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1 **[The R.M.C. 803 session was called to order at 0902, 19 April 2023.]**

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

3 Government, please account for the parties. There you go.

4 TC [MR. O'SULLIVAN]: Good morning, Your Honor.

5 MJ [COL ACOSTA]: Good morning.

6 TC [MR. O'SULLIVAN]: These proceedings are being transmitted
7 via CCTV to public viewing locations in the United States pursuant to
8 the commission's order AE 028M dated November 20th -- dated
9 22 November 2019 except for Norfolk, as I mentioned yesterday.

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

12 Present for the United States in Guantanamo Bay are myself,
13 Michael O'Sullivan; Mr. John Wells; Staff Sergeant Maria Young;
14 Mr. Forrest Parker Smith; Mr. Louis Marmo; Ms. Joleen Sanders; and
15 our linguist.

16 Present in the Remote Hearing Room in northern Virginia are
17 Lieutenant Colonel James Garrett; Lieutenant Commander Keven
18 Schreiber; Major Michael Ross; Major Stephen Romeo; Lieutenant Tess
19 Schwartz; Captain Jonathan Danielczyk; Master Sergeant Laura
20 Speranza; Ms. Paige McLachlan; Special Agent Paul Rude with the
21 Transregional Criminal Investigation Unit; and for the Federal Bureau
22 of Investigation, Supervisory Special Agent Mary Sonnen.

23 MJ [COL ACOSTA]: Thank you, Counsel.

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1 Good morning, Defense Counsel. Please do the same.

2 LDC [MR. NATALE]: Good morning, Your Honor. Anthony Natale
3 on behalf of Mr. Nashiri, who is present in the ELC and will be
4 observing the proceedings. He has been advised of his right to be
5 here, and he has asked that he be allowed to view the proceedings
6 from his location.

7 MJ [COL ACOSTA]: And Mr. Natale, that was the same thing
8 yesterday. He was here, wanted to -- wished to attend but in a -- in
9 a way that allowed him to listen and hear and consult with attorneys
10 on recesses but not be in the -- in the courtroom, correct?

11 LDC [MR. NATALE]: That's correct, sir.

12 MJ [COL ACOSTA]: Okay.

13 LDC [MR. NATALE]: In the -- in the ELC is Mr. Padilla,
14 LN1 Wood. Mr. Bendernagel is present. Ms. Morgan is not present.

15 In the RHR, myself, Ms. Carmon, Lieutenant Commander Piette,
16 Mr. Roy, Mr. Dolphin -- Ms. Pinate will probably be coming in this
17 afternoon -- Mr. Scott Hoffmann, Mr. Ted Lange, Ms. Brown, Staff
18 Sergeant McGuire, and Tech Sergeant Gause.

19 Pursuant to the notice that was provided to the court in an
20 e-mail I believe which was sent on the 9th, Lieutenant Colonel
21 Nettinga has a medical procedure that was scheduled for today which
22 he was unable to reschedule.

23 MJ [COL ACOSTA]: And ----

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1 LDC [MR. NATALE]: All of these ----

2 MJ [COL ACOSTA]: And Mr. Nashiri consents to his being absent
3 today?

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

5 MJ [COL ACOSTA]: Okay.

6 LDC [MR. NATALE]: All of these individuals have the necessary
7 clearances and classifications and need to be present for these
8 proceedings.

9 MJ [COL ACOSTA]: Thank you, Defense.

10 And, Mr. Natale, you can stay where you are, but the accused
11 consents to the absence of Ms. Morgan as well, correct?

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

13 MJ [COL ACOSTA]: All right. Thank you.

14 All right. Before we get started, as the parties are aware,
15 I'm set to retire in the fall of this year. After close of
16 proceedings yesterday, I submitted an application for the position of
17 Clerk of Court for the Air Force Trial Judiciary. This application
18 did not require nor did it include any writing samples.

19 Prior to applying, I considered R.M.C. 902, other applicable
20 rules, the ethical canons of the Code of Judicial Conduct and various
21 other applicable cases, including the D.C. Circuit ruling in this
22 case. I determined that there's no possible conflict between my role
23 as the military judge in this case and my application.

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1 Do the parties have any questions for me?

2 Government?

3 TC [MR. O'SULLIVAN]: None from the government, Your Honor.

4 MJ [COL ACOSTA]: Defense?

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

6 MJ [COL ACOSTA]: All right. Thank you.

7 I only disclose that application because it is within the
8 Department of Defense. There's been other issues in other cases
9 where -- in other commissions about applications within the
10 Department of Defense. Again, this is to work for the Air Force
11 Trial Judiciary as the clerk of court, and that was -- that's the
12 limit of the -- of what I think at -- in the most abundance of
13 caution, that I'm disclosing that in case you had any questions
14 whatsoever. If I felt that there was any issue, I would not have
15 applied.

16 All right. Defense?

17 DC [MS. CARMON]: Yes, sir. In support of AE 481, the defense
18 would call Agent Cardon.

19 ATC [LT SCHWARTZ]: Your Honor, I apologize for interrupting.
20 Can I bring up a matter that I believe needs to be addressed prior to
21 Agent Cardon getting on the stand?

22 MJ [COL ACOSTA]: Okay.

23 ATC [LT SCHWARTZ]: I apologize for the interruption, Your

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1 Honor. I wanted to bring to the court's attention and get the
2 court's input as to the plan ahead today as it pertains to
3 Dr. Welner.

4 At a little before 8:00 this morning we received about 700
5 pages of documents from defense that they anticipate on using with
6 Dr. Welner, and was told about five minutes ago there would be
7 hundreds more pages that they have not yet sent, that they will be
8 sending, of articles that they'll be asking Dr. Welner about. I
9 don't have those yet. I have not seen those, and I don't know which
10 ones they are. It's a mix of classified and unclassified.

11 The other issue is, as we had told defense yesterday, we
12 don't have printing capabilities the way they do here at the RHR, so
13 we cannot print that magnitude of documents, and I don't have a hard
14 copy of the documents that they're intending to use.

15 So my -- what I would like to alert the court to is if we
16 finish with Agent Cardon at, like, 1030 or 1100, I don't want to
17 start with Dr. Welner because I need time to review what is still
18 incoming of documents they plan to use with the doctor.

19 MJ [COL ACOSTA]: Okay.

20 ATC [LT SCHWARTZ]: So I would ----

21 MJ [COL ACOSTA]: Defense?

22 ATC [LT SCHWARTZ]: Oh, I apologize.

23 MJ [COL ACOSTA]: No, let me just hear from the defense.

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1 Mr. Natale, I believe ----

2 LDC [MR. NATALE]: That is correct, Your Honor. The ----

3 MJ [COL ACOSTA]: Can you hold -- can you hold one second.
4 I'm being talked to. Hang on.

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

6 MJ [COL ACOSTA]: I don't know if you can hear it, but there
7 is a low hum of -- it sounds like air or static being played or
8 coming through the speakers here in this courtroom. That's what
9 we -- what I was being explained what it was. I just want to
10 apologize and tell you that's why I was interrupting you. I don't
11 know if you can hear it up there, but it's quite audible here.

12 Go ahead.

13 LDC [MR. NATALE]: Your Honor, the materials which were sent,
14 many of them involve what Dr. Welner would already know, which is
15 court opinions in which his ability to testify was either prohibited
16 or restricted. So he would have access to -- that's not, I think,
17 you know, something that's unique to this.

18 The articles that we're talking about are all related to the
19 topic which he said that he's going to be talking about, and in the
20 government's notice, they mention that they were not going -- that he
21 didn't review any learned treatise. So I plan to cross-examine him
22 on the fact that learned treatises exist on these very topics and to
23 outline what they contain and why that would be something that he

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1 would not incorporate into his opinion.

2 It goes directly to not only his qualifications, but it goes
3 to his bias as well as whether or not there's a sufficient database
4 for him to give the opinions which they have articulated in the
5 notice.

6 MJ [COL ACOSTA]: So it's the questions that you want to ask
7 him during your voir dire of him about did you consider this? What
8 have you -- you know, what are the things that you based your opinion
9 on? Did you consider -- you know, the typical questions, right?

10 LDC [MR. NATALE]: That's correct, sir.

11 MJ [COL ACOSTA]: Okay. So my question is not about that.
12 It's just the provision of those to the government in a form that
13 they have. I don't --

14 And, Government, I don't -- frankly, if they intend to
15 reference them and he has not -- they're not listed in his --

16 Defense, is there any way to -- do you have any objection as
17 to a delay so that you can provide them in a form or that they can go
18 print them and have them ready to go?

19 LDC [MR. NATALE]: Not at all, Your Honor. And part of the
20 things that I have to apologize for is that there's been trouble with
21 my hotel arrangements which required me to not have reservations and
22 then have to run around in order to find a place to stay.

23 So it was certainly not anything that was intentional, Your

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1 Honor. It's just things haven't been very smooth or ----

2 MJ [COL ACOSTA]: No, I understand. But I also know that it
3 shouldn't necessarily be up to the lead defense counsel to be
4 providing the documents that you have to the government, right? I
5 hope that there's someone who's going to -- who can work that out for
6 you.

7 However, what we'll do is we'll take a -- Government, if
8 there's questions about what they're going to be presenting
9 or -- we'll make sure that you have those documents.

10 Defense, have you provide everything you're going to provide
11 or have you told the government, indeed, that there's more that
12 you're going to talk about that you have not yet provided?

13 LDC [MR. NATALE]: What I'm going to ask my colleague across
14 the aisle is to make sure that there are certain things which I will
15 be referring to that they have.

16 Just so the court is aware, I have been receiving, you know,
17 on a -- just yesterday and the day before some additional
18 material ----

19 MJ [COL ACOSTA]: Are you saying from the government about
20 this witness?

21 LDC [MR. NATALE]: Yes.

22 MJ [COL ACOSTA]: Okay. My question to you was: The
23 government stated that you told them that you have more material to

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1 provide them. Is that accurate?

2 LDC [MR. NATALE]: That is accurate, and it's probably only
3 going to be material that comes from public sources and which
4 directly relate to Dr. Welner's qualifications in his ----

5 MJ [COL ACOSTA]: Right.

6 LDC [MR. NATALE]: ---- past testimony and ----

7 MJ [COL ACOSTA]: Yeah. The source is not where I'm at -- is
8 not the concern. It's the fact that you still owe it -- that you
9 said you're going to give it to them and you have not yet.

10 LDC [MR. NATALE]: That's correct.

11 MJ [COL ACOSTA]: Whoever -- somebody needs to work in the
12 background while we're here to provide that to them now, to the rest
13 of the -- to the prosecutorial team so that they can have that
14 material and at least be able to have it in their possession before
15 you start questioning the witness about it. Okay? So ----

16 LDC [MR. NATALE]: Not a problem. I will dispatch my staff to
17 do that.

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

19 ATC [LT SCHWARTZ]: And, Your Honor, just the one problem
20 is -- again, and we informed defense of this -- we don't have
21 printing capabilities here to print hundreds of pages of articles
22 that they have informed me it is, so we would request hard copies of
23 those articles. They indicated they would e-mail them to me, but I

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1 would -- I would need hard copies of those documents.

2 LDC [MR. NATALE]: Judge, we'll have our copy work as -- give
3 her hard copies.

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

5 ATC [LT SCHWARTZ]: And, Your Honor, just one additional. To
6 clarify what we're doing, given the documents I've been given and
7 Mr. Natale's statements just there, I want to clarify. I'm just
8 unsure if whether there is a Daubert hearing that is being held today
9 or if it is just him cross-examining. Because it sounds as though
10 he's already challenging his qualifications and ability to act as an
11 expert. I just want to make sure that I am tracking what we are
12 actually doing today.

13 MJ [COL ACOSTA]: That is part of the -- that is going to be
14 part of the examination of -- the voir dire of the expert could
15 indeed result in a challenge to his qualifications and, therefore,
16 require me to make a determination using Daubert standards and other
17 applicable cases and standards, the Daubert standard, and whether or
18 not I receive his testimony. I can do that.

19 And as lead counsel for the government suggested, that most
20 of the things that would respond to a challenge, the Daubert
21 challenge, would be presented during the -- your presentation of his
22 qualifications as an expert.

