you this way. The -- the combined  
19 statements that you were involved in, the 302 notes, that those were  
20 22 to 25 August. But from our previous conversation, I thought you  
21 had gotten involved the evening before when Mr. Al Owhali is about to  
22 start telling you the truth.

23           A.     Oh.

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1 Q. Is that right?

2 A. Yeah, and it wasn't just the evening. It was a few days  
3 before that. It would have been -- it would have been a couple days  
4 before that.

5 Q. Okay. Talk to me about that because that's ----

6 A. Yeah.

7 Q. ---- sort of when you enter ----

8 A. Yep.

9 Q. ---- the -- the ----

10 A. Yeah. So when John ----

11 Q. ---- interview, right?

12 A. Yep. So when John -- so what they did, there was a  
13 history of al Qaeda in Kenya, and one of those things was an  
14 individual named Wadih El Hage, who John Anticev had interviewed or  
15 had in some capacity -- Wadih El Hage and John, I don't know if they  
16 were known to each other. I do know I think Danny Coleman, who was  
17 an agent, had interviewed Wadih at one point in time.

18 But during one of the searches and I -- for some reason I  
19 want to say it was a gas station. During one of the searches at some  
20 establishment, there was a -- there was a picture, and I believe  
21 John's -- either John or John's full name and a flower sketch was  
22 seen around that, and so it was -- it was taken as a potential threat  
23 to John, that somebody -- if they knew John was there, it would be a

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1 threat.

2 So John ended up leaving, and that's when I took over for  
3 John and Wayne; and it was Steve; myself; Amos; and John, the CID  
4 officer, as part of that interview.

5 Q. Okay.

6 A. And I became part of ----

7 MJ [COL ACOSTA]: Okay. Both of you ----

8 WIT: ---- those -- those interviews.

9 MJ [COL ACOSTA]: Please slow down. Please allow for some  
10 space between question and answer for the translation to occur,  
11 please.

12 WIT: Okay.

13 MJ [COL ACOSTA]: Again, slow down, both of -- you know,  
14 between question and answer and during the answer, okay? I -- we  
15 appreciate you being here and answering the questions in a most  
16 fulsome manner; however, we just don't need it as fast as we're  
17 getting it.

18 WIT: Okay.

19 MJ [COL ACOSTA]: Thank you.

20 WIT: I'm sorry, Your Honor.

21 Q. Agent, let me ask you some questions about what was known  
22 in the community about a suspect being in custody. And the community  
23 I'm interested in here is the Kenyan community. Okay?

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1           Am I right that a photograph of Mr. Al Owhali had leaked to  
2 a Kenyan newspaper as being the man in custody?

3           A.     That is correct.   Yep.

4           Q.     And that had run during the period where these interviews  
5 are happening; is that right?

6           A.     I don't know the exact timing, but I think it was around  
7 that -- around that time period.

8           Q.     And prior to you being the person now involved in the  
9 interviewing, Mr. Al Owhali had participated in an  
10 identification -- I think they call it a parade -- where witnesses  
11 come forward and touch him if they recognize him; is that right?

12          A.     That's correct.   I did not witness that particular ID, but  
13 I do know that happened.

14          Q.     Okay.   But you are aware that that had happened.

15                 And that was prior to you becoming involved in the ----

16          A.     As I ----

17          Q.     ---- interviews?

18          A.     Yes, because I would have been there for that.

19          Q.     And so let us set the stage, then, for your coming  
20 involvement.   Would it be correct to say that up until the point  
21 where you become involved, this man has been less than truthful with  
22 the agents?

23          A.     Yes.   Correct.   He -- he had been less than truthful.



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1 Q. And he has not at this point told you his real name; is  
2 that right?

3 A. Correct.

4 Q. And he has not inculpated himself in the bombings at all?

5 A. Correct.

6 Q. Now, when do you get notified that you're going  
7 to -- instead of being on the ground running down leads, going to be  
8 in the interviews?

9 A. So I was doing both up until -- in  
10 the -- the -- the -- let me give you an example.

11 So I was trying to track down the safehouse where the bomb  
12 factory was made. And we had found the -- the telephone line.  
13 Jacques Baptiste had -- had been told by the telephone company  
14 that -- that the very next day we could actually -- he would -- the  
15 telephone company would avail themselves to actually show him where  
16 it leads to, where does the -- where does the -- where does  
17 the -- the phone line lead to that the -- the collect calls from  
18 Kahlid Saleh were coming from.

19 So like in that particular case, it was myself and I want to  
20 say seven other agents and maybe a handful of Kenyan CID  
21 officers -- because we weren't interviewing al Owali the whole time.  
22 But early in the morning when this -- I remember it being in the  
23 morning. Not early-early, but again ----

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1 MJ [COL ACOSTA]: Counsel, again, we are getting the slow down  
2 signal again from the ----

3 WIT: Yep.

4 MJ [COL ACOSTA]: I don't think it's front of you. I have a  
5 small device here in front of me, and what happens is when you go too  
6 fast and the interpreters can no longer keep up, it turns yellow.

7 WIT: Yep. Yep.

8 MJ [COL ACOSTA]: And that's when I generally interrupt you.  
9 It just flashed yellow again.

10 WIT: Okay.

11 MJ [COL ACOSTA]: I need you to slow down.

12 WIT: Okay.

13 A. So one of the things that I was doing was trying to track  
14 down the safehouse. And we were not interviewing him every day the  
15 entire day. I want to say it was a couple hours a day that we would  
16 try to -- that we would try to talk to him. There may have been an  
17 interview or two in there where I wasn't there, but I remember being  
18 there for most of the time to try to support Steve.

19 So the morning when we were going to the safehouse, to find  
20 the safehouse, there was another search that was going on that was  
21 connected to Wadih El Hage. There's some Wadih El Hage connection  
22 to -- to this -- to this -- to this other search. And the timing  
23 could be off here. John might have still been there when this

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1 happened. I -- I don't recall.

2 But when we went to the -- we were trying to get people  
3 to -- we were trying to get resources, additional agents to go on the  
4 search, and I remember it being a problem, trying to get agents,  
5 because agents were going on this search. And I want to say maybe  
6 this was the gas station or something.

7 But it made no sense to me that -- that here we are with the  
8 hottest lead, which is the phone line that's going to lead us to what  
9 we believe is the safehouse, and I had a handful of agents and a  
10 borrowed truck, I think, with CID. Jacques was part of it.

11 And it turned out that that morning is when we actually  
12 found -- and we went with some bomb techs, and we went with  
13 forensics, the forensics, the handful of people -- the couple of  
14 people that we had. And it was -- the Runda Estate. I want to say  
15 the address and I can't believe I don't remember the exact number,  
16 but I believe it was 45 for Runda Estate was the -- and as soon as we  
17 saw the compound and this house, we were like, wow, this fits the  
18 bill as to what we think these usually look like.

19 And we were in there taking pictures of  
20 everything -- everything that we -- where -- where -- it looked like  
21 it had been cleaned out. Some of the agents started doing interviews  
22 of the neighbors to find out who had been there and that type of  
23 thing. That was not me.

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1           But from that day forward what I remember doing is bringing  
2 back different things and showing them to al Owali. Here's a  
3 picture. Do you recognize this place? Do you not? I believe that  
4 you were in this location. He said, no, I was not there.

5           Somewhere -- one of the last things I told him before he  
6 actually said it was -- I had taken the -- I had gotten the phone  
7 records from Jacques. And in the course of, I want to say this  
8 interview, which was probably an hour and a half -- hour, hour and a  
9 half, after going through his whole story, which is normally what we  
10 would try to do every day, okay, tell us your whole story again,  
11 I -- I showed him the phone records. And I said, Kahlid, look at  
12 these phone records. And he saw them.

13           And I said here's -- and I was telling him, this is -- this  
14 is phone records from Kenya. When -- when you make a collect call in  
15 Kenya, as I think you know, you have to give a name. And here's the  
16 phone records and here's the name Kahlid Saleh, and that's your name.  
17 You were the number -- you were the person making collect phone calls  
18 to this number.