23 So it will essentially be a two-in-one. It is -- this is

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1 motions hearing. This is not about his testifying before the
2 commission on these expert issues, on the -- on this expert
3 opinion -- before a panel, pardon me, before the factfinder. This is
4 for me as the -- to rule on the admissibility of the accused's
5 statements under 467. And I will -- and whether or not that opinion
6 is valid or based on -- appropriately based for me to even consider
7 it.

8 ATC [LT SCHWARTZ]: Thank you, Your Honor.

9 And the last thing is, we received notice from defense,
10 either last night or this morning, that they also intend to discuss
11 459 with this witness. And again, the government reiterates this
12 witness should not be used for 459. It should not be questioned or
13 referenced as that is not the motion at issue. And so I just want to
14 stop that before it even begins and bring it to the court's
15 attention.

16 MJ [COL ACOSTA]: You've called him on 467, correct,
17 Government?

18 ATC [LT SCHWARTZ]: That is correct.

19 MJ [COL ACOSTA]: Okay.

20 LDC [MR. NATALE]: Your Honor, the notice that I was given
21 expressly says that he reviewed 459, so I'm sort of confused.
22 Because if that's something that his testimony is based upon and he
23 reviewed, then, you know, it's fair game.

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1 ATC [LT SCHWARTZ]: That's two separate matters, Your Honor.

2 MJ [COL ACOSTA]: Well ----

3 ATC [LT SCHWARTZ]: He has been consulted for ----

4 MJ [COL ACOSTA]: Hold on, Counsel. I know he was consulted,
5 but you stated that he reviewed it in -- did he review it? This is
6 getting into what the -- the body of what I'm going to need to hear
7 later. And I will hear it, to the extent that it's relevant, about
8 what he considered in reaching the opinion that you're asking him to
9 offer to me for 467.

10 I'm not going to give you any advisory ruling before I get
11 to that about hearing what he -- what he considered. If there's
12 testimony about consideration of 459, I'll hear what the defense has
13 to say about that and make the determination at that time. I'm not
14 foreclosing hearing about your expert's consideration of the
15 pleadings and attachments in 459.

16 ATC [LT SCHWARTZ]: And that's fine, Your Honor. My concern
17 was that he was just being called as a witness to that motion ----

18 MJ [COL ACOSTA]: No.

19 ATC [LT SCHWARTZ]: ---- specifically, so that's fine.

20 MJ [COL ACOSTA]: Counsel, they didn't call him as a witness;
21 you did. If he's considered 459 and its attachments, then to the
22 extent that he considered them, it may be relevant. I'm not hearing
23 that right now.

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1 I need to get to Agent Cardon and Ms. Carmon's questions for
2 him regarding 481. I'll hear -- I will hear Dr. Welner on 467 when I
3 get to that point today. Thank you.

4 ATC [LT SCHWARTZ]: Copy that, sir.

5 MJ [COL ACOSTA]: That's enough. All right.

6 Ms. Carmon.

7 DC [MS. CARMON]: Yes, sir. We call Agent Cardon.

8 ATC [MAJ ROSS]: Sir, raise your right hand.

9 **SPECIAL AGENT ANTHONY J. CARDON**, civilian, was called as a witness
10 for the defense, was sworn, and testified as follows:

11 ATC [MAJ ROSS]: Please have a seat.

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

13 MJ [COL ACOSTA]: You may proceed.

14 DC [MS. CARMON]: Thank you.

15 **DIRECT EXAMINATION**

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

17 Q. Good morning.

18 A. Good morning.

19 Q. Am I pronouncing your last name correctly, Cardon?

20 A. Correct.

21 Q. Okay. Good morning, Agent Cardon. I want to start with
22 your background. It is my understanding that you are a Naval Academy
23 graduate; is that correct?

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1 A. Correct.

2 Q. And what year was that?

3 A. 1985.

4 Q. And then tell me about your service, please.

5 A. I was a Marine Corps officer after graduating from the
6 academy, stayed on active duty until 1990 and then went into the
7 reserves after that.

8 Q. And how long did you stay in the reserves?

9 A. Until 2011.

10 Q. And at what rank did you retire?

11 A. Lieutenant colonel.

12 Q. And is it at that time that you joined the Federal Bureau
13 of Investigation?

14 A. No.

15 Q. I'm sorry. After your active duty service, did you join
16 the Federal Bureau of Investigation?

17 A. That's correct. A couple years later. I retired in 1990
18 and didn't join the FBI until 1995.

19 Q. Understood.

20 And between 1990 and 1995, what kept you busy?

21 A. I was a reservist, and I went to school also.

22 MJ [COL ACOSTA]: Sir, can you just pull that microphone a
23 little closer to yourself. Thank you.

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1 WIT: How's that?

2 MJ [COL ACOSTA]: Perfect. Go ahead.

3 Q. And speaking of school, sir, can you give me your
4 educational background, as far as college.

5 A. Yeah. Bachelor of Science from the Naval Academy and then
6 some post-baccalaureate work at the University of Hawaii but without
7 a degree.

8 Q. Understood.

9 Let's talk about the -- when you joined the Federal Bureau
10 of Investigation. Can you talk me through -- is it my understanding
11 that you would have gone to training at Quantico ----

12 A. That's correct.

13 Q. ---- when you first joined?

14 And during that training, am I correct that this is basic
15 agent training, meaning interrogations, interviews, police work,
16 crime scene, that sort of stuff?

17 A. Yes, ma'am.

18 Q. Okay. Did you have any specialized training at that time
19 or later in your career in counterterrorism matters?

20 A. No. Just interview/interrogation training post New Agents
21 Training.

22 Q. And what about language skills, sir? Do you possess
23 fluency in any other language?

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1 A. I don't. The FBI had me do an -- or a short course in
2 Bahasa, Indonesia, because I was spending a fair amount of time in
3 Indonesia.

4 Q. But would not say fluent at that time?

5 A. I think I was one -- you know, zero-plus or one at the
6 time, but not anymore.

7 Q. Understood.

8 Can you please walk us through your assignments in the FBI
9 after you finished New Agent Training at Quantico?

10 A. Sure. After graduation from new agent's training, I was
11 assigned to the Honolulu office.

12 Q. That's not a bad assignment.

13 A. It's -- I was lucky.

14 And in Honolulu -- spent five years in Honolulu, primarily
15 doing criminal work on a violent crimes squad. And then in the
16 summer of 2001, I was transferred to the New York Office and the JTTF
17 in the New York Office where I worked for the next 16 years on the
18 JTTF. And then in early 2017 went down to our Domestic Human
19 Training Center in -- outside of Quantico and taught -- taught there
20 until I retired in 2019.

21 Q. As part of the New York Office and the Joint Terrorism
22 Task Force, what counterterrorism cases were you involved in?

23 A. Obviously everyone was involved in 9/11, PENTTBOM. I was

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1 the case agent for the first Bali bombing, and that was a case that
2 ran roughly -- or I was involved in from roughly 2002, when it
3 occurred, until roughly 2005, when I went to Iraq for a four-month
4 tour for the Bureau.

5 And then there were some other CT cases that -- between
6 19 -- I'm sorry, between 2005 that we worked primarily Hamas until
7 2009, then went to Afghanistan to do an embed tour with a DoD unit;
8 and then came back, was a squad supervisor for roughly two years on
9 the JTTF, worked the Westgate bombing in 2012, and then a myriad of
10 cases between that and when I left the JTTF in 2017.

11 Q. Any involvement with the investigation into the bombing of
12 the USS COLE?

13 A. No.

14 Q. And, sir, since your retirement, what keeps you busy these
15 days?

16 A. I do part-time contract work at the Domestic Human
17 Training Center in -- outside of Quantico, and then there's another
18 USIC schoolhouse up outside of Philly that I do some part-time
19 teaching at.

20 Q. Let me ask some questions about what you've done in
21 preparation for your testimony today. Did you review any documents?

22 A. I reviewed two 302s.

23 Q. And would that be the 4 August and 6 August 302 for

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1 Mr. Salim Hamdan?

2 A. I believe so. There was one long one and then there was
3 one very short one.

4 Q. And the very short one is just, like, a paragraph?

5 A. Correct.

6 Q. Okay. Did you meet with the government at all to discuss
7 your testimony?

8 A. I did.

9 Q. And how many times did you meet with the government?

10 A. If you count yesterday, it would be two times.

11 Q. Okay. And were you made aware that I had been -- I had
12 requested to speak with you as well?

13 A. Yes.

14 Q. Okay. And you declined that?

15 A. Correct.

16 Q. Let me take you to Guantanamo Bay in 2002. When did you
17 arrive, if you can remember the month?

18 A. I think mid-July.

19 Q. And am I using the correct terminology, you were TDY there
20 for about a month?

21 A. Yes, ma'am.

22 Q. Okay. Did you arrive to be part of the Criminal
23 Investigative Task Force, CITF?

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1 A. Yes.

2 Q. And so you arrived, you said, mid-July. Am I correct that
3 you would have then left mid-August?

4 A. Yes.

5 Q. Was that your one and only TDY to Guantanamo Bay?

6 A. I came back in 2007 or 2008 in preparation for a trial but
7 didn't have to testify, so I spent, I don't know, two or three weeks
8 there but didn't end up testifying.

9 Q. And was this the trial for Mr. Salim Hamdan that you were
10 preparing for?

11 A. You know, I don't even recall.

12 Q. And you said you -- whatever trial it was, you did not
13 testify?

14 A. No.

15 Q. Let me ask you some questions about CITF.

16 Am I correct that this task force involved multiple DoD
17 elements and federal law enforcement?

18 A. To the best of my knowledge, yes.

19 Q. And would it also have involved members of military
20 intelligence?

21 A. I don't recall. I would think so, but I for sure can't
22 say yes or no.

23 Q. And what about members from other government agencies?

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1 A. Other than task force officers, like, from the JTTF or
2 something like that, I don't recall any others.

3 Q. The -- when you were in Guantanamo Bay in that summer of
4 2002, the head of CITF at that time was Colonel Brittain Mallow.
5 Does that name ring a bell for you?

6 A. No.

7 Q. What about the deputy who would have been an NCIS agent,
8 Mark Fallon?

9 A. No.

10 Q. Do you recall anybody else being in your chain of command
11 who you would have reported to as part of that TDY?

12 A. Yeah. There was an SSA down there who was basically our
13 DET OIC.

14 Q. And who was that, if you can remember?

15 A. You know, that's a great question. Because he was a good
16 guy, but I can't -- I can't recall his name.

17 Q. While you were there, were you part of a tiger team? Does
18 that -- do you recall being part of a team composed of -- there would
19 have been an FBI agent, some other CITF, DoD elements, military
20 intelligence, a linguist, that operated together? Does that sound
21 like the composition of interrogation teams that you were part of?

22 A. The term doesn't ring a bell.

23 Q. Who would have been -- if the term doesn't ring a bell,

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1 did you otherwise operate with a team of the same linguist, agent,
2 military intel, in doing interrogations?

3 A. You know, I really -- I can't recall. It's -- I
4 don't -- I don't recall.

5 Q. Am I correct to assume that you were TDY there to do
6 interrogations and interviews?

7 A. Yes.

8 Q. Okay. Were you giving -- excuse me. Were you given any
9 special tasking, any special topic, or any special intel service
10 requirements -- or intel requirements to service, rather, during your
11 TDY?

12 A. I'm sure at some point that we were -- usually when we're
13 doing interrogations or interviews, there is a -- you know, okay,
14 this is what we're trying to uncover. I'm sure that daily -- you
15 know, each time we would go in to do the interviews, there was
16 something they -- that we were aiming to get or to at least further
17 investigate, but -- as far as overriding the safety of Americans and
18 especially troops that were on the ground overseas.

19 Q. Was it your understanding that even as part of the FBI, as
20 a law enforcement agent, that you were being TDY on an
21 intelligence-gathering mission, that what you were doing was
22 gathering intelligence?

23 A. Evidence is what we were looking to gather. How they used

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1 that evidence was beyond my scope. But gaining evidence, additional
2 information about things that would potentially harm the U.S. or
3 things that have harmed the U.S. and we're following up on, so those
4 were the -- that was the crux of our interviews.

5 Q. Do you recall any agents who were TDY with you at the same
6 time?

7 A. Ali Soufan was a colleague of mine that I had the pleasure
8 of working with down there. Bill Corbett, who was the admin agent
9 down there out of Miami. Those are the two that come to mind.

10 And then the OIC, Scott. I forget what Scott's last name
11 was or...

12 Q. Do you recall seeing NCIS Agent Michael St. Ours, or
13 Michael St. Ours, there?

14 A. I don't recollect it.

15 Q. Either prior to your TDY or once you were on island, did
16 you ever attend a briefing given by the Joint Personnel Recovery
17 Agency on the exploitation of detainees for intelligence purposes?

18 A. Not that I recall.

19 Q. And either before you left or once you got on island, did
20 you attend any sort of briefing about the interrogations that you
21 would be doing and any directives about how you were to go about
22 those interrogations?

23 A. None that I recall. I would have thought that -- that

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1 there probably was something, some type of training that we attended,
2 but I don't recall -- excuse me -- specifically any of it.

3 Q. Do you recall being told that in the course of these
4 interrogations that you are not to give the formal Miranda rights?
5 Do you recall that directive?

6 A. I don't. I don't recall that.

7 Q. Do you recall ever reading rights, either with an FD-395
8 or some other like form, to anyone that you interrogated?

9 A. If I did, it would have been documented in a 302. So I
10 don't specifically recall, but I would think a 302 would reflect that
11 having occurred.

12 And if somebody had been read their rights previously, I
13 think there -- unless they revoked that, we would have just continued
14 on under the assumption that they had already ----

15 Q. That they had already waived it once?

16 A. They had already -- yes.

17 Q. Understood.

18 Who -- how, I guess is a better question. How did you get
19 the assignments for whom to interview or interrogate while you were
20 there? Who gave those ----

21 A. I think the OIC did.

22 Q. Say that one more time.

23 A. The officer in charge or our DET OIC probably did it, or

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1 maybe Billy Corbett, the admin agent out of Miami.

2 Q. And so when you were TDY about to leave, was it your
3 understanding that you were going to interview a specific person that
4 was there or that you would be available to interview whomever you
5 were assigned?

6 A. The latter. I would just be available to interview.

7 Q. Okay. Do you recall how many interviews you conducted
8 while TDY that month?

9 A. Exact number, I don't know.

10 Q. Could you give me a ballpark? Is it tens? I'm assuming
11 it's not hundreds, but ----

12 A. It would probably be -- if we were there for 30 days, at
13 least 15 interviews.

14 Q. Do you recall doing interviews daily or were there some
15 days that you did not have such an assignment?

16 A. For the most -- I would say 90 percent of the time, you
17 were -- you were prepared to do an interview, and if one came up, you
18 would do it. I don't specifically remember saying, okay, you're
19 going to have a day off today. I know that there -- there was at
20 least free time -- there were times when we -- I didn't have to do
21 anything. But the vast majority of the time, I was there to
22 interview folks if they were available.

23 Q. Let me ask you some questions about interrogations that

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1 you conducted at Guantanamo Bay and sort of just general practice,
2 atmospheric, things that you remember.

3 Do you recall that the interviewee, or the person being
4 interrogated, was restrained in any way during your questioning?

5 A. They would come to us restrained. And if for some reason
6 they were agitated at the time of being brought into the
7 interrogation room, probably for officer safety, would have kept them
8 restrained until either the -- either we felt that it was no longer
9 an officer safety issue, but that's...

10 Q. Am I understanding correctly that it would be in your
11 discretion whether or not to have someone unrestrained depending on
12 how you perceived the threat or not threat to be?

13 A. It would be an officer safety issue.

14 Q. Okay. Now, when CITF was on the ground doing these
15 interrogations, do you also recall that military intelligence
16 interrogations were happening?

17 A. I don't specifically. My concern was -- was whatever the
18 FBI was doing down there.

19 Q. Did you ever go -- show up to question a detainee to find
20 that that person was not available because they were being questioned
21 by military intelligence or some other party? Did that ever happen?

22 A. Not that I recall.

23 Q. Do you recall having to coordinate your assignments with

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1 any other parties to make sure that you would have access to your
2 assigned detainee?

3 A. Not that I recall. Again, I would think the OIC would
4 handle that stuff.

5 Q. In terms of who was present during these interrogations,
6 would you often go as the lone FBI agent or would there be other law
7 enforcement in the room?

8 A. I think for the majority of them, we would pair up. I'm
9 sure that there were a couple times that -- there may be a time or
10 two that I went by myself. But usually, if it was, it was just to
11 answer the mail on something like that one 302.

12 Q. Doing a check-in ----

13 A. Yes.

14 Q. ---- or asking just a follow-up question?

15 A. Yeah, or, whatever, a welfare check or whatever, like I
16 said, yeah.

17 Q. And other than the law enforcement, yourself and/or a
18 partner in the room, was there ever military intelligence officers
19 also participating at the same time or just observing your
20 interviews?

21 A. Yeah, I don't recall.

22 Q. Do you recall anyone belonging to any other government
23 agency being in the room with you during these interviews?

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1 A. There was probably some -- there was probably one or two
2 where I had an enlisted soldier in there. But I don't even remember
3 the specifics of it.

4 Q. Do you recall if any of these interrogations or interviews
5 that you did were recorded in any way?

6 A. I don't recall.

7 Q. Were you aware of the ability for others outside of the
8 room to watch in real time, to be able to observe your interviews?

9 A. Yes.

10 Q. And was that happening behind a one-way mirror?

11 A. For the most part, yes.

12 Q. Were you aware of the ability to watch and listen via any
13 electronic capabilities in real time?

14 A. One more time?

15 Q. Were you aware of any capabilities to watch and listen to
16 these interviews outside the room in real time through any electronic
17 means?

18 A. Like CCTV or something like that?

19 Q. Correct.

20 A. That may have been -- I just -- I don't recall
21 specifically if it was available, but it would make sense if it was.

22 Q. Do you recall who was observing or what agencies or what
23 departments these people may belong to that were observing your

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1 interviews?

2 A. I don't recall. I mean, there were a couple that I had
3 actually observed from the outside. But other than that, I don't
4 have specifics on who would have been observing me.

5 Q. Were there ever times that you would take breaks to
6 consult with people who were observing?

7 A. I'm sure that there were.

8 Q. And so, like, perhaps an analyst or another officer?

9 A. Yes.

10 Q. Okay. Let me circle back to some of the information or
11 directives you may or may not have been given prior to these
12 interviews.

13 Were you ever given any direction about asking or not asking
14 about the detainees' prior confinement status, where they'd been
15 held, how they'd been treated? Did you have any direction on that?

16 A. I don't recall.

17 Q. If a detainee had made any sort of allegations of abuse
18 where they were held prior or about their prior custody, did you have
19 any direction on how to document that or where to take that
20 allegation?

21 A. It would either have been documented in a 302, the results
22 of the interview or interrogation, or advised the OIC of the
23 information.

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1 Q. Did you have a discussion or do you recall a discussion
2 amongst your colleagues about what to do if you observed pressure
3 techniques being used against detainees that would not have been
4 available to American law enforcement? And so if you saw coercive
5 measures that would have been outside the bounds for U.S. law
6 enforcement, was there ever a discussion of how to report that or
7 what to do?

8 A. Not really. It would have been, again, use your chain of
9 command to ----

10 Q. But you don't recall any sort of formal briefing or
11 discussion about the ----

12 A. I don't.

13 Q. Let me jump forward, just a couple of years, to June of
14 2004. At this point, the FBI's doing its internal investigation to
15 ask if people TDY to GTMO had observed cruel treatment or
16 mistreatment of detainees. There was an e-mail that was sent out, I
17 think in June of 2004, to folks like you who would have been TDY
18 during this period.

19 Do you recall getting an e-mail from your chain of command
20 or from the heads of the department asking if you had observed
21 mistreatment of detainees at GTMO?

22 A. In June of 2004, I was either over in Indonesia or getting
23 ready to go to Iraq. So I -- no, I don't recall.

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1 Q. And I guess more pointedly, did you ever observe any
2 mistreatment that you had to report while you were there that month?

3 A. I did not.

4 Q. So never observed any detainees being short-shackled,
5 unable to move in their cell?

6 A. No.

7 Q. Didn't see that?

8 Did you ever show up to an interrogation or an interview and
9 the detainee says to you, I've already been interviewed by the FBI?

10 A. Other than -- like, interviewed that day by the FBI
11 or ----

12 Q. Sorry. Let me be a little bit more clear.

13 One of the allegations in this investigation is that DoD
14 personnel were impersonating FBI agents. Did you ever observe that
15 or did you ever hear from a detainee, hey, I've already talked to the
16 FBI even though you knew that not to be true?

17 A. No.

18 Q. Were you aware of that practice?

19 A. I was not aware of it.

20 Q. All right. Let me move you to Mr. Hamdan specifically.
21 Who is he, just in general terms, Mr. Salim Hamdan?

22 A. I don't recall. Obviously I read the long 302, so he was
23 somebody who could provide a fair amount of information. But other

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1 than that, I don't know.

2 Q. In preparation for -- well, I guess let me back up.

3 Did you have a chance to prepare to interview Mr. Hamdan,
4 meaning were you told this is the guy for tomorrow, and here's a
5 file, please look through it?

6 A. We would have, and I think Ali was familiar with him, and
7 so a lot of -- I was basically a scribe for Ali because he had so
8 much institutional knowledge, and I at that point did not.

9 Q. Do you recall -- excuse me.

10 Do you recall reviewing a military intelligence file from
11 prior intel collection for Mr. Hamdan?

12 A. Specifically, no.

13 Q. Do you recall reading any 302s that had previously been
14 written from results of interviews of Mr. Hamdan?

15 A. I don't specifically remember any, but it would -- I would
16 have had the opportunity to review files prior to going into an
17 interview or an interrogation.

18 Q. Okay. Let me ask about your awareness of any conditions
19 of confinement or prior custody of Mr. Hamdan prior to you commencing
20 your interview.

21 Prior to his interview, were you aware of any of the
22 circumstances surrounding his arrest?

23 A. I was not. I mean, I may have at the time. I

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1 don't -- nothing that I recall.

2 Q. Were you aware of anything related to his custody or his
3 interrogations at Bagram?

4 A. Again, not that I recall.

5 Q. I'll represent to you that there were multiple
6 intelligence information reports, IIRs, disseminated from Bagram.
7 Would those have been the types of products that you would have read
8 in preparation to interview Mr. Hamdan?

9 A. We probably would have had access to them. I don't know
10 if it would be in his case file or whatever, but we would have had
11 access to them.

12 Q. Okay. And those would have been the types of things you
13 would have reviewed in preparation; is that fair to say?

14 A. I would say 302s and IIRs, potentially.

15 Q. Okay. Did you have any awareness about his custody or
16 interrogations that occurred at Kandahar?

17 A. No.

18 Q. Were you aware that FBI Special Agent Robert Fuller -- are
19 you familiar with him? Do you know who he is?

20 A. Yeah.

21 Q. Okay. He interrogated Mr. Hamdan at Kandahar. Did you
22 ever speak to him about that?

23 A. I've talked to Rob. Rob's a good friend. But

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1 specifically about Hamdan, I don't know. But he still gives me a
2 hard time because we -- when we went back for the trial, he ended up,
3 I think, having to testify and I didn't, so ----

4 Q. Okay.

5 A. ---- I caught grief from him.

6 Q. He did, in fact, have to testify.

7 Do you recall ever seeing any 302s or results of interviews
8 done by Agent Fuller that were coming out of Kandahar prior to your
9 interview with Mr. Hamdan?

10 A. I -- if there were -- I didn't know Rob at that point, so
11 it wouldn't have been noteworthy.

12 Q. So how do you come to be assigned to interview Mr. Hamdan?

13 A. I don't know. The OIC said this is who you're assigned
14 to, so...

15 Q. Do you recall how many times you met with Mr. Hamdan
16 during your one-month TDY period?

17 A. I've seen two 302s that have my name on them, so I would
18 say at least twice. I -- at least twice.

19 Q. Do you recall or do you have any independent memory of
20 meeting with him more than that?

21 A. Not that I recall.

22 Q. And so you said you have reviewed the 4 August 302; is
23 that right?

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1 A. The short one.

2 Q. The short one.

3 A. Yeah.

4 Q. And this is just, I think, a welfare check to see if he'd
5 heard from his family; is that accurate?

6 A. According to the 302, yes.

7 Q. Were you aware if at that time Mr. Hamdan was being given
8 incentive items, like food from the outside, phone calls with family?
9 Are you aware of any of that?