19           And he said no. He said it wasn't me.

20           And I said, Kahlid, look at it again. These are -- I went  
21 through the thing. This is the phone records. When someone named  
22 Kahlid Saleh made a phone call, they gave their name. Are you trying  
23 to tell me there was another Kahlid Saleh out there that was making

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1 phone calls during this time period to this number?

2 And he -- as I remember, he hesitated, and then I said, is  
3 it possible that you made these phone calls and you forgot?

4 And he waited for a second, and he looked, and he  
5 said -- he -- in Arabic, and I know what he said because it was  
6 translated. But he said something in Arabic and Mike Feghali, who  
7 was the translator said, he said yes.

8 And I went, wow, that's an admission. At that point in time  
9 I think we have him. He's put himself there, because we had traced  
10 him back to the bomb house. And I said ask him again. Because we  
11 were going through the translator. I said ask him again. I don't  
12 want to get this wrong. I want to say yep, we got him. But ask him  
13 again.

14 And so Mike asked the same question again, and he said -- he  
15 said -- he said yes in Arabic. And I -- and I said -- and Mike  
16 translated it back to me and said yes.

17 And I went, okay, that's an admission.

18 I mean, we -- he's putting himself -- and this was a -- this  
19 was a conversation. I mean, it was -- it was an interview, it  
20 was -- it was, yes, we were -- we were pressing him a little bit  
21 to -- about -- with regards to explaining exactly how this implicated  
22 him.

23 But at that point in time, I went, wow, I think we have him.

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1           And so at some period of time after that, and I think  
2   shortly, Steve interjected: We have -- we can clear this whole  
3   matter up, right?

4           And the angle -- the angle that I recall Steve  
5   happening -- and this is the -- to get to the time when he finally  
6   said the next day he's going to tell us everything -- was Steve said,  
7   there's enough evidence here for them, in our belief, is to convict  
8   you and no one will ever know your story. Or you can come to the  
9   United States, you can tell us your story and al Qaeda and their  
10   grievance and why this happened.

11           And he said okay. He basically agreed. I'm paraphrasing  
12   through the translator, but he was like, okay, I want -- I want  
13   to -- I want to come to the United States. I want to tell my story.

14           And the next day was when this was going to happen.

15       Q.     Okay.

16       A.     And that's -- that was that evening.

17           MJ [COL ACOSTA]: All right, hold on a second, Counsel. Your  
18   co-counsel is raising his hand here.

19           LDC [MR. NATALE]: Your Honor, could I just have a brief  
20   conversation with the ----

21           DC [MS. CARMON]: What?

22           LDC [MR. NATALE]: He can still keep the testimony. I just  
23   need to let them know something.

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1 MJ [COL ACOSTA]: You want to -- okay. I know you didn't hear  
2 it, Ms. Carmon, because I heard you just say what.

3 DC [MS. CARMON]: Sorry.

4 LDC [MR. NATALE]: But Mr. Natale has asked to consult with  
5 government counsel while you're asking questions. I'm going to allow  
6 that, as long as it's not disruptive and then we will -- and which  
7 I'm sure he will not be, and we'll go from there.

8 You can keep ask -- you can -- ask another question now.

9 DC [MS. CARMON]: The court's brief indulgence, please?

10 **[Counsel conferred.]**

11 **[The military judge conferred with courtroom personnel.]**

12 DC [MS. CARMON]: Thank you, sir. May I, Your Honor?

13 MJ [COL ACOSTA]: You may, unless there's something that your  
14 recent consultation with government counsel needs to reveal to me.

15 DC [MS. CARMON]: No, I'm good. Thanks.

16 Q. Agent, let me swing back to the conversation that you and  
17 I had in July. You mentioned angle, the angle that you're taking in  
18 the interview.

19 When you and I talked, you mentioned that the angle was, to  
20 Mr. Owhali, the truth gets you the -- let me start again.

21 A. Okay.

22 Q. The truth gets you the United States. Lies get you left  
23 in Kenya. Did I have that right?

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1           A.       That's a little brash. I wouldn't characterize it that  
2 way. I do remember more rationalization, right, trying to -- trying  
3 to think of a -- a way to get him to confess to killing over 200  
4 people, right? I mean, the -- and so that -- but I don't remember it  
5 being that -- that brash.

6                 I do remember being sensitive to the fact that if we  
7 coerced -- if we told him he was going to die in a Kenyan cell and he  
8 goes, yeah, I'll go to the United States and then we get him out of  
9 there, that's not going to be a good thing, right? So I remember  
10 being a lot -- a lot more subtle.

11                In Steve's pitch -- I remember Steve mainly coming from it.  
12 Now Steve and I -- I'm sorry. Let me slow down.

13                Steve and I had talked about, you know, this type of pitch  
14 and this type of angle, trying to get him to do it. But our thought  
15 was more like he could stay here in a Kenyan jail and no one would  
16 never -- would ever know his story, or he could come to the  
17 United States.

18                It wasn't necessarily he could -- I don't remember being  
19 that direct, you could die in a Kenyan jail or you can come to the  
20 United States where, you know, you get to go to Disneyland or, you  
21 know, anything like that. I mean, I don't remember anything like  
22 that at all.

23                I do remember being -- using the angle of him -- and we



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1    tried to develop this over -- over the course of days, of -- of him,  
2    you know, telling us the -- the real story and telling us the truth  
3    about why this happened and why it was carried out.

4           The other thing that happened -- I think we talked about  
5    this -- is I'm a fairly big guy and at one point in time when I was  
6    showing him photographs from an earlier -- from the safehouse and  
7    during an early interview -- so when I was showing al Owhali  
8    photographs from the safehouse in an earlier interview, while  
9    probably the same distance of this table, two and a half or three  
10   feet, I leaned over to show him the photo and point something out to  
11   the photo.

12           And during a break, Mike Feghali, who is the translator,  
13   told me, he said, Steve, you're a big guy -- I'm not as big as I used  
14   to be -- but you're a big guy. When you lean over, he leans back.  
15   So, you know, you just want to make sure -- I know you're trying to  
16   build rapport with him. Don't -- don't act like that.

17           And I was like, oh, Mike, you're right. I don't -- I'll  
18   just slide it over, then. Where I was thinking -- you know, the  
19   classic interrogation technique is where you -- you kind of, you  
20   know, bend over like you're having a closer conversation with the  
21   individual.

22           So we were very sensitive during this time period of making  
23   sure that it did not come off as coercive in any way. And this would

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1 have been after the -- the picture slapping incident that we knew of  
2 or whatever too. So we were -- we were trying to be on our best  
3 behavior -- behavior with regards to coercive.

4 Which is why I just correct the way that -- if I  
5 characterized it -- that, I think that was inaccurate. It was more  
6 of a stay here, no one will ever know your story. Come to the  
7 United States, you'll be able to tell everyone your story in a U.S.  
8 court of law.

9 Q. And particularly, if you are inculpatating yourself, you can  
10 tell that in the United States. Because if you continue to deny,  
11 that angle would not have worked, right?

12 A. Correct.

13 Q. Okay.

14 A. Right. Correct.

15 Q. Let me ask just a couple of questions about the interviews  
16 that occur after this breaking point, okay ----

17 A. Okay.

18 Q. ---- where he becomes -- he is now going to be forthcoming  
19 with you about his involvement.

20 Am I right that he tells you: That's not my name; my name  
21 is Mr. Owhali?

22 A. Yeah, right off the -- at the very next morning, it was  
23 myself -- at the point -- at that time we had Pat Fitzgerald that was

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1 part of the interview because he was -- as I recall, he -- it was  
2 more of a proffer, what we would consider a proffer. He was going to  
3 tell everything he had, everything he knew, and based on his  
4 cooperation, we were going to -- we'll -- we'll -- we'll figure out  
5 what the next step is.