10 A. Not that I recall.

11 Q. Did you personally or your partner, Agent Soufan
12 at -- during these interrogations, did you observe him or did you
13 personally give Mr. Hamdan any incentive items, like a fish sandwich
14 from McDonald's or a blanket or a book for his cell?

15 A. Not that I recall.

16 Q. If those incentive items had been handed over during one
17 of the interviews or interrogations, would that have been noted in
18 the 302?

19 A. It may have been. It may have been or it may not have
20 been. I'm not...

21 Q. So let's talk, from what you remember, about the
22 6 August 2002 statement, which is the one at issue here.

23 The 302 reads that you were present during portions of the

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1 interview. Can you tell me about that?

2 A. I can't. I don't recall the interview, specifically
3 recall the interview itself. And -- so I don't have any specifics on
4 that other than the 302 says I was present for part of it.

5 Q. Do you recall where the interview was taking place?

6 A. Not -- I would just venture to guess it was at the regular
7 detention facility.

8 Q. Do you have any independent memory, or any memory at all,
9 of the room where it took place or what it looked like?

10 A. Not specifically.

11 Q. And when you say not specifically, you could tell me it's
12 like a 10-by-10 room somewhere over there, but ----

13 A. Yeah. And again, from my recollection, generally the
14 rooms were, you know, an interview room, chair, maybe table with a,
15 you know, one-way mirror on one of the walls.

16 Q. Did -- do you recall if during this 6 August 2002
17 statement that -- if Mr. Hamdan was restrained in any way?

18 A. I don't recall.

19 Q. Could you tell me what Mr. Hamdan looked like?

20 A. I couldn't.

21 Q. Could you pick him out of a lineup?

22 A. If you show me a lineup, I can try, but I probably
23 couldn't.

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1 Q. And so if I were to ask you details about how he presented
2 or, you know, if he looked stressed or tired or very happy, do you
3 have any of those details available to you?

4 A. I don't.

5 Q. Do you recall ever consulting with a behavioral science
6 consultation team, a BSCT, prior to interviewing Mr. Hamdan?

7 A. I don't.

8 Q. Does that name or does that acronym ring a bell to you at
9 all?

10 A. It doesn't. I know that there -- what I call BAU, had
11 stopped in at some point during the four weeks that I was down there.

12 Q. And that's the FBI's Behavioral Analysis Unit?

13 A. It is.

14 Q. Okay.

15 A. But I don't even remember specifically what they were
16 there for.

17 Q. So I know that Agent Soufan is fluent in Arabic. The
18 portions that you were present for, do you have any recollection as
19 to how you were being told what was said?

20 A. Not specifically.

21 Q. Would there have been a separate linguist there or, in
22 your experience with Agent Soufan, would he have just translated for
23 you?

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1 A. Specifically, I don't remember, but I -- yeah,
2 specifically I don't remember.

3 Q. Did you ever -- did you ever meet with Mr. Hamdan after 6
4 August, to your memory?

5 A. Not that I recall.

6 Q. And you said you were -- it sounds like maybe you were
7 consulted about testifying but ultimately did not have to testify in
8 his trial?

9 A. Correct.

10 Q. And so if I were to ask you details from this 6 August
11 statement, would you be able to give me even topics of discussion
12 between the agents and Mr. Hamdan?

13 A. The agent, like ----

14 Q. The agent.

15 A. ---- Ali? Okay.

16 I just remember that there were individuals he
17 was -- that -- that were identified during interview.

18 Q. And he was asked to identify via photograph; is that
19 right?

20 A. According to a 302, I believe.

21 Q. And other than the 302, do you have any independent
22 recollection of photographs that were shown or topics that were
23 discussed ----

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1 A. I don't.

2 Q. ---- with Mr. Hamdan?

3 A. No.

4 Q. Is there -- are there any details that you could give me
5 about Mr. Hamdan's conditions of confinement at Guantanamo Bay? Did
6 you ever see where he was being held or discuss that with anyone?

7 A. No. I've -- I've walked through the detention facility,
8 I'm sure, at some point, and nothing appeared noteworthy that stuck
9 in my mind.

10 Q. But you weren't specifically shown this is where
11 Mr. Hamdan stays?

12 A. No. Not that I recall.

13 DC [MS. CARMON]: Court's brief indulgence, please.

14 MJ [COL ACOSTA]: Go ahead.

15 **[Counsel conferred.]**

16 DC [MS. CARMON]: Agent Cardon, I think that concludes my
17 questions. Thank you so much.

18 WIT: Thank you.

19 MJ [COL ACOSTA]: Government, any cross?

20 ATC [MAJ ROSS]: Yes, Your Honor.

21 **CROSS-EXAMINATION**

22 **Questions by the Assistant Trial Counsel [MAJ ROSS]:**

23 Q. Agent Cardon, you joined the FBI in 1995; is that correct?

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1 A. That's correct.

2 Q. And you previously served as an officer in the Marine
3 Corps?

4 A. I did.

5 Q. And your first posting at the FBI was in Hawaii?

6 A. Correct.

7 Q. And you were there several years?

8 A. Yes.

9 Q. And then you went to the New York Field Office?

10 A. Correct.

11 Q. And that was in 2001?

12 A. Correct.

13 Q. Just a short time before 9/11?

14 A. Correct.

15 Q. And when you were assigned to the New York Field
16 Office you were on the JTTF, right?

17 A. Correct.

18 Q. That's the Joint Terrorism Task Force?

19 A. That's correct.

20 Q. And your specific squad on that team was I48, right?

21 A. Correct.

22 Q. And what they do is they investigate terrorism cases that
23 don't relate to al Qaeda, right?

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1 A. Yes.

2 Q. And you went to Guantanamo Bay in the summer of 2002?

3 A. Correct.

4 Q. You said you were only there a few weeks?

5 A. Correct.

6 Q. And your mission there was to interview detainees,

7 correct?

8 A. Correct.

9 Q. Assist with interviews?

10 A. Yes.

11 Q. And you're not fluent in Arabic?

12 A. I am not.

13 Q. And at the time, you're not -- you weren't an expert in

14 al Qaeda, right?

15 A. Not -- I'm still not, but I wasn't at the time.

16 Q. And you were paired up with Agent Ali Soufan, correct?

17 A. I was.

18 Q. And he is fluent in Arabic, right?

19 A. To the best of my knowledge.

20 Q. And at the time, he had been working al Qaeda cases for

21 several years at that point, right?

22 A. He had been, yes.

23 Q. Didn't work with any other government agencies, correct?

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1 A. None -- non -- only JTTF -- JTTF personnel are the only
2 ones that come to mind.

3 Q. That would be, like, a DoD linguist?

4 A. Yeah, there -- probably DoD linguists and potentially an
5 enlisted soldier from the Army there.

6 Q. Prior to coming into court today, you had a chance to
7 review those two 302s, right?

8 A. I did.

9 Q. And after reviewing the 302s, you still can't remember
10 meeting with Mr. Hamdan?

11 A. I can't.

12 Q. Can't pick him out of a lineup?

13 A. I -- if it's a six-person lineup, I've got a one-sixth
14 chance of picking him out.

15 Q. Don't recall what he did for al Qaeda?

16 A. Other than knowing a number of individuals of import, I
17 don't recall.

18 Q. But Ali Soufan had interviewed him previously, right?

19 A. There was probably a relationship there.

20 Q. For lack of a better term, this was his case?

21 A. Again, I knew he had the COLE case. So at that point, if
22 Hamdan was associated with the COLE case, then he would have been
23 somebody that Ali was aware of.

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1 Q. Okay. And you realize that you're testifying today in a
2 prosecution related to the COLE case, right?

3 A. Well, yes. Although it's Hamdan-specific, that is ----

4 Q. Yeah. You went back to Guantanamo Bay in 2008?

5 A. Roughly then, yes.

6 Q. And that was to testify at a trial, right?

7 A. Correct.

8 Q. And you met with the prosecution?

9 A. **[Indicated]**.

10 Q. And you weren't called as a witness, right?

11 A. Correct.

12 Q. Defense didn't call you?

13 A. Defense did not, no.

14 Q. Prosecution didn't call you?

15 A. No. Much to Rob Fuller's chagrin.

16 Q. And then you went home, right?

17 A. I did.

18 Q. While you were at Guantanamo Bay in 2002, you had an
19 opportunity to observe where the detainees were housed, correct?

20 A. I did, at one point or two.

21 Q. And you had an opportunity to watch the guards interact
22 with the detainees too, right?

23 A. I did.

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1 Q. You saw them being transported to the interview rooms,
2 right?

3 A. Walked over there, yes.

4 Q. You didn't see anything indicative of mistreatment, did
5 you?

6 A. No.

7 Q. Didn't see anything indicative of abuse?

8 A. Nothing that, again, stands out in my mind.

9 Q. And no detainee-reported abuse, correct?

10 A. Correct.

11 Q. No detainee-reported mistreatment, correct?

12 A. Correct.

13 Q. You didn't see anything there that exceeded what law
14 enforcement would do in the United States, right?

15 A. That's correct.

16 ATC [MAJ ROSS]: Mr. Cardon, thanks for answering my
17 questions. That's all I have for you, sir.

18 MJ [COL ACOSTA]: Defense, any redirect?

19 DC [MS. CARMON]: No, sir. Thank you.

20 MJ [COL ACOSTA]: Permanent for the purpose of this motions
21 hearing?

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

23 MJ [COL ACOSTA]: Any objection?

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1 ATC [MAJ ROSS]: No, Your Honor.

2 MJ [COL ACOSTA]: All right. Mr. Cardon, you're -- for the
3 purpose of this hearing you're permanently excused. Do not discuss
4 your testimony or your knowledge of this case with anyone other than
5 counsel for either side. You can step down and return to your day.

6 WIT: Thank you.

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

9 MJ [COL ACOSTA]: All right, Government -- specifically
10 Lieutenant Schwartz -- how long do you need?

11 ATC [LT SCHWARTZ]: I would say if I can have until 1400 to
12 wait for -- defense is, I know, gathering the documents. I think we
13 can finish the direct and cross of qualifications today, Your Honor,
14 to give us tomorrow for the rest.

15 MJ [COL ACOSTA]: 1400? You need all ----

16 ATC [LT SCHWARTZ]: Yes, sir.

17 MJ [COL ACOSTA]: Four hours?

18 ATC [LT SCHWARTZ]: Ideally. I don't have the documents yet,
19 Your Honor, so I still don't know what we're looking at.

20 MJ [COL ACOSTA]: Okay. Defense?

21 LDC [MR. NATALE]: No problem, Your Honor, with that.

22 MJ [COL ACOSTA]: All right.

23 LDC [MR. NATALE]: I can report to the court that I have

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1 dispatched my staff, and they are making hard copies of the requested
2 materials.

3 MJ [COL ACOSTA]: All right. Given that the copies are still
4 being made, I'll give you to 1400, and then we're going to start back
5 up then with the examination of Dr. Welner.

6 I do have defense counsel here. Mr. Padilla would like to
7 speak to me, so I'm going to let him talk to me now.

8 DC [MR. PADILLA]: Judge, I'm sorry. If you can just give us
9 a minute so I can talk to the people down south before we ----

10 MJ [COL ACOSTA]: You're down south. You want to talk to the
11 people up north?

12 DC [MR. PADILLA]: I'm sorry, up north, yes.

13 MJ [COL ACOSTA]: Go ahead.

14 **[Counsel conferred.]**

15 MJ [COL ACOSTA]: Mr. Padilla, anything else?

16 DC [MR. PADILLA]: No, Judge. Thank you so much.

17 MJ [COL ACOSTA]: Okay. All right. If there's no objection,
18 we're going to -- well, regardless, we're going to recess until 1400
19 to take up Dr. Welner.

20 The commission is in recess until 1400.

21 **[The R.M.C. 803 session recessed at 1005, 19 April 2023.]**

22 **[The R.M.C. 803 session was called to order at 1402, 19 April 2023.]**

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

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1 Government, all parties present as before?