6 Q. Let me stop you right there ----

7 A. Yeah.

8 Q. ---- very quickly about Mr. Fitzgerald.

9 The night before when -- or the day before when you're  
10 having this breaking moment and he says, okay, I'm going to tell all,  
11 do you at that point inform Mr. Owhali that the next day, a  
12 United States attorney will come in and talk to you and then you can  
13 tell your entire story?

14 A. I don't -- I don't remember being that explicit with him  
15 where we told him, hey, an attorney is going to come in. I don't  
16 remember being that explicit with him.

17 And he might have also prayed at that time. We might  
18 have -- at that point in time he said, hey, I would like to pray on  
19 this, and we -- at some point in time around there I think we broke  
20 and he -- he had a prayer.

21 But I don't remember explicitly telling him it's going to  
22 be -- we're going to have an AUSA come in and explaining the whole  
23 proffer-type agreement with him at the time. Although every -- every

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1 day before we talked to him we would -- we would talk about  
2 his -- his -- his rights in the capacity of what -- of what he was  
3 doing.

4 When it came to rights overseas in a foreign -- a foreign  
5 territory, there was a whole -- the FBI went through -- and with the  
6 AUSA's consult, went through a lot of different iterations of what do  
7 we say.

8 But every day we would at least address on some level, hey,  
9 you're talking to us today. Based on, you know, the fact that  
10 we're -- you're cooperating, we're trying to close your file, you're  
11 doing this freely. There were some words to that effect before we'd  
12 just started off. We wouldn't just start off interviewing him again.

13 That was -- it wasn't always the Miranda warning. I'm sure  
14 you're familiar with the Miranda warning. Like, we would read the  
15 Miranda warning -- if we were in the United States, you would have an  
16 attorney; however, we are not in the United States, so we cannot  
17 guarantee that an attorney will be with you and -- and those types of  
18 things, how we would use the Miranda warning, to eventually over time  
19 we would be like, okay, so we're still -- we're talking, we're  
20 communicating, we're trying to close your file, we're trying to get  
21 to the bottom of this, yes, okay, yep, good, we're good to go.

22 But I don't remember being that specific with him. It  
23 stands out as being there's going to be an Assistant United States

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1 Attorney. We could have said that, or the next day we could have  
2 introduced him on that -- on that level.

3 Q. In those interviews, 22 to 25 August, which is before he  
4 is extradited to the United States -- so he has told you his real  
5 name, and he is also admitting, in great detail, his involvement in  
6 the bombing; is that right?

7 A. Yes. Correct.

8 Q. And what he is telling you is corroborated by the  
9 investigation on the ground that you have been doing; is that  
10 correct?

11 A. Correct.

12 Q. The details that he is giving you involve not only his own  
13 participation but the participation of others in this plot; is that  
14 right?

15 A. Can you give me an example what -- like, participation of  
16 others?

17 Q. Meaning other al Qaeda members who were involved in the  
18 plot, like a Tawfiq Bin'Attash, for example?

19 A. Correct. Correct.

20 Q. And so would you characterize the statements that you're  
21 getting over these few days as truthful, forthcoming, in  
22 contradiction to what you had gotten beforehand?

23 A. Yes. I -- I would say yes. I wouldn't believe everything

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1 that -- that he said. I mean, my best source only probably told me  
2 80 percent of what he knew. But, yeah, I would say it was -- it was  
3 night and day. I mean, when he -- the next day when he said my name  
4 is Muhammad Rashid Daoud al Owhali, I was born in Saudi Arabia -- and  
5 I can't remember his date of birth off the top of my head -- we were  
6 all like, wow, okay, this is the -- this is the -- we had the right  
7 guy from the very beginning and this -- and this is -- this is him.  
8 And then when he went into it, he was -- yeah, he was -- he -- a  
9 hundred percent -- or at least 180 degrees around from the way that  
10 he had been before.

11 Q. Now, he admits to you that he was going to be a suicide  
12 bomber in the truck that was supposed to go into the embassy but  
13 bails at the last moment; is that right?

14 A. Correct.

15 Q. And so at that point he's at least admitted his intentions  
16 to kill hundreds of Kenyans and Americans, or whomever is in the  
17 building, right?

18 A. Yeah, I wouldn't put a number on it. It could be greater.  
19 It could be less. But yes. Yep.

20 Q. So I want to ask you a question about something that we  
21 discussed in our phone call. When we were talking about what he was  
22 admitting to, you said that once he had admitted to killing 200-plus  
23 Kenyans, we knew we needed to get him out of there. Do you recall

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1 saying that?

2 A. Yes.

3 Q. Talk to me about that.

4 A. That was a concern. Well, the -- so -- and again, the  
5 timing is -- I'm not completely clear of the timing, but around this  
6 time period as well was when the photograph -- and I think he might  
7 be going like this **[indicated]** in the photograph. I can't remember  
8 the photograph. There's a photograph of him.

9 Q. So he's collapsing his hands in like "hurray" near his  
10 head?

11 A. Yeah, that's what my recollection is. I haven't looked it  
12 up or wanted to see it, but there was a photograph of that that  
13 I -- a photograph of him doing that. And so now we knew and  
14 the -- the Kenyans knew that he had admitted to killing them. And so  
15 we were -- we were concerned, just generally in any situation, in any  
16 scenario, I think, in any country, that -- at least when it's not our  
17 country and we know how we're going to protect the suspect, the  
18 subject at this point in time -- we were concerned about  
19 his -- their -- their safety and -- and wanted to try to get him out  
20 as soon as we could. Yep, that was a big push.

21 Q. Now, once the statements are complete, he's given you his  
22 information, the decision is made that, in fact, he will be coming to  
23 the United States. Were you a part of that discussion at all?

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1           A.     At least at some point in time, I was. At least  
2 initially.

3           Q.     And ----

4           A.     Yeah.

5           Q.     ---- what was the tenor or what were the details of that  
6 discussion?

7           A.     I remember there was some question about extradition,  
8 right? How were we going to do it? How were we going to get him out  
9 of there, whether that was the right move or not. I -- and I think  
10 at some point in time -- and I remember being just a part of that  
11 initial conversation.

12                   I'm sure there were conversations that took place well  
13 beyond my recollection of -- of what it was. And I was probably more  
14 like a interviewer in the room, like FBI. This was above our pay  
15 grade, other than the fact that one of us would probably go with  
16 him -- right? -- back ----

17           Q.     And ----

18           A.     ---- to the United States because -- somebody that had  
19 built rapport.

20           Q.     And was that -- did you accompany him on that flight?

21           A.     No, that was Steve Gaudin, without -- without a doubt, it  
22 would have been. Because I think at some point in time, al Owali  
23 had a list of next of kin, and he put Steve down. That's the degree



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1 of the rapport that Steve had built with -- had built with him.

2 Q. And so you would not have been, then, a part of booking  
3 Mr. Al Owhali into the New York facility?

4 A. No.

5 Q. Did you ever have any contact with him after he got to the  
6 United States?

7 A. Never.

8 Q. Now, the information that he gives -- and I do have the  
9 302 for your review, if you need it, okay?

10 The information that he gives you in his statement about  
11 Mr. Al Nashiri specifically, that was a statement that Mr. Al Nashiri  
12 had helped him procure his fake passport; is that right?

13 A. That's correct. That's what I recall.

14 Q. And as part of this investigation, thinking about all the  
15 things that you were running down on the ground, was that ever  
16 information that you were running around to corroborate?

17 A. The -- so this would have been in Yemen, that he got his  
18 passport in Yemen, or ----

19 Q. The statement was that he was -- that Mr. Al Nashiri  
20 helped facilitate his fake passport in order for -- to travel from  
21 Yemen to Nairobi.

22 A. So that would be -- that would be the type of lead that  
23 maybe we could get done in Yemen, but my thought was that we

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1 wouldn't. We would have to use another government agency or another  
2 agency or our relationships within those other governments to try to  
3 get that information to figure out who this al Nashiri was.

4 Q. And so that would have been information that you would  
5 have been passed on to partners for further investigations?

6 A. Correct. And that might have been, like, Debbie Doran.  
7 There's a whole host of people that were supporting Steve and I  
8 and -- and Pat at this point in time. Like we'd come back and we  
9 would brief them on what he had said and what he had done, and they  
10 would, like, set dozens of leads perhaps based on the information  
11 that he had given us.

12 DC [MS. CARMON]: The court's brief indulgence, please.

13 MJ [COL ACOSTA]: You may.

14 **[Counsel conferred.]**

15 DC [MS. CARMON]: Thank you, sir.

16 Q. Just a couple of questions, Agent.

17 A. Yeah, sure.

18 Q. Do you recall taking photographs of Mr. Owhali when he was  
19 in Kenyan custody, or having that done?

20 A. I don't recall that. I think Steve did. And if I  
21 remember correctly, Steve would go get him out of the -- the -- the  
22 holding cell where he was, and I would go up to the command post, try  
23 to see if there was any new information, and then meet him at

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1 the -- at the interview room along with -- I think he took either  
2 John or -- John CID or Amos with him to get him, and would need to to  
3 get him out of the cell.

4 So I think the pictures that were taken were out of my  
5 purview, as I recall.

6 Q. What about prior to his extradition photographs on the  
7 plane? Are you aware if any of those were taken?

8 A. The plane, I don't recall ever hearing about any on the  
9 plane. I remember there was one taken the day of maybe of him coming  
10 out of the photo that Steve is in. And I remember there were  
11 some -- I thought there were photographs taken of his injuries in the  
12 very beginning, when we first had him.

13 Q. And when you say you first had him, meaning he first came  
14 into Kenyan custody?

15 A. When he first came in -- yeah, when he first came into  
16 Kenyan custody.

17 Q. Okay.

18 A. Correct.

19 Q. Any other photographs that you're aware of other than  
20 those that you just described?

21 A. No. I could be forgetting some, but that's what I -- I  
22 have a picture in my head of a picture of Steve with him and then  
23 maybe seeing some of his injuries, pictures of his injuries at some

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1 point in time, and that's it. That's what I ----

2 Q. Okay.

3 DC [MS. CARMON]: Thank you. I have nothing further.

4 MJ [COL ACOSTA]: All right. Government, before you take up  
5 cross, we're going to take a 15-minute recess. The commission is in  
6 recess for -- oh, sorry. Hold on one second. I failed to warn the  
7 witness.

8 Same instruction as before. You remain on the stand. Don't  
9 discuss your testimony with anyone other than counsel for either  
10 side -- don't discuss your testimony with anyone, including counsel  
11 for either side, and be back on the stand in 15 minutes when we start  
12 back up.

13 WIT: Okay. Thank you, Your Honor.

14 **[The witness was warned, was temporarily excused, and withdrew from**  
15 **the RHR.]**

16 MJ [COL ACOSTA]: The commission is in recess.

17 **[The R.M.C. 803 session recessed at 1528, 1 March 2023.]**

18 **[The R.M.C. 803 session was called to order at 1547, 1 March 2023.]**

19 MJ [COL ACOSTA]: The commission is called to order.

20 Government, all parties present as before?

21 TC [MR. O'SULLIVAN]: Yes, Your Honor.

22 MJ [COL ACOSTA]: Defense?

23 LDC [MR. NATALE]: Yes, Your Honor.

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1 MJ [COL ACOSTA]: All right.

2 Government, any cross?

3 MATC [MR. WELLS]: Yes, Your Honor.

4 **[The witness, Steve Bongardt, resumed the witness stand.]**

5 **CROSS-EXAMINATION CONTINUED**

6 **Questions by the Managing Assistant Trial Counsel [MR. WELLS]:**

7 Q. Detective Bongardt, John Wells here. Can you see me?

8 A. Detective? No, I'm just giving you a hard time, John.

9 Q. Yes, sir. Special agent retired.

10 You know, I missed it. When did you retire?

11 A. December 31st of 2015.

12 Q. How many years did you spend? You came in in '95, so that  
13 would be ----

14 A. Yeah, 20 years and 21 days, but who's counting?

15 Q. Yeah. It's interesting. Early in your career there,  
16 1995, you were on the ground in Nairobi, Kenya, and then just -- it  
17 looks like two years later you're on the ground also in Yemen; is  
18 that correct?

19 A. That is correct.

20 Q. And in Yemen, you arrived there shortly after the attack  
21 on the USS COLE?

22 A. That's correct. I think it was within -- I'm going to say  
23 the same thing, within 48 hours, maybe 72 hours of the attack.

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1           Q.     Right.  So you're on the ground there, and how long did  
2     you stay there in October of 2000?  All the way to October 30th or  
3     past that?

4           A.     So I remember staying there until I think it was just  
5     after Thanksgiving.  It was either just after Thanksgiving or just  
6     before Thanksgiving that I -- so I was there for seven weeks -- six  
7     or seven weeks.

8           Q.     And your role there was to work with local law  
9     enforcement; is that correct?

10          A.     In Yemen?

11          Q.     Yes.

12          A.     Not as much because in -- in -- in Yemen it was more about  
13     coordinating the -- it -- it was more about coordinating the  
14     investigation over there that might periodically involve meeting with  
15     Yemeni law enforcement or Yemeni -- Yemeni government agencies.

16          Q.     Sure.

17          A.     But it was -- it was less hand-in-hand running  
18     investigations than with my previous experience with Kenya and  
19     Tanzania.

20          Q.     And in that jurisdiction, Yemen had authority over the  
21     investigation; isn't that right?

22          A.     They -- they did.

23          Q.     All right.

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1           A.     They would control who we could talk to, when we could  
2 talk to them, our movement at times, where we -- where we would go.  
3 So in some -- I think "control" is a strong word, but I want to say,  
4 yeah, that's -- on some level, I think, yeah, that would -- you could  
5 say that, control.

6           Q.     And there were security concerns in Yemen, just like they  
7 were in Kenya, correct?

8           A.     Correct.

9           Q.     And in Kenya, didn't the Kenyan authorities have control  
10 of the investigation?

11          A.     Yeah. So I would -- I would say -- I would say yes. I  
12 would say yes. It was more cooperation, so -- where we would -- we  
13 would come up with ideas about where to go and if it was possible to  
14 go in certain ways, and by that I mean go interview someone. If we  
15 said, hey, this individual just mentioned this individual. Can we go  
16 talk to them? They would say ----

17          MJ [COL ACOSTA]: Again ----

18          A.     I don't remember them ever saying no ----

19          MJ [COL ACOSTA]: ---- I'm getting the flashing yellow again.  
20 If you could just slow down a little bit.

21          WIT:    Yep.

22          MJ [COL ACOSTA]: Thank you.

23          WIT:    Yep.

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1           A.     So if the Kenyan -- if -- if we were talking to an  
2 individual in Kenya and -- and -- and that individual mentioned a  
3 name or mentioned a location, we would say something to the Kenyans  
4 like, is it possible? Can we set this interview up or go visit that  
5 location tomorrow? And I don't ever remember them saying that that  
6 was -- we couldn't do that.

7           However, the other way around in Yemen, it wasn't -- we  
8 would get -- if we got information, like we think the bomb house is  
9 here, and we said, well, can we go check out that location, it was  
10 more of a negotiation between John O'Neill and Ali Soufan and the  
11 ambassador and the Yemeni authorities. And then after that  
12 negotiation happened, which could take a day or two while we set it  
13 up, then we would be able to go.

14           So it was -- it was a little bit different of a dynamic -- I  
15 mean a lot of a different -- a lot different of a dynamic.

16           Q.     Sure. And when you arrived in Kenya, Nairobi, Kenya, did  
17 you get a chance to go by the blast site at the embassy and see that?

18           A.     I did. That was the first place we went after we got off  
19 the -- the -- the military aircraft that flew us over there, was down  
20 to the -- the embassy site.