2 TC [MR. O'SULLIVAN]: Except Ms. Sanders, yes, Your Honor.

3 MJ [COL ACOSTA]: Defense?

4 LDC [MR. NATALE]: Yes, Your Honor, except we now have the
5 appearance of Lieutenant Colonel Nettinga.

6 MJ [COL ACOSTA]: Thank you.

7 All right. During the recess, the commission staff received
8 communications regarding the excusal of Mr. Soufan. Mr. Soufan has
9 already been excused from this session with the anticipation that
10 he's going to be coming back in June.

11 Further, I want to set the expectations for how we're going
12 to proceed for this expert testimony that we're going to receive
13 today.

14 The government is going to -- this is what I want and what
15 will occur. The government can present the qualifications of the
16 expert for his individual qualifications and his training, et cetera,
17 that would make him -- that would qualify him as an expert.

18 Defense, you can question him on that, on his individual
19 qualifications.

20 Government, then you can present what he did to reach his
21 opinions and what his opinion is.

22 Defense, you can then question, as you intend to do, the
23 basis of his opinions and the -- whether or not those should be

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1 considered.

2 The commission is already aware of what his opinions are
3 proffered to be, as you've presented them in your motion. There's no
4 risk that any panel is -- or jury is going to hear that opinion
5 because I'm not a jury, I'm not a panel. And I assure you of my
6 ability to -- if his opinion is not based upon the appropriate
7 factors or substantial evidence, that I can disregard it; and I will
8 make a ruling as such if he's -- if it is necessary after your
9 presentation.

10 So we'll do the regular qualification of the -- of the
11 expert, questioning of that, Defense, if you wish, on his education
12 and experience, et cetera. And then we'll go into the government's
13 presentation of what his opinion is and the foundation for that
14 opinion in this case.

15 And then, Defense, you are -- you have full rein to question
16 all of the quality and the admissibility and potential whether or not
17 the court -- the commission should even consider it based upon that
18 foundation. Understood?

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

20 ATC [LT SCHWARTZ]: Yes, Your Honor.

21 MJ [COL ACOSTA]: All right. Anything else to take up before
22 the government calls Dr. Welner? Government?

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

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1 ATC [LT SCHWARTZ]: Nothing from the government.

2 MJ [COL ACOSTA]: Defense?

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

4 MJ [COL ACOSTA]: Okay. Government, you may proceed.

5 ATC [LT SCHWARTZ]: The government calls Dr. Michael Welner to
6 the stand.

7 MJ [COL ACOSTA]: Lieutenant Schwartz, I want to remind you
8 before you get started, we're still being -- things are still being
9 translated today. This is not a -- we had issues with it yesterday.
10 I'm trying to make sure that I don't have those issues again today.
11 Thank you.

12 ATC [LT SCHWARTZ]: Copy that.

13 Dr. Welner, will you please raise your right hand. I'll
14 swear you in.

15 **MICHAEL WELNER, M.D., civilian, was called as a witness for the**
16 **prosecution, was sworn, and testified as follows:**

17 ATC [LT SCHWARTZ]: Thank you. Please take a seat.

18 And just to coordinate you to the courtroom, the military
19 judge is down in Guantanamo. You should have him on your screen. He
20 is able to see you and hear you just fine, so you're free to keep
21 looking where you are right now.

22 WIT: Okay.

23 **[END OF PAGE]**

1

DIRECT EXAMINATION

2 **Questions by the Assistant Trial Counsel [LT SCHWARTZ]:**

3 Q. Dr. Welner, can you please state your full name for the
4 record.

5 A. Sure. My name is Michael Welner, W-E-L-N-E-R, M.D.

6 Q. What is your current occupation?

7 A. I am a forensic psychiatrist and a psychiatrist.

8 Q. And where are you a forensic psychiatrist currently?

9 A. I am based in Palm Beach County, Florida.

10 Q. With what company?

11 A. I'm chairman of The Forensic Panel.

12 Q. Can you please just describe to us what is The Forensic
13 Panel?

14 A. The Forensic Panel is a multidisciplinary, multispecialty
15 practice that consults on a variety of criminal and civil litigation
16 across medical and other specialties.

17 Q. And we'll get into a few more details about that later.

18 Specifically to today, what were you requested to do in this
19 hearing that we're here for today?

20 A. I have been consulting to you on the -- on this particular
21 matter. But for this hearing, I have been asked to specifically
22 address questions raised by the motion to suppress. And I've been
23 asked to speak to whether Mr. Nashiri -- at the time that he offered

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1 his self-incriminating statements on January 31st, February 2nd, and
2 March 14th, 2007, whether he had the ability to do so and exercise
3 choice in the process.

4 I was asked that -- whether during that relevant period,
5 what symptoms might be present of any particular diagnosis and
6 whether any symptoms of a diagnosis or some kind of psychiatric
7 condition impacted during that time on his ability to make the choice
8 of whether to participate and offer statements as he did.

9 Q. Thank you. And I want to go first just over your
10 qualifications for your background.

11 Can you please inform the court: Where did you go to
12 medical school?

13 A. I went to the University of Miami in Florida, and
14 graduated from there in 1988 and got my M.D.

15 Q. And after medical school, did you go through any residency
16 periods?

17 A. After medical school, I did a rotating internship in
18 emergency medicine and medicine and psychiatry at Beth Israel Medical
19 Center in New York and completed that in 1989. Following that I did
20 a residency in psychiatry from 1989 until 1992 at Beth Israel Medical
21 Center, also in New York.

22 Between 1991 and 1992, I completed a part-time fellowship in
23 forensic psychiatry at the University of Pennsylvania at

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1 Philadelphia, concurrent with my residency completion in 1992 at Beth
2 Israel Medical Center.

3 Q. And to break down a few of the terms, what is a
4 fellowship?

5 A. A fellowship is postgraduate training. It's particular
6 focus on a subspecialty area. So within medicine, areas are sub and
7 then further subspecialized. You can be a gastroenterologist or you
8 could be an interventional gastroenterologist. You could be a
9 gastroenterologist and then you could further specialize in
10 hepatology. And so it is with psychiatry. There are a variety of
11 subspecialties. For example, geriatric psychiatry, substance abuse
12 psychiatry, child psychiatry, forensic psychiatry ----

13 MJ [COL ACOSTA]: Doctor -- Doctor -- Doctor, I'm going to
14 need you to slow down. As I was telling Lieutenant Schwartz before
15 she began, we're -- as you're speaking, your words are being
16 translated live to the accused who is listening, and it is impossible
17 for our translators to keep up with your translation -- with the
18 translation at this time if you don't pause occasionally and take a
19 beat to allow the translation to occur smoothly. Just keep that in
20 mind as you continue your testimony.

21 You may continue.

22 WIT: Yes, Your Honor.

23 ATC [LT SCHWARTZ]: Thank you, Your Honor.

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1 Q. And you spoke just now -- you were discussing the
2 subspecialties to psychiatry to include forensic psychiatry. What is
3 forensic psychiatry?

4 A. Forensic psychiatry is the intersection between psychiatry
5 and the law. And put another way, it's how law -- it's how
6 psychiatry, as a brain science, gets applied to legal questions and
7 within what we call litigation or legal cases.

8 Q. And did you go on to specialize in forensic psychiatry?

9 A. I've gone on in -- subsequent to my training, into a
10 career in which forensic psychiatry has been part of my practice and
11 increasingly all of my practice.

12 Q. What was required in order for you to attain a
13 specialization in forensic psychiatry?

14 A. Well, I was board certified in forensic psychiatry
15 in -- first board certified in 1996 and then subsequently recertified
16 in 2006 and then recertified in 2017. It's not a requirement, but
17 there is a percentage of those who practice forensic psychiatry who
18 are board certified because it enables one to make sure that you can
19 demonstrate proficiency in core qualities and core subject matter
20 areas of psychiatry and the law and how they're evolving.

21 Because psychiatry, and forensic psychiatry is no exception,
22 there are always new things. There are always things changing. And
23 certification allows one to demonstrate that you're keeping up with

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1 things.

2 Q. So from what you understand, board certification and
3 recertification is a way to ensure that the quality of practice is
4 maintained ----

5 A. Yes.

6 Q. ---- would that be fair?

7 A. That's why it's there.

8 Q. And how often is it recommended that one becomes
9 recertified in an area?

10 A. It depends on the area. In forensic psychiatry,
11 the -- the expectation is if you're going to certify, that you
12 recertify every ten years if you can. Some people choose to; some
13 people don't. I find it healthy to do that, and I plan to continue
14 to do it.

15 Q. You ----

16 A. Depending on your subspecialty, different subspecialties
17 have their own rules and requirements.

18 Q. Okay. And you mentioned previously in your experience
19 that you worked for a period of time at Bellevue. Can you ----

20 A. Yes.

21 Q. ---- tell us about your work that you conducted at
22 Bellevue?

23 A. Yes. Following -- when I finished my training in 1992 and

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1 began my practice, I began practice on two tracks. One, I assumed a
2 full patient load of just clinical care patients in a private
3 practice; and then separately, I had a full-time, which was, for all
4 intents and purposes, 9:00 in the morning until 3:00 in the
5 afternoon, attending physician position at the Correction Psychiatry
6 Unit at Bellevue Hospital in New York, New York.

7 Q. And what type of patients would you see whenever you began
8 practicing at Bellevue?

9 A. The Correction Psychiatry Unit at Bellevue is where
10 pretrial detainees are sent. If somebody is arrested and they
11 haven't gone to trial, they will typically be housed in the jails;
12 and if they have mental health needs, the jails will take care of
13 them.

14 But if those needs become too pronounced and it's too much
15 for the staffing or the expertise or even just the safety of the jail
16 to handle, they will send those patients, those individuals, to
17 Bellevue Hospital. And we had a corrections psychiatry ward which
18 was built like a jail, and it was staffed by corrections officers;
19 but it was also built like a hospital, so it was much more staffed
20 with nurses' aides and social workers and the opportunity for much
21 more concerted face-to-face care between a doctor and a patient in a
22 traditional doctor-patient environment for people who needed more
23 acute care.

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1 Sometimes they were people with psychiatric illness.
2 Sometimes they were people who were just a management problem in
3 jail. Sometimes they had substance abuse problems and have
4 difficulty now being off the street because they were recently
5 arrested and -- but always, they were a unique population of people
6 who were at the pretrial setting, which is different from the
7 community. And that was very much in their forebrain: What was
8 going on in their case, what was going on with their charges, what
9 was going on with what they were arrested for, and the broader
10 repercussions.

11 And what one did on the clinical side at Bellevue was relate
12 to them as our patients and engage them about the things that were on
13 their mind at that time and that were current for them in that
14 setting.

15 MJ [COL ACOSTA]: All right. I'm just going to remind you, we
16 need to go a little bit slower than that to help us along, please.
17 Thank you.

18 WIT: All right. Sorry.

19 Q. During your residency, did you also do a portion in which
20 you, not specialized, but did a time studying and serving in
21 psychopharmacology?

22 A. Psychopharmacology is a part of the training of every
23 psychiatric residency at this point. Some people take more of a

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1 specialized interest in it and it becomes more of a focus area for
2 their practice once they go out into the community and define
3 themselves. But yes, I was trained in psychopharmacology as part of
4 my residency training, and Beth Israel Medical Center had a
5 particularly good psychopharm training.

6 Q. You mentioned forensic psychiatry being board certified.
7 Are you board certified in anything else?

8 A. I've been board certified in psychopharmacology -- and
9 I -- specifically it's clinical psychopharmacology and in disaster
10 medicine. I was board certified in clinical psychopharmacology in
11 2004. I renewed that board certification in 2007. And then the
12 certifying organization stopped offering certification, so there's no
13 means now to get recertified in clinical psychopharmacology.

14 However, that illustrates the point that I made earlier. In
15 forensic psychiatry, one certifies and recertifies every ten years.
16 In clinical psychopharmacology, the process was a
17 once-every-three-years.

18 So clinical psychopharmacology is the discipline and what it
19 focuses on is literally the treatment, specifically the treatment of
20 psychiatric conditions, primarily with medications but sometimes with
21 other biological treatments. Magnet therapy ----

22 MJ [COL ACOSTA]: I need you to slow down. I need you to slow
23 down.

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1 WIT: Sorry.

2 A. ---- magnet therapy, light therapy, electroconvulsive
3 therapy, things like that. But they are all called biological
4 therapies, and they're part of the universe of psychopharmacology.