21           Q.     And so you saw the -- the wreckage of the building itself?

22           A.     Correct.

23           Q.     And did you see injured persons still in the area?



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1           A.     They were searching the -- the debris. The search was  
2 still ongoing for finding people in the debris at the time that I was  
3 there, but there was no bodies or anything like that that -- that  
4 were -- that were still left out or in the open that we could see.  
5 But the search -- search and rescue was still ongoing at the time  
6 that we got there.

7           Q.     When you were in Yemen, when you arrived shortly after the  
8 attack on USS COLE, did you get to go see the ship in the harbor?

9           A.     We did. We did not ----

10          Q.     All right.

11          A.     I did not get to go on, but that was one of the first  
12 places we went to as well as -- as -- as I recall.

13          Q.     You saw it from a distance; is that right?

14          A.     From a distant, correct, yep.

15          Q.     And you saw the hole in the side of the ship?

16          A.     I have a vision of that, yes.

17          Q.     Yeah. And the -- just to make this clear ----

18          A.     Sure.

19          Q.     ---- the USS COLE was a warship; isn't that right?

20          A.     Correct, it was.

21          Q.     It was a military object ----

22          A.     Correct.

23          Q.     ---- that was attacked?

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1           And in that harbor, did you see civilian vessels, big ships  
2 and small boats?

3           A.     That is correct. As I -- as I recall, yes ----

4           Q.     And then ----

5           A.     ---- there was ----

6           Q.     ---- taking yourself back to Kenya, that attack on the  
7 embassy, was that primarily an attack on civilian objects and  
8 persons?

9           A.     Correct.

10          Q.     All right. You indicated that you had experience doing  
11 canvass interviews in the TWA Flight 800; is that correct?

12          A.     That's correct.

13          Q.     And in this case in Kenya, did Mr. Owhali -- was he  
14 revealed by a tip from a concerned citizen?

15          A.     He was.

16          Q.     In the investigation in Yemen, are you aware of the tip  
17 about the vehicle in the trailer at the jetty site, the launch site?

18          A.     I was.

19          Q.     And typically, when police get a tip like that, they might  
20 run a plate or a VIN number on the registration; is that correct?

21          A.     Correct.

22          Q.     All right. That might give an indication of the owner of  
23 the vehicle or those persons who were registered?

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1 A. Correct.

2 Q. And that's just basic police work, isn't it, correct?

3 A. That is correct.

4 Q. And in Yemen, the first tip that the investigation got  
5 about the vehicle and the trailer, are you aware that it was the  
6 vehicle registration with Nashiri's picture attached to the vehicle  
7 registration? Just tell me if you know that, yes or no.

8 A. Yes, that's correct.

9 Q. Did that picture make it into the photo book that was  
10 being used in the ADENBOM Photo Book? If you don't know, just say  
11 yes or no.

12 A. So, well let me go back, I'm a little confused.

13 DC [MS. CARMON]: Judge, I'm going to object.

14 MJ [COL ACOSTA]: Okay, hold on. There's an objection.

15 DC [MS. CARMON]: I'm going to object to relevance since this  
16 is 482 now.

17 MATC [MR. WELLS]: Sure.

18 MJ [COL ACOSTA]: It ----

19 MATC [MR. WELLS]: I'm going to connect it, Your Honor.

20 MJ [COL ACOSTA]: Pardon?

21 MATC [MR. WELLS]: I'm going to connect it, Your Honor.

22 MJ [COL ACOSTA]: You're going to connect this to the

23 Owhali ----

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1 MATC [MR. WELLS]: Yes, sir.

2 MJ [COL ACOSTA]: ---- the admissibility of the Owhali  
3 statement?

4 MATC [MR. WELLS]: Yes, sir.

5 MJ [COL ACOSTA]: Okay. Overruled. I'll allow it. Go ahead.

6 Q. Let me ask the question again.

7 The vehicle registration in Yemen for the vehicle that was  
8 found at the jetty with the trailer, do you know if that was  
9 registered to Nashiri, yes or no?

10 A. I think it's -- it was al Khamiri that ----

11 Q. Okay.

12 A. ---- the -- yeah, the picture that I remember seeing  
13 before -- and I think this -- my recollection is it came in before  
14 the tip or before we knew that there was a boy or -- or the -- the  
15 owner of the -- of the -- the -- the jetty or the person that saw the  
16 jetty, my first that I remember how they said they identified  
17 the -- the boat was trying to match up every registration with every  
18 boat in the harbor, and this was the one that was missing. And I  
19 think the tip came in later.

20 But my understanding was that registration has al Khamiri,  
21 one of the actual bombers' photograph. And it wasn't until we had an  
22 identification of a safehouse -- of the safehouse or the bomb  
23 factory, where the bomb factory was -- was, that we had a name that

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1 then came back to the photograph of al Nashiri, through a passport or  
2 some other government identification.

3 Q. Yes. Going back to your experience in Kenya when  
4 Mr. Owhali finally revealed his true name and you're interviewing  
5 him, there were questions on direct that Nashiri's name was raised;  
6 is that correct?

7 A. That is correct. When ----

8 Q. And let me ask this: Wasn't one of the suicide bombers  
9 with Owhali Nashiri's cousin?

10 A. I don't remember that. I don't ----

11 Q. All right.

12 A. I don't remember that. I don't remember that connection.  
13 It -- I don't remember that connection.

14 Q. Now, Owhali ----

15 A. It could be and I've forgotten.

16 Q. Owhali possessed a Yemeni passport; is that correct?

17 A. As I recall, yes.

18 Q. Right. And what Owhali provided to you is that was a  
19 falsified passport; is that correct?

20 A. That's correct.

21 Q. And that that passport was provided to him by Nashiri,  
22 correct?

23 A. Correct.

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1 Q. Did Owhali say that Nashiri created it or falsified that  
2 passport in any way? Do you recall?

3 A. I don't recall.

4 Q. But he just provided that ----

5 A. Yeah.

6 Q. ---- passport?

7 A. My -- my -- yeah, my understanding is he falsely obtained  
8 it for -- for him; and that it -- whether that was a valid passport  
9 or not is that -- that it was -- it was not really Muhammad Rashid  
10 Daoud al Owhali's name so it was falsely obtained.

11 Q. And you learned from al Owhali too about the involvement  
12 of Khallad Tawfiq Walid Bin'Attash; is that correct?

13 A. That is correct.

14 Q. Did Owhali give you an indication that Nashiri and  
15 Bin'Attash were connected in any way?

16 A. He did. I'd have to reread the 302. I do remember they  
17 were both trusted by Usama bin Laden and in what I would call the  
18 inner circle, so it would make sense that they would know -- that  
19 they would know each other.

20 I -- specifically I remember Attash was more connected to  
21 Afghanistan and the battle in Afghanistan, and the -- and in -- and  
22 Nashiri was not. Nashiri was an individual who was more connected to  
23 Yemen and doing operations and things in the field. That's my

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1 understanding. But they would -- they knew of each other.

2 Q. Do you recall information that Nashiri -- that Owhali was  
3 appreciative of Nashiri because Nashiri set up a meeting between  
4 al Owhali's father and Owhali prior to the Kenyan operation? Is that  
5 accurate?

6 A. I don't recall that. Do you have something I could -- I  
7 could read to ----

8 Q. No.

9 A. ---- to -- okay.

10 Q. What I'm doing right now is asking your memory.

11 A. Yep.

12 Q. Now, let's look at this investigation that occurred in  
13 Kenya. Do you agree with this, that the questioning occurred  
14 continuously over two weeks? Is that accurate?

15 A. You'd have to define continuously.

16 Q. All right. You indicated that there were times when U.S.  
17 investigators asked questions of what we understood at the time  
18 Khalid Salim bin Rashid who now we know is Owhali.

19 A. Correct.

20 Q. Do you know if the Kenyans were also questioning Khalid  
21 Salim bin Rashid at the same time you were questioning?