5 Q. And understanding that psychopharmacology is essentially a
6 facet, in some ways, to forensic psychiatry, when one is board
7 certified in psychiatry, are they automatically qualified and board
8 certified in forensic psychiatry?

9 A. Well, I -- board certified in psychiatry. I should have
10 mentioned that. I'm board certified in psychiatry as well. One is
11 expected to master some level of understanding of psychopharmacology
12 as a board-certified psychiatrist; however, there is much more of a
13 clinical subspecialty knowledge of clinical psychopharmacology if you
14 make it a career focus, as I did following my residency.

15 Forensic psychiatry is a bit more removed from regular
16 psychiatry certification for a few reasons. One, because you're
17 dealing with patient populations that in regular psychiatry you're a
18 lot less likely to encounter. Regular psychiatrists will have far
19 less exposure to corrections psychiatry patients and the culture of
20 corrections which is its unique experience.

21 Then there are other kinds of conditions and phenomena that
22 in general practice -- and again, I had a general practice for many
23 years -- I was a lot less likely to see. People who were in forensic

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1 psychiatry will much more deal with violence and the out -- the
2 byproducts of violence because they are dealing with incarcerated
3 people. Out in the community, the nature of the violence that you
4 work with is just of a very different nature.

5 As a forensic psychiatrist, I'll see sex offenders, but as a
6 clinical psychiatrist, it's not your typical type of referral. So
7 that is much more of a different neighborhood than psychiatry.
8 You're expected to understand the fundamentals of psychiatry, but
9 many in psychiatry feel, to borrow an expression from -- it might
10 even be in this case, that in forensic psychiatry, you're on another
11 planet. And it's just like a different person that you might be
12 seeing.

13 Q. And I want to take a moment just to make sure we have a
14 baseline of understanding for terms. Psychopharmacology and
15 psychotropics ----

16 A. Yes.

17 Q. ---- can you give us a general idea of what those are?

18 A. Yes. Psychopharmacology is the treatment of psychiatric
19 conditions with psychiatric medications and other medicines that
20 affect the biology. Psychotropics are medications that specifically
21 affect thinking and behavior.

22 Q. And you also mentioned that you were board certified in
23 disaster medicine? Can you please ----

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1 A. Yes.

2 Q. ---- let us know what is disaster medicine?

3 A. Yes. In the aftermath of 9/11 in particular, on the
4 clinical side there were a lot of initiatives taken to develop
5 response effectiveness among different medical subspecialties, and
6 that gained momentum with some significant natural disasters, some
7 here in the United States, some abroad. Two that immediately come to
8 mind are Hurricane Katrina and then the tsunamis in the South Pacific
9 and the earthquake in Haiti.

10 So around that time, particularly in North America, a number
11 of institutions and specialists came together to try to converge and
12 to develop a much more proficient training for readiness in disaster
13 medicine.

14 I was a part of that. I helped to develop it. I became
15 certified in it. And so for a while, I was active in disaster
16 medicine in that world, but I haven't been for several years. So
17 while I certified in disaster medicine, I did not renew it, and I'm
18 not active in it at this time. I was only influenced by its
19 teaching.

20 Q. And can you tell us what the difference between forensic
21 psychiatry and forensic psychology is?

22 A. Forensic psychology, like forensic psychiatry, is very
23 much a reflection of the intersection between the law and psychology,

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1 psychology as it is applied to the law. Psychological theories
2 derive from many sources that psychiatry doesn't necessarily have
3 access to, so many of the psychoanalytic theories, many of the social
4 psychology theories, sociology, things that we have less exposure to.
5 But we converge together in forensic psychiatry and psychology.
6 There's really quite a lot of overlap.

7 In present day, forensic psychiatry and forensic psychology,
8 the major difference between the two is that psychologists have much
9 more proficiency in the administration of psychological testing in
10 legal matters and how to get valid and reliable data when they give
11 that kind of testing. Psychiatrists aren't trained in that area;
12 psychologists are. Psychologists are not trained in biological
13 aspects of legal matters and questions that may relate either to
14 pharmacology or the medical aspects of someone's condition.

15 So the medical side on psychiatry is unique. The biological
16 side is unique -- or I should say is unique -- is particular to
17 psychiatry, and the testing side is particular to psychology. But
18 otherwise, we share the same journals, we share the same academic
19 interests, and we cross-pollinate pretty effortlessly.

20 Q. And when you became board certified in forensic
21 psychiatry, did you study and were you tested on conditions like
22 post-traumatic stress disorder?

23 A. Yes, but in particular, as it related to forensic

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1 settings. So post-traumatic stress disorder is of particular
2 interest in forensic psychiatry because in civil forensic psychiatry,
3 personal injury litigation is one of the very common experiences of
4 the forensic psychiatrist. And in those kinds of cases, one
5 routinely is looking at someone and whether they're experiencing
6 post-traumatic stress disorder or some other condition that -- that's
7 trauma related but not post-traumatic stress disorder.

8 And yet on the clinical side, you have to know about it
9 because you need to know how to assess it and how to treat it. The
10 area in forensic psychiatry includes that as well as considerations
11 about malingered post-traumatic stress disorder, and malingering
12 occupies much more of an aspect of relevance to forensic
13 psychiatrists and forensic psychologists.

14 Q. Whenever you were -- whenever you became board certified
15 in line with your testimony just now about PTSD and forensic
16 psychiatry, were topics like learned helplessness and one's ability
17 to exercise freewill -- are those topics and areas that were studied
18 and tested in forensic psychiatry?

19 A. Well, learned helplessness is something that we -- we've
20 had exposure to just as a matter of background psychological training
21 that one gets. It's -- the Seligman's experiments about learned
22 helplessness are considered to be fundamental in social science
23 background that you get along the way of your psychological training.

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1 It's not something that one has much exposure to in forensic
2 training, but you've already received it and you're already aware of
3 it when you get there.

4 With respect to your other issue that you raised, which
5 was -- what was the other besides learned helplessness?

6 Q. One's ability to exercise freewill or ----

7 A. Yes.

8 Q. ---- voluntariness. Okay.

9 A. Yes. Issues of voluntariness come up in a range of
10 forensics -- forensic types of evaluations. And so in one's
11 experience, for example, competency to draft a will, undue influence
12 in financial decision-making, these are areas in my experience
13 and -- that one has some exposure to in forensic training for which
14 freewill and independent decision-making are core issues.

15 So the idea of the capacity to make a decision pops up in
16 a -- in a range of criminal and noncriminal forensic psychiatry
17 matters.

18 Q. In your residency and further study and practice
19 concerning psychopharmacology, were you ever able to study or
20 evaluate the effects that psychotropics have on an individual?

21 A. One is expected to be very much aware of the cognitive
22 effects of different kinds of psychotropic drugs. And that affects
23 dosing, that affects selection of medicine, and it may affect

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1 decisions about whether to start or stop a medication. Not only does
2 one have to be aware of the cognitive effects, but also just the
3 nature of cognitive effects and behavioral effects.

4 The behavior effects are diverse enough -- diverse enough
5 that medicines may be substituted from one to another within the same
6 class just because of a slightly different behavioral effect that one
7 is looking out for. So you need to know about cognitive effects and
8 behavioral effects as part of the whole prescribing and management
9 decision.

10 Q. And in your experience and in your studies, being board
11 certified, have you had the ability to have that experience?

12 A. Yes.

13 Q. Have you been selected to be part of any specific group in
14 light of your experience as a forensic psychiatrist?

15 A. With respect to New York State, I'm on the panel of highly
16 qualified independent psychiatrists that's maintained by the New York
17 State Supreme Court. And with respect to questions that you've just
18 been asking me, the questions that are posed to a psychiatrist who is
19 court appointed under those circumstances sometimes relate to
20 medication, people who are refusing medication and questions about
21 how to resolve that or whether the person needs to be medicated and
22 in what way. So -- and also the effects of medicine and to what
23 degree there may be better solutions involved.

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1 Q. And just to flesh out, what is the panel of highly
2 qualified independent psychiatrists? What is that?

3 A. New York State Supreme Court maintains a roster of
4 individuals who, based on their own experience and standing within
5 the state, the court has sufficient confidence in that if there's an
6 unresolved question that comes up posed by somebody who is an
7 insanity acquittee or someone who has been civilly committed and is
8 represented by mental hygiene -- they're called -- those are the
9 attorneys, the mental health attorneys, attorneys for people who are
10 in custody but by virtue of their psychiatric conditions.

11 They and the State can come together and agree that -- that
12 somebody on that panel for a particular question that can't get
13 resolved, that that person will do the examination and help
14 contribute to the court's understanding.

15 Q. And when were you selected for this panel?

16 A. In the late 1990s.

17 Q. Are you currently still on that panel?

18 A. I am.

19 Q. Concerning academic appointments, do you currently hold
20 any?

21 A. I'm a clinical professor of psychiatry at Mount Sinai
22 University School of Medicine.

23 Q. And can you go over what your responsibilities in your

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1 role is there?

2 A. Primarily teaching, and the teaching reserves itself to
3 Beth Israel Medical Center. There's been a bit of turnover within
4 the Department of Psychiatry, but -- and COVID has also reorganized a
5 few things -- but those responsibilities also include intermittently
6 supervising residents who have a particular interest in forensic
7 psychiatry and the practice and close-up participation in actual case
8 work.

9 Q. How long have you taught there?

10 A. I've been on the Sinai faculty, I believe, since 2016.

11 Q. To go a little bit into your -- the treatment that you've
12 conducted in your practice, The Forensic Panel that you spoke about
13 earlier, you mentioned that you were the chairman for The Forensic
14 Panel; is that correct?

15 A. Yes.

16 Q. And when was The Forensic Panel stood up?

17 A. Just to clarify, my treatment practice has existed
18 independent of The Forensic Panel. I maintained a private practice
19 in psychiatry and forensic psychiatry since 1992, and the forensic
20 side of my practice pretty much merged with The Forensic Panel after,
21 say, 2000 or 2001. The Forensic Panel began in 1998.

22 Q. And currently, at The Forensic Panel, what are some of
23 your responsibilities?

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1 A. The Forensic Panel, as I mentioned earlier, is a
2 multispecialist and multidisciplinary practice. So I have cases that
3 I handle myself as a forensic psychiatrist; and cases that are
4 handled by other mental health professionals, I may be a peer
5 reviewer and I may not be or I may just have more of an
6 administrative responsibility of quality control as the chairman
7 because I have enough of an understanding of it.

8 I have a more -- more loose but still involved
9 administrative and quality control role for cases that are not part
10 of our specialty. So, for example, The Forensic Panel has a vibrant
11 forensic pathology side as well as different forensic medical
12 subspecialties; that's not my specialty. However, there are certain
13 aspects of those cases that, from an administrative standpoint, I can
14 be involved as a chairman and involved in quality control.

15 So on the case side, it's either directly as a -- as an
16 examiner or as a peer reviewer providing oversight, which I'll
17 explain later, or administratively just making sure, knowing the
18 types of cases, the quality control that has to be involved.

19 Q. And you mentioned a few with the forensic pathology and
20 obviously the forensic psychiatry. What are some of the other
21 specialties that The Forensic Panel provides or services?

22 A. Forensic toxicology, emergency medicine, critical care
23 medicine, radiology, cardiology. Those are the most -- those are the

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1 most active. We do have a crime scene investigative component, but
2 the medical specialties, as well as toxicology, are the most active.

3 Q. And how many specialists do you currently supervise at
4 The Forensic Panel?

5 A. There are somewhere between 40 and 50 individuals who, as
6 independent contractors, are part of The Forensic Panel.

7 Q. Can you give us a few examples of individuals who are
8 specialists at your company, The Forensic Panel?

9 A. Well, there -- there are -- for example, the former Chief
10 Medical Examiner of Virginia, Marcella Fierro; the former Chief
11 Medical Examiner of Milwaukee, Brian Peterson.

12 On -- on the -- on the neuroimaging side, the chairman
13 of -- I should say, I'm sorry, professor of neuroradiology and
14 epidemiology, Dr. Christopher Whitlow from Wake Forest.

15 So the individuals who are part of The Forensic Panel come
16 from a variety of different parts of the country as do our cases.

17 I think more pertinent to this case, forensic psychologist,
18 Dr. Michael Sweda, he was a person who helped to set up the forensic
19 psychology training program at USUHS, the medical center -- the
20 military medical center. Dr. Nancy Slicner who was the former chief
21 investigator for the OSI forensic psychologist who is also part of
22 the practice.

23 But again, there are a number of people who are nonmilitary

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1 who are part of the practice. But, again, it's a diverse group of
2 really wonderful individuals that I very much enjoy learning from as
3 part of our day to day.

4 Q. And to go off of the day to day, is one of the things that
5 you do in addition to these services, do you also train students ----

6 A. Oh, yes.

7 Q. ---- or interns?

8 A. Yes.

9 Q. Can you -- can you explain a little bit about that,
10 please.

11 A. Well, there are a few other things that go on in
12 The Forensic Panel, and one, we have a really very substantial
13 research arm. But putting that aside, we have had a training program
14 that's case specific as well as research specific for students since
15 19 -- really 1998, we've had that in place. And we draw students
16 from a variety of different specialties, again, depending on the
17 individual; it's a very competitive internship.

18 We probably accept maybe 3 percent of the applicants and it
19 may come from all -- literally all over the world, but we have
20 typically one to three at a time. So it's a very small group of
21 people, but at all times, they may come from a psychology background.
22 They may be prelaw, occasionally someone who is in law school,
23 someone who is in medical school, or someone who is premed, as more

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1 common, graduate-level students in psychology, criminal
2 justice -- people who are studying criminal justice, people who are
3 studying forensic science. We've had a couple of people who had an
4 interest in the intelligence world.

5 So that's typically what we will draw from, but they are
6 people with varied interests, and that's because there's -- there's
7 such a variety of cases within the panel that, if students come in,
8 they will get exposure to different experiences and some may directly
9 appeal to what they're interested in and other cases may expose them
10 to something they've never seen before. And that's the point of an
11 internship; you go in to see and to learn things that you never even
12 thought to ask.

13 Q. And I apologize for backtracking.

14 Going back to your teaching at Mount Sinai, can you go into
15 a few of the examples of topics or areas that you teach in your role
16 there?

17 A. Just forensic psychiatry.

18 Q. Just generally forensic ----

19 A. That's really -- forensic psychiatry is what -- in earlier
20 years -- it hasn't been this way, really, for quite some time, but in
21 earlier years, my academic teaching, I was teaching forensic
22 interview and forensic -- not forensic interview, just interviewing
23 and diagnosis. But really, in -- in most recent years, at Sinai in

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1 particular, it's just forensic psychiatry.

2 Q. And do you currently treat any patients, Dr. Welner?

3 A. I haven't had a patient care practice for a few years now.

4 Q. And ----

5 A. I'd pretty much say that that coincided with COVID.

6 Q. That was my next question. Thank you.

7 In your clinical practice at The Forensic Panel, can you
8 walk us through how a provider would give care to an incoming
9 patient?

10 A. Well, cases at The Forensic -- when a case -- a case that
11 comes in to The Forensic Panel, we're contacted. We have a lengthy
12 discussion with the attorney who reaches out to us and make a
13 determination about whether we're willing to be involved, because
14 there may be any number of reasons why we wouldn't want to
15 participate in a case. So that's a -- that's a courtesy discussion
16 that takes place before that decision is made.

17 Then we will furnish the attorney with a list of materials
18 that we believe whoever our primary examiner is would like to review.
19 And then it's incumbent on the attorney to put together that list,
20 make it available to us, and then we start our review.

21 Then we will review the materials and then at some point
22 either -- ask for additional materials, having become acquainted with
23 a case. Later in the case, after we feel we've become much more

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1 fluent in the case, if it's a mental health case, then an examination
2 is involved. We'll ask to sit down and interview the examinee.

3 The Forensic Panel always tries to videotape all of our
4 litigant interviews. Once in a while in a particular case there's a
5 compelling reason why we cannot, but we usually make that clear to
6 the attorneys when we're first brought in, that if we -- you know, if
7 we're involved in this case, we want to interview the litigant and we
8 want to interview that person on videotape. And that is for
9 everyone's benefit.

10 The Forensic Panel promotes best practices; in certain
11 instances, we've developed them. And one of the things that
12 The Forensic Panel is a big believer in is that everybody should have
13 access to the evidence on all sides. And when you videotape an
14 interview, then everybody can understand what was asked, what was
15 said. A litigant is always quoted accurately and fairly and nothing
16 out of context, everything is aboveboard, and it avoids what has
17 plagued the behavioral sciences for a long time, which is the
18 impressionism that you see in notes. You know, that somebody will
19 sit with somebody and talk with them for an hour and you'll see five
20 lines of notes and you ask yourself, well, is that all there is?

21 So if you have a videotaped encounter, you as an examiner
22 may think something is important. But someone who's retained by the
23 other side may look at something else in the interview and go, wow,

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1 you know, that's really significant. And it should be exactly as it
2 is for pathology. You know, both sides access the autopsy slides,
3 and in toxicology, everybody finds out what the toxicology samples
4 are and the assays.

5 So we're really just trying to replicate what goes on
6 elsewhere in medical science as it relates to forensics with the
7 videotaped examinations.

8 Q. And thank you for that.

9 I want to take you back to whenever you were treating
10 patients. Do you have experience in diagnosing and treating
11 post-traumatic stress disorder?

12 A. Yes.

13 Q. And did you -- in that treatment, did you encounter
14 patients who had experienced trauma, assumably, right?

15 A. Yes.

16 Q. And what kind of patients would you treat that would come
17 in with trauma? Can you give us a sampling of some of the patients
18 you would see?

19 A. Sure. Over the years -- and we're talking about over 20
20 years of practice -- actually, yeah, well over 20 years of practice.
21 And I started my practice with a full complement of patients, because
22 I was taken on by an older gentleman who really wanted to move on to
23 the next phase of his life. So my life as a young psychiatrist began

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1 with: Congratulations. Here's your caseload and good luck. So it's
2 a way to take on responsibility very quickly.

3 And so right from the -- I think for most people who have a
4 clinical practice, post-traumatic stress disorder is a fairly common
5 condition. Sometimes it is more common than others. After 9/11,
6 post-traumatic stress disorder as a treatment referral was more
7 common for me and for many other people who were based in New York
8 City. So it may have waves according to what's going on at the time.
9 And certainly, you know, I touched on COVID a moment ago.

10 So I've had the opportunity to treat a lot of PTSD over the
11 years. The referrals typically are people who are victims of
12 domestic violence, people who have been victims of sexual assault, as
13 well as people coming from the corrections world. People who were in
14 corrections facilities and developed post-traumatic stress disorder
15 from experiences there or people who by virtue of being crime
16 victims, they develop post-traumatic stress disorder. It wasn't a
17 sexual assault but it was another crime that they were victimized by
18 or witness to, developing post-traumatic stress disorder.

19 So there are a few outliers here and there, very unusual
20 stories. But for the most part, that's the -- that's the patient
21 population. You know, you're going to have people who are involved
22 in a fire and those kinds of things, but those are -- those are,
23 again, the minority of cases. The typical referral of post-traumatic

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1 stress disorder that I've had experience treating are the ones I
2 noted before.

3 And also, just what I would mention, beyond the inmates,
4 correction officers. You know, I had a fair amount of experience
5 with corrections officers who had post-traumatic stress disorder as
6 well.

7 Q. And so to delve a little bit deeper into that area, for
8 those you just mentioned that there were individuals that you would
9 treat who developed post-traumatic stress disorder while they were
10 incarcerated, what types of trauma in your experience would they see
11 that would cause post-traumatic stress disorder while incarcerated?

12 A. Well, I know that you -- you know, I know that in this
13 case, we're getting into the issue to some degree of what happens
14 between law enforcement and suspects. So there were people who had
15 experiences with law enforcement from which they developed
16 post-traumatic stress disorder or people who had experiences with
17 corrections officers that gave them post-traumatic stress disorder or
18 people who were attacked by other inmates or people who were on the
19 wrong side of a gang dispute.

20 So it was typically violence, typically physical violence,
21 but there was some occasional sex assault, both among patients who
22 had been incarcerated and among corrections officers. For example,
23 people who were at a riot and then things got out of hand.

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1 So that's typically what I was seeing: These kinds of
2 near-death experiences, either of people who had been held hostage
3 and believed they were going to be -- that they were going to be
4 killed and then how they were treated during that hostage situation
5 or people who were just, as part of an assault or an attack, either
6 something small scale or a little bit larger scale, developed those
7 symptoms.

8 Q. And do you have a rough estimate of how many patients over
9 the years since you began practicing that you have treated
10 clinically?

11 A. Oh ----

12 Q. Rough estimate.

13 A. ---- I've had hundreds of -- I've had hundreds of
14 patients. But the one thing that I should point out to you is that
15 from an early stage of my treatment career, I focused on the
16 treatment of people who had recidivistic violence. So I would have
17 people referred to me who were out in the community who had problems
18 managing violent behavior.

19 And then I had other nonviolent patients, and that became
20 actually what took over the focus of my practice. And of those
21 people -- and that started to ramp up in the latter part of the '90s.
22 The early years of my career, I had much more of a -- of a focus in
23 that area, even though I had a variety of patients that I noted. I

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1 began focusing on patients who had not responded to treatment, so I
2 would have other psychiatrists send me patients who would not get
3 well.

4 So it was -- I was used to dealing with people who had
5 already been in treatment but who were still sick, who were -- who
6 were struggling, and the key could not be found to unlock them.

7 Q. I want to shift directions and talk a little bit more now
8 about prior cases in which you've testified and in which you've
9 consulted.

10 Have you ever been qualified as an expert witness in
11 military courts-martials [**sic**]?

12 A. Yes.

13 Q. And have you ever been qualified as an expert -- and, I'm
14 sorry, and in what capacity as an expert were you qualified, if you
15 can remember?

16 A. As a psychiatrist and forensic psychiatrist.

17 Q. Have you ever been qualified as an expert in military
18 commissions -- in a military commission?

19 A. That's what I was thinking of.

20 Q. I'm sorry. Yes.

21 And in what case was that?

22 A. That was in United States v. Omar Khadr.

23 Q. And what year was that?

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1 A. I believe that was 2010, October 2010.

2 Q. Have you ever been qualified to testify as an expert
3 witness in Article III courts or state courts as well? And not ----

4 A. I'm not sure I know what Article III is. I'm sorry.

5 Q. In non-military courts, have you ever been ----

6 A. Oh, yes.

7 Q. ---- qualified as an expert?

8 A. Yes. Yes.

9 Q. How many times have you been qualified as an expert in
10 other jurisdictions?

11 A. I think that at this point, I've probably been qualified
12 and testified probably somewhere around a hundred times. Probably
13 more, actually, at this point.

14 Q. And that's pertaining specifically to testimony, correct?

15 A. Yes.

16 Q. And in the cases that you just said that you testified in,
17 were these in your capacity as a forensic psychiatrist?

18 A. Sometimes. Sometimes as a psychiatrist, sometimes as a
19 psychopharmacologist, sometimes as a forensic psychiatrist.

20 Again, I mentioned that forensic psychiatry often deals with
21 this patient population and corrections and areas that psychiatry
22 doesn't concern itself with; however, the area of forensic psychiatry
23 crosses over with clinical psychiatry because a number of psychiatric

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1 legal questions may come up, for example, of psychiatric malpractice
2 or personal injury, in which questions that come up are familiar to
3 psychiatry, for example, diagnoses like post-traumatic stress
4 disorder or depression or treatment considerations that are really
5 well within the area of a clinical psychiatrist's training.

6 So there are -- certainly on the -- on the civil side, there
7 hasn't been any special designation for forensic psychiatry, even
8 though it's the practice of forensic psychiatry. So it's been
9 psychiatry, psychopharmacology, and forensic psychiatry.

10 Q. And in testifying as an expert in forensic psychiatry
11 first, what are some of the issues that you've been asked to resolve
12 in cases?

13 A. Well, I suppose the easiest way to present it is that
14 there's an arc of criminal litigation, from pretrial to post trial,
15 where questions may come up and questions have come up for which I
16 have contributed in actual testimony.

17 And before I go on, I want to make it clear that I probably
18 testify no more than one to three times a year. So the overwhelming
19 majority of matters in which I've been involved in as a forensic
20 psychiatrist have never proceeded to my testimony; however, I've
21 provided whatever input I've given to the court and it's been
22 received and had whatever -- whatever role that it played.