22 A. Not outside of -- if they were, it was outside of  
23 our -- our, meaning someone from the FBI, being part of that, and I

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1 would be incredibly surprised.

2 Q. You didn't see any questioning from the Kenyan CID, other  
3 than during the interviews that you conducted; is that correct?

4 A. Correct.

5 Q. And when you conducted the interviews, did Mr. Al Owhali,  
6 or Khalid Salim at that time, look tired, exhausted?

7 A. No. He looked mentally drained at times, like  
8 he -- it -- which I have seen since then as when somebody's  
9 telling -- not telling you the truth and having to keep it all  
10 together, like mentally exhausted, but not physically exhausted.

11 And when you say -- I mean -- and I just want to clarify  
12 something. When you say "you," I mean -- me meaning the FBI, I do  
13 not remember seeing him being interviewed at anytime outside of the  
14 presence of the -- of the FBI. Either when I was part of those  
15 interviews or when I was over on the other side of the partition, I  
16 did not remember -- I don't remember ever seeing part of  
17 that -- of -- of that interrogation or any interviews or any talks or  
18 discussions at that time.

19 Q. All right. Did he ever indicate to you that he was being  
20 questioned by the Kenyan authorities?

21 A. No.

22 Q. All right. Did he ever indicate to you that he was sleepy  
23 or tired or exhausted in any way?



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1 A. No.

2 Q. Did he ask for breaks?

3 A. I think he asked for bathroom breaks periodically, like a  
4 bathroom break or a prayer break.

5 Q. Okay. And did you grant those requests?

6 A. Every time that he requested them, they were granted.

7 Q. You testified earlier that Kenyan law required that family  
8 members provide food and drink or sustenance while you're being  
9 detained by Kenyan law enforcement; is that correct?

10 A. That's correct.

11 Q. Are you aware that there is a Kenyan law or legal  
12 procedure, legal tool, that limits how long investigators can hold a  
13 person for interviews or suspicion of a suspect?

14 A. I remember that now -- I remember that as a conversation  
15 point, but I don't remember specifically what that was. I do  
16 remember it was longer than what our laws would allow.

17 Q. All right. And at this time, Khalid Salim bin Rashid who  
18 we know is Owhali, possessed a Kenyan pass -- or, excuse me, a Yemeni  
19 passport and was not a native Kenyan; is that right?

20 A. Correct.

21 Q. And were you aware of any family members that would come  
22 and provide him food and drink while he was held in custody?

23 A. No, I was not aware of anyone.

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1 Q. All right. Are you aware that the Kenyans withheld any  
2 food and drink from him or sustenance in any way?

3 A. No.

4 Q. So when you said -- or testified that he had a choice to  
5 stay with the Kenyans and starve, is that really accurate?

6 A. That's not accurate. I don't think I would have said  
7 that. If I said that, I was in error, but not -- he wouldn't  
8 have -- my understanding is that -- I understand where -- where that  
9 gets pieced together now, but my -- my understanding is that -- that  
10 would not have -- that would not have happened. That was not a  
11 possibility. We were not -- for two reasons, if I can continue.

12 One is we weren't going anywhere. We would have made sure  
13 that we -- so we were under -- at that time too, since a lot of us  
14 were not familiar with the water and the -- the other -- some of the  
15 other food, we -- we were all eating MREs, which I know you're  
16 familiar with. And so I remember making sure that he had food  
17 via -- via MREs, and it just didn't seem like a possibility that he  
18 would -- that he would starve. I don't remember using that angle  
19 specifically or not.

20 I can see why someone might say that, based on the fact that  
21 if we left and his family is supposed to provide him food and he does  
22 not have food he would starve, but I -- that was not -- that leap was  
23 never -- I don't ever remember anyone making that leap or -- or

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1 insinuating that ----

2 Q. Sure.

3 A. ---- or saying it explicitly.

4 Q. I'm going to ask you straight up: Did you use that to  
5 extort or extract a confession from ----

6 A. No.

7 Q. -- Mr. Owhali?

8 Did you see anybody on the FBI team use that?

9 A. No.

10 Q. All right. In fact, Mr. al Owhali was requesting  
11 favorable treatment from the U.S. government; is that correct? To be  
12 tried in the United States versus with the Kenyans; is that correct?

13 A. Yeah, I -- yeah, that is correct.

14 Q. All right. Did he tell you why he wanted to go to the  
15 United States to be tried and not in Kenya?

16 A. We -- we -- we brought that up to him, I think, in the  
17 beginning. It was not initially his idea. It was our angle in the  
18 interview and interrogation. It was -- we brought it up, to come to  
19 the United States and your story will be known to the world and  
20 certainly to the United States, since that was the main grievance of  
21 al Qaeda, was the United States' activity throughout the world.

22 Q. And did he agree to that?

23 A. He did.

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1           Q.     All right. I want to ask you some questions about how the  
2 interview room was set up. You know, this is August of 1998. Was it  
3 hot in Nairobi, Kenya?

4           A.     No, it was actually -- I remember it being actually quite  
5 cool at night.

6           Q.     Is it at elevation a little bit there?

7           A.     They're about 6,000 feet, if I remember correctly ----

8           Q.     Sure.

9           A.     ---- right at about a mile. And it was -- my recollection  
10 is individuals had winter coats on. It might have gotten to 55  
11 or -- at night, 55 degrees Fahrenheit, 50, 55, but it was quite  
12 comfortable there.

13          Q.     All right. So this interview room in Kenyan CID  
14 headquarters, did it have -- was it nice and comfortable as far as  
15 temperature?

16          A.     Yes.

17          Q.     You described for the commission how the interview room  
18 was set up, particularly early on when -- before Mr. Feghali arrived,  
19 your interpreter. But early on when there was a civilian female  
20 interpreter, she was not actually in the presence, physical presence,  
21 of Mr. Owhali; is that correct?

22          A.     Not physical presence where he could see her, but where  
23 she could talk to him and he could talk to her, and he was not facing

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1 the direction that she was in, as -- as I recall.

2 Q. And you were not present during the interview with Owhali  
3 while John Anticev and Detective Wayne Parola were asking questions;  
4 is that correct?

5 A. That's not correct. I was present. I wasn't -- I wasn't  
6 visible, and I wasn't part of the actual interview process. But I  
7 was on the other side of the partition, not all the times, but as  
8 much as I could be there, based on my other leads, and try to attend  
9 and listen to what they were ----

10 Q. Saying?

11 A. ---- getting from al Owhali and what he was saying.

12 Q. Right. And you made a point on direct to questioning,  
13 that you made sure that Owhali did not see you through the partition.

14 A. Correct.

15 Q. And there was an effort to make sure that Owhali could not  
16 see the interpreter, correct?

17 A. That is correct.

18 Q. And while you were observing the investigation and the  
19 interviews and listening to the questions, did you see Special Agent  
20 Steve Gaudin with you outside, in the room with the interpreter?

21 A. Could -- could you say that again? I'm sorry.

22 Q. Where was Steve Gaudin during the interviews when John  
23 Anticev and Wayne Parola were questioning al Owhali, then we knew as

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1 Khalid Salim bin Rashid?

2 A. Yeah. My understanding is during those interviews, he was  
3 in that room as well.

4 Q. Did you ever see him outside that room, outside the poncho  
5 liner or the partition with you ----

6 A. Not that I -- not that I recall, no. Excuse me.

7 Q. Bless you.

8 When you say that you were listening for leads, did someone  
9 come out of the room and provide a lead to you or ask you to go hunt  
10 down a lead? How did that get to you?

11 A. I would hear different things that were being talked about  
12 and that seemed -- that would have lead value. And then at the end  
13 of the interview, if I stayed to the end -- which I tried to. I  
14 recall trying to stay to the -- the end of the interview. Then we  
15 would usually have a powwow or some kind of a debrief where we would  
16 talk about what he said and what we could try to follow up on and  
17 potential questions to ask of the source. Sorry.

18 Q. About Owthali's injury to his back and his arm, did you or  
19 any of the other FBI investigators ever touch his arm, twist it,  
20 aggravate it, cause him pain?

21 A. No. The only time we might have touched it was -- would  
22 be to roll the sleeve back if -- and then I -- again, I don't  
23 remember, but under no circumstance would we have even thought of

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1 doing that.

2 Q. Did you see any of the Kenyan investigators or authorities  
3 do anything like that?

4 A. No.

5 Q. Did Mr. Owhali ever indicate that that was occurring?

6 A. No.

7 Q. There's been a question whether or not his arm was broken.  
8 Do you know whether or not he was able to use that hand that was  
9 injured?

10 A. So my belief is yes, and the reason was is because one of  
11 the things that -- Steve and I would talk about this afterwards.  
12 What got -- what built the rapport with al Owhali was teaching him  
13 how to make ranger cookies out of the MREs. And we wouldn't do it  
14 for him. We would show him how to do it.

15 And a ranger cookie is a -- probably everyone in this room  
16 knows, but where you take an MRE and the hot cocoa and you break up  
17 the cracker and you put the cracker in there and then you pour water  
18 in and mix it all up and it's a kind of delicious little thing that  
19 you can do.

20 And we would -- to do it, you need the use of both hands.  
21 You need to hold the bag, the MRE bag or the -- that the -- that  
22 the -- usually, I think you'd use the cracker cover from the MRE or  
23 the hot chocolate cover, and then you would -- you need both hands to

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1 do it, right? So you'd break it up, put it in there, put the water  
2 in and then stir it up.

3 And my recollection is that al Owhali did it for himself,  
4 and that was part of the rapport building interaction that -- that we  
5 had with him. And that was Steve's idea to do. And that's  
6 what -- that's what helped us progress in building rapport with him  
7 along the rapport building type of interview. So he would need both  
8 hands to do that.

9 Q. All right. My last question here is -- read this from a  
10 pleading. Did you threaten to leave Mr. Al Owhali in Kenya to be  
11 tortured?

12 A. No.

13 Q. All right. Was there any indication that he would be  
14 mistreated or tortured in Kenya?

15 A. No.

16 MATC [MR. WELLS]: All right. No further questions, Your  
17 Honor.

18 MJ [COL ACOSTA]: Defense, redirect?

19 DC [MS. CARMON]: Thank you, sir.

20 **REDIRECT EXAMINATION**

21 **Questions by the Defense Counsel [MS. CARMON]:**

22 Q. Just to go back to the substance of Mr. Al Owhali's  
23 statement and particularly his statement about Mr. Al Nashiri. I



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1 have here with me, if you need to review -- but here is my question.

2 Other than the mention that -- and he calls him Bilal, but  
3 that's Mr. Al Nashiri. Other than the mention that Mr. Al Nashiri,  
4 Bilal, helped procure this passport for him, does Mr. Al Owhali say  
5 that person's name or mention him in any other context or in any  
6 other sentence in these statements?

7 A. May I -- may I take a look at the document?

8 Q. Would that refresh your recollection ----

9 A. It ----

10 Q. ---- as to what Mr. Al Owhali told you about  
11 Mr. Al Nashiri?

12 A. It might, yep.

13 Q. Okay.

14 A. Correct.

15 DC [MS. CARMON]: Your Honor, I have AE 319MM. It begins on  
16 page 1528. I am going to direct the witness to page 1532, 1533, and  
17 then 1542.

18 A. Before I look at that, can I -- there's one thing that  
19 comes to mind, before I look at it?

20 Q. Go ahead.

21 A. And it's al Owhali claimed that he had this blue-chip  
22 information that once he provided -- once he knew he was coming to  
23 the United States, that he would give us this blue-chip information.

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1           We were -- so much has been said about the FBI not  
2   considering reactive -- being only reactive and not proactive with  
3   regards to threats since 9/11, and that's not the case. Every  
4   interview I've been part of has always -- once we know they're  
5   cooperating, has been to try to find out what they know about other  
6   opportunities.

7           And my recollection is that his blue-chip information that  
8   he had was a plan by Bilal -- is when he mentioned the same Bilal,  
9   that was going to use missiles to attack a ship in Yemen, other than  
10   what you're talking about.

11           Besides that, was -- was that his additional blue-chip  
12   information that he said once he was coming to the United States, he  
13   would tell us the -- that information, and that was kind of his  
14   bargaining chip to get to the United States. So in a way, he was  
15   kind of leveraging us to come to the United States, is my  
16   recollection. But I'm hoping that's in that 302.

17       Q.     So let's take this one step at a time.

18       A.     Yep.

19       Q.     This is the 302 for your 22 to 25 interviews ----

20       A.     Yep.

21       Q.     ---- of Mr. Al Owhali. So this is not in the blue chip  
22   302.

23       A.     Oh, okay. That's not ----

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1 Q. Okay?

2 A. Yep, yep. Thank you.

3 Q. Just give me a second here.

4 Do you need to review the -- this 302 to determine, in the  
5 course of those statements, whether Mr. Al Owhali mentioned  
6 Mr. Al Nashiri in any other sentence other than to say he helped me  
7 get that passport?

8 A. Can I believe you that -- I haven't read the 302 in 20  
9 years, so I -- if I can believe you, absolutely. If you want me to  
10 read it just to make sure -- if not, I believe what you're -- what  
11 you're saying, I'm not going to see his name in there. Because his  
12 name would be in there. If he had said anything else about Nashiri,  
13 it would be in there.

14 Q. If I showed you that blue-chip ----

15 A. Yep.

16 Q. ---- 302, would that refresh your memory that the person  
17 he named as the suspect is not, in fact, Bilal?

18 A. Yeah, that -- that would -- yeah, that would -- that would  
19 refresh ----

20 DC [MS. CARMON]: Your Honor, may I just have a moment to go  
21 to the desk?

22 MJ [COL ACOSTA]: You may.

23 DC [MS. CARMON]: Thank you.

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1           Your Honor, I have before me AE 166G. If I may approach  
2 with this?

3           MJ [COL ACOSTA]: You may.

4           DC [MS. CARMON]: Thank you.

5           Q. And, Agent, I'll just direct you ----

6           MJ [COL ACOSTA]: This is what you're referring to -- pardon  
7 me, as the blue-chip, correct?

8           DC [MS. CARMON]: Yes, sir.

9           MJ [COL ACOSTA]: Thank you.

10          DC [MS. CARMON]: This is -- yes.

11          Q. Agent, I'll just direct you to the second paragraph here,  
12 okay?

13          A. Okay. Yep. Thank you.

14       **[The witness reviewed the evidence.]**

15          WIT: No, thank you for clearing that up.

16          MJ [COL ACOSTA]: Don't -- just read it, and then she will ask  
17 questions in a minute.

18          WIT: Yep. Yep. Yep.

19          MJ [COL ACOSTA]: No need to speak. Just read it quietly to  
20 yourself.

21       **[The witness reviewed the evidence.]**

22          WIT: Okay.

23          DC [MS. CARMON]: Your Honor, I'm going to retrieve AE 166G.

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1 MJ [COL ACOSTA]: Okay.

2 Q. Agent, did that refresh your recollection as to the person  
3 Mr. Al Owhali named as the man who was intending to attack a U.S.  
4 ship in the Port of Aden?

5 A. Yeah, it does.

6 Q. And who is that?

7 A. In there, they refer to him as Abu Jaffar.

8 Q. And so not Bilal?

9 A. So there -- for some reason or other, I'm either mistaken  
10 or there was some additional information that Abu Jaffar might indeed  
11 be Bilal from some other source, or I could be just absolutely  
12 mistaken, not having read that in a long time.

13 Q. Suffice it to say in this 302 memorializing your  
14 conversation ----

15 A. Yes.

16 Q. ---- with Mr. Al Owhali, the person ----

17 A. Yes.

18 Q. ---- at issue here is Mr. Abu Jaffar?

19 A. Correct.

20 DC [MS. CARMON]: If I can just have the court's brief  
21 indulgence?

22 MJ [COL ACOSTA]: You may.

23 **[Counsel conferred.]**

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1 DC [MS. CARMON]: Thank you, sir. Thank you, Agent. I have  
2 nothing further.

3 **EXAMINATION BY THE MILITARY COMMISSION**

4 **Questions by the Military Judge [COL ACOSTA]:**

5 Q. Agent Bongardt, I want to ask a question.

6 You said that you were in a position during the interview in  
7 Kenya to where you couldn't -- you couldn't -- where -- that  
8 Mr. Owali could not see you and neither could the female civilian  
9 interpreter; is that correct?

10 A. Correct.

11 Q. Okay. So you were in a third room?

12 A. So ----

13 Q. Or a third area?

14 A. Your Honor, the way I remember it is there was basically a  
15 rectangular partition -- there was basically two walls of a  
16 partition. One going -- think of a rectangle, a short-sided  
17 rectangle. The short side of the rectangle is where the interpreter  
18 was, as I recall, and the long -- the longer partition was where I  
19 was behind.

20 And so if she was already behind that shorter wall -- and  
21 there was a gap between them, like kind of like ----

22 Q. A gap between what?

23 A. A gap between the partitions, that that was the entryway

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1 into the -- into the partition ----

2 Q. Please don't demonstrate with your hands. It's ----

3 A. Yeah, okay.

4 Q. It's going -- because what you just did I have to explain.

5 Just ----

6 A. Yep.

7 Q. ---- so you know ----

8 A. Yep.

9 Q. ---- when you do that, now I'm going to show you what I  
10 have to do.

11 The witness took his hands, made them into a T form with  
12 his -- his right hand over his left hand with a small space between  
13 the two hands.

14 So what I'm -- while it's helpful in -- in some ways what  
15 you did ----

16 A. Right.

17 Q. ---- my question is: You -- you said there was a  
18 partition that was in the shape of a rectangle, and then you said  
19 there was two partitions. Was there one partition ----

20 A. So ----

21 Q. ---- or were there two -- just listen to the question  
22 before you start answering. I'm very sorry.

23 I just need to -- were there two partitions or one

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1 partition?

2 A. Could you define partition, how you're thinking of it?  
3 When I think of a partition, I think of a solid -- of a solid  
4 wall -- of a solid wall that doesn't -- that -- that runs from -- in  
5 one direction to the other.

6 There were two part -- collectively, there -- I guess you  
7 could call them one partition, but there was -- one wall of the  
8 partition went one way and the other wall of the partition went the  
9 other way. And the interpreter was on the short end or the -- what I  
10 recall as the short end of the one partition, and I was on the long  
11 end of the other -- of the other partition. So there was basically  
12 two walls as part of that ----

13 Q. Okay.

14 A. ---- as part of that partition.

15 Two screens, let me say -- two screens as part of the whole  
16 thing being a partition. One screen was going one way, one screen  
17 was going the other way. I was along the way that was closest to the  
18 door, and she was on the screen -- on the other side of the screen  
19 that was furthest away from the door, so it was possible that I did  
20 not see her because we were 90 degrees kind of apart from each other.

21 Q. Okay.

22 A. I could draw a diagram. Would that ----

23 Q. No, please don't.



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1 A. ---- help?

2 Q. No, please don't draw.

3 A. So ----

4 Q. Thank you.

5 A. Yep.

6 Q. During the interview in which there was this noise, you  
7 were not present, correct?

8 A. My memory is that my -- I -- as I remember it ----

9 Q. Just do you remember that you were there or that you were  
10 not there?

11 A. I do remember I was -- I do remember being there.

12 Q. So you were present ----

13 A. Correct.

14 Q. ---- and you saw this event or you heard this event occur?

15 A. I heard the event occur.

16 Q. Okay. Who was present in the presence on the same side or  
17 around this table that you described with Mr. Owhali?

18 A. The interpreter. I'm not sure ----

19 Q. Was on the same side of the wall as Mr. Owhali?

20 A. On the short side. No, she was on the short side of  
21 the -- of the screen. She was on the other side. She was hearing  
22 but she probably could not see ----

23 Q. Okay. Let me ask my question again.

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1           Who was in the visible presence of Mr. Owali, sitting at  
2 the table with him?

3           A.     John Anticev, Wayne Parola, Steve Gaudin. Again, I know  
4 John was there and I know Wayne was there. It might have been Steve  
5 Gaudin. I don't know. And Amos Combo or -- and/or John. I don't  
6 specifically -- they might have been there.

7           But I can certainly say John was there, Amos was there, and  
8 Wayne Parola.

9           Q.     Okay. Next question: Did you see anybody that was next  
10 to the interpreter on her side of whatever partition this was?

11          A.     I don't -- I don't recall.

12          Q.     Okay. And you, in some liminal space that is yet to be  
13 defined that I can imagine, are in a third place. Is there anybody  
14 with you?

15          A.     No.

16          MJ [COL ACOSTA]: Okay. All right. That's all the questions  
17 I have.

18          WIT: Okay.

19          MJ [COL ACOSTA]: Defense, any questions based upon mine?

20          DC [MS. CARMON]: No, sir.

21          MJ [COL ACOSTA]: Government?

22          MATC [MR. WELLS]: No, sir.

23          MJ [COL ACOSTA]: Okay. All right.

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1 Defense, permanent for the purpose of these two motions and  
2 this session, yes or no?

3 DC [MS. CARMON]: Yes, sir.

4 MJ [COL ACOSTA]: Government, any objection?

5 MATC [MR. WELLS]: None, sir.

6 MJ [COL ACOSTA]: Okay. All right.

7 Agent Bongardt, for the purpose of this hearing, you are  
8 permanently excused. Do not discuss your testimony or your knowledge  
9 of this case with anyone other than counsel for either side. You can  
10 step down and return to your day.

11 WIT: Okay. Thank you, Your Honor.

12 MJ [COL ACOSTA]: Thank you. All right. You can get up and  
13 go.

14 **[The witness was warned, was permanently excused, and withdrew from**  
15 **the RHR.]**

16 MJ [COL ACOSTA]: All right. Counsel, we have one witness  
17 tomorrow on 319. How many statements is he presenting there?

18 ATC [LCDR SCHREIBER]: Nine -- nine statements, sir.

19 MJ [COL ACOSTA]: Okay. Coming in a little hot on the mic.

20 ATC [LCDR SCHREIBER]: Apologies.

21 MJ [COL ACOSTA]: It's okay. Nine statements tomorrow. We'll  
22 start at 0900. And then Special Agent Emley on Friday. Okay.

23 You can expect -- if there's any more guidance, I'll put it

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1 out in rulings or we'll take it up tomorrow morning before we get  
2 started. All right.

3 If there's nothing else to take up ----

4 LDC [MR. NATALE]: Your Honor.

5 MJ [COL ACOSTA]: Defense?

6 LDC [MR. NATALE]: Your Honor, there is. It's more of an  
7 administrative matter.

8 I think that on 534, the -- what the government filed  
9 ex parte was actually unclassified and that, if it was unclassified,  
10 we would like to have a copy of it.

11 MJ [COL ACOSTA]: It was ex parte.

12 LDC [MR. NATALE]: Oh.

13 MJ [COL ACOSTA]: I rejected it.

14 LDC [MR. NATALE]: Okay.

15 MJ [COL ACOSTA]: And I did not -- it's not that I -- and I  
16 rejected it in accordance with what I ruled on.

17 LDC [MR. NATALE]: Okay.

18 MJ [COL ACOSTA]: So I did not accept the pleading, and I  
19 didn't consider it.

20 LDC [MR. NATALE]: Very well.

21 MJ [COL ACOSTA]: Okay. All right.

22 If there's nothing else, the commission is in recess until  
23 0900 tomorrow.

1 [The R.M.C. 803 session recessed at 1629, 1 March 2023.]

2 [END OF PAGE]

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