23 So putting that aside for a moment, at junctures that begin

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1 with pretrial questions such as motions to suppress of whether
2 somebody was competent to waive Miranda or disputed confessions in
3 which one may raise an assertion that the confession was false or,
4 such as in this particular case, that the confession was coerced. So
5 matters that relate to confessions fall on three different areas;
6 that's -- that's one.

7 Then continuing on, there are questions of competency.
8 Competency ----

9 MJ [COL ACOSTA]: Doctor, I need you to slow down a little bit
10 again. I'm getting the -- I have a little light here that the
11 translators turn on for me to remind you to slow down, and it's going
12 off again. So take a breath ----

13 WIT: Yes, Your Honor.

14 MJ [COL ACOSTA]: ---- break up your phrases, and you can
15 continue.

16 WIT: Okay. I feel like I'm speaking slowly, actually.

17 ATC [LT SCHWARTZ]: That's a good thing. If you feel like
18 you're speaking slowly ----

19 WIT: Can you imagine how quickly I would be speaking if I was
20 still in New York. All right. Let me move on.

21 A. Competency to stand trial, competency to make a plea,
22 competency to be one's own attorney. And so while those questions
23 come up at the same stage, or roughly the same stage in that arch,

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1 they involve different responsibilities. Because competency is task
2 specific; you could be competent to do one thing and not competent to
3 do another, although there are various schools of thought about
4 whether one crosses over into the other. But that's for another
5 time. So there's the competency stage.

6 Then there is trial, and trial questions involve criminal
7 responsibility. Criminal responsibility may involve questions of
8 whether someone had the capacity to form intent or whether someone
9 was legally insane or whether someone was not legally insane but had
10 diminished capacity, just the same. So that's trial.

11 Or there are other, what they call, affirmative defenses
12 that are less common in my practice but that I've had experience,
13 such as battered -- a battered individual and making a defense in
14 that way or duress defenses.

15 Then there are sentencing-phase questions. In every capital
16 case, in every death penalty case, the defendant, once found guilty,
17 can present evidence that a jury may find to mitigate, to lessen
18 their blameworthiness so that they don't get a death penalty. The
19 prosecution may look at that evidence and examine its legitimacy and
20 to see what the ground truth of those areas are.

21 So those are presentencing issues that relate specifically
22 to capital sentencing. There are a whole range of other
23 presentencing questions that may come up when both prosecutors and

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1 defense say, hey, you know, we're not really sure how to dispose of
2 this case. Why don't we get a better read on this individual and
3 then just figure out the right thing to do.

4 And that's something that -- perhaps the best name that's
5 put on it is -- I don't want to call it alternative resolution, but I
6 guess that's the best name I can give it, where it doesn't
7 necessarily follow the same track as everyone envisions. You know,
8 you go to court. You go to trial. If you get convicted, you get
9 sentenced, and that's that.

10 But it's more just, hey, something happened, we know who is
11 responsible; but there's an individual here that we have to take a
12 closer look at and what's going on with this individual and how
13 should this be dealt with. And that's really across a whole range of
14 diagnoses and scenarios. So that's also at the sentencing stage. So
15 those -- that's the arc on the criminal side.

16 On the civil side, one of the more ----

17 Q. Sorry. Before you get into that, those -- everything that
18 you just said for examples of issues, have you testified in cases
19 concerning those issues?

20 A. Yes.

21 Q. I apologize. And then I believe on the civil side, what
22 are some common issues that you have testified about?

23 A. Yes. And I'm just talking about areas that I've offered

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1 testimony in.

2 Q. Correct. That's all I want. Yes.

3 A. Okay. On the civil side, I've mentioned before personal
4 injury matters in which the questions fundamentally relate to what is
5 a person's diagnosis? What does it relate to? Does it relate to the
6 event in question? Does it relate to something else? What's the
7 severity of that condition? What's the prognosis? What would impact
8 that prognosis?

9 And then issues of patient care that will typically come up
10 in malpractice questions or related kinds of cases that aren't quite
11 malpractice but, for all intents and purposes, they involve the
12 management of a psychiatric situation that may have gone -- gone
13 wrong.

14 Then as I mentioned earlier, competency to draft a will,
15 competency to invest, those are securities-related cases, the latter,
16 and typically before arbitration panels, so they have a very
17 different kind of tempo to them.

18 And then finally, in the employment arena, fitness for duty,
19 and then hostile work environment types of cases in which
20 post-traumatic stress disorder questions are also raised because of
21 the nature of the activity that may have happened at a workplace and
22 how someone may have been affected by it.

23 There are other areas within forensic psychiatry, but those

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1 are not areas in which I'm involved. And The Forensic Panel does not
2 work within family law and, in particular, does not work within
3 custody matters.

4 Q. And in all the issues that you just spotted and have
5 reiterated, in all of those cases, have you ever failed to qualify as
6 an expert in forensic psychiatry?

7 A. I was -- I was excluded from testifying in one case which
8 was Sacchetti -- actually, it was local. It was a D.C. case.
9 Sacchetti v. Gallaudet University, the case of a young man who was a
10 student at Gallaudet who was deaf, as are the students at that
11 distinguished university.

12 And he had a major psychiatric condition, and he became
13 acutely unstable. And how Gallaudet handled the situation became an
14 issue because while he was in need of urgent psychiatric care at the
15 time, he was actually escorted off campus and thrown off, whereupon
16 he fairly promptly killed himself. So that gave rise to litigation
17 against Gallaudet and how they should have handled a psychiatric case
18 which, to the surprise of neither his family nor anyone close to him,
19 resulted in the young man's suicide.

20 Q. And in that case, were you initially qualified as an
21 expert to provide testimony?

22 A. What happened in the case was I was a -- I was retained by
23 the family to look at the case. I provided them with an opinion, and

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1 I was deposed, and the -- and the university moved to have me
2 excluded, and the court excluded me. So that's -- you know, that's
3 probably the simplest way to put it.

4 Q. And as it pertains to your previous testimony concerning
5 psychopharmacology -- and just to clarify, is that, as you stated
6 before, a facet of forensic psychiatry? Would that be fair to say
7 it's a ----

8 A. It's a facet of psychiatry.

9 Q. Okay.

10 A. Psychopharmacology may be -- there may be forensic aspects
11 to psychopharmacology, but it's really its own -- its own standalone
12 subdiscipline.

13 Q. And having testified before as an expert in
14 psychopharmacology, have you ever failed to qualify as an expert?

15 A. I have not.

16 Q. Do you have experience in testifying in death penalty
17 cases?

18 A. I do.

19 Q. And can you go over briefly the number of cases that you
20 have testified in?

21 A. Several. I can remember several. I can't remember them
22 all, but I -- you know, I can remember Renfro in Idaho. I can
23 remember -- I can remember ----

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1 Q. And you don't need to give exact names. Generally a
2 number, if you can provide, of how many death penalty cases or a
3 range.

4 A. Yeah. Of times that I've actually testified in a death
5 penalty case, I would say five.

6 Q. And in some of those cases, the rulings that have come
7 down, have those been appealed?

8 A. Oh, in -- if -- in each of those -- let me clarify this.

9 In each of those cases I testified as a -- as a witness
10 called by the prosecution. And in -- and in those cases, for which a
11 death penalty is then given, all of those cases invariably get
12 appealed. Death penalty -- when a death penalty is passed, it
13 is -- it is appealed several times.

14 It is appealed really ad infinitum until ultimately either
15 someone may be resentenced to life or a person is given the death
16 penalty or in some instances -- not my cases, but certainly it's
17 happened and I was involved in a case like this in a different way,
18 someone who was on death row is found to be innocent and they are
19 exonerated. And that's a case -- a separate case that I have an
20 involvement in but did not testify.

21 Q. And for the cases that were appealed that you did testify
22 in, have those been appealed all the way up to the Supreme Court of
23 the United States?

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1 A. I have had cases that I've been involved in and testified
2 in that have been appealed all the way up to United States Supreme
3 Court, I think one actually quite recently.

4 But it's de rigueur. And as I noted that I've testified in
5 five cases, but I have consulted and contributed to quite -- quite a
6 number more.

7 Q. And for those cases that were appealed to various courts,
8 did some of those include the issue of excluding your expert
9 testimony?

10 A. Oh, yes.

11 Q. And on any of those cases was your testimony excluded on
12 appeal?

13 A. Not one.

14 Q. When you take a case at The Forensic Panel and a party
15 approaches you, you said earlier that you sit down with the attorney
16 and you look at the case. Whenever you do that, are you looking at
17 it objectively or from the eyes focusing on the party that approached
18 you?

19 A. I need you to repeat the question.

20 Q. Whenever you do an initial review of a case, is it a
21 subjective or objective review of the case file?

22 A. Oh, it's an objective review, and that's really a
23 precondition of working with anyone. The people who approach

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1 The Forensic Panel, there's an understanding that whatever opinion we
2 arrive at, they're comfortable with. We'll let them know what the
3 opinion is, and that it's up to them to figure out what to do with
4 the science as we see it.

5 Q. And what would you say the percentage of cases that
6 The Forensic Panel takes on?

7 A. I'm sorry. I need to add something ----

8 Q. Yes.

9 A. ---- to an earlier answer.

10 You were talking about the death penalty and appeal.

11 Q. Uh-huh.

12 A. And I didn't explain something, but it's very important
13 for the court to understand about the effort to exclude my testimony.
14 It's de rigueur strategic. It is a strategic necessity in death
15 penalty litigation for someone to try to exclude my testimony because
16 I may be involved in a significantly focused scientific area.

17 So if my testimony is excluded, well, then, it's
18 advantageous to one of the litigant parties, and that's just part of
19 the culture and one accepts it. So I just want to make it clear that
20 I realize that that's just part of what happens.

21 Q. Thank you. And shifting back -- I appreciate that.

22 Shifting back to cases in which are presented or referred to
23 your office -- which is probably a good initial question, which is:

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1 How are cases brought to your office?

2 A. Word of mouth.

3 Q. And of those cases, what would you say the percentage is
4 that you actually accept to either consult on or testify on?

5 A. I would say at this point, probably 30 to 40 percent.

6 Q. And do you have a hand in reviewing the cases that are
7 presented or are there others that also look over cases?

8 A. Absolutely. I have a hand -- I don't do it alone. We
9 have staff that I work with who are case managers. We will bounce
10 thoughts off one another.

11 There are cases that we initially feel we don't want to
12 take, and then somebody may persuade me to take it. It's
13 usually -- that's how it works in that sense. Or we all agree that
14 it's wise for us to get involved in the case.

15 But I have a wonderful staff. They are very sensible. And
16 in that sense, oversight is a fairly common practice within the panel
17 at different administrative stages as well.

18 Q. And whenever -- and we're talking about you consulting on
19 cases and testifying on cases. When you consult on cases, does it
20 always lead to your testifying in a case?

21 A. Rarely. Rarely. As I -- as I noted before, I probably
22 testify one to three times a year. And yet, I can't tell you how
23 many cases we're involved in in the practice, but I think we aim to

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1 provide an opinion that encourages resolution of the case, always.
2 The side that retains us sees the opinion. The other side sees the
3 opinion. And then whatever happens to the case, come what may.

4 Sometimes that might not be surprising, but because we have
5 a tertiary care practice, the cases that are referred to The Forensic
6 Panel come from all over the country, sometimes beyond, and they're
7 brought to the practice because there's an expectation. The case is
8 quite complex, quite difficult. And the people who come to us say,
9 we just want to know what's going on.

10 And so our expectation is we're going to give them that
11 opinion. And sometimes that litigation is very contentious. But if
12 the opinion comes in and both sides look at it, they figure it out.
13 They figure it out. And then the case resolves, and there's no
14 testimony.

15 Q. So what I'm hearing is in some cases, your opinion or
16 consultation is that of a neutral party?

17 A. Well, there are certain instances in which we're going
18 to -- we reach an opinion that's -- that is contrary to the interest
19 of the side that retains us.

20 As I told you, I alluded to the death penalty -- the death
21 row inmate, Damon Thibodeaux, in Louisiana. We were retained by the
22 prosecutor's office in -- in Jefferson Parish, Louisiana, and that
23 was a disputed confession issue, and the question came up. It was an

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1 extrajudicial matter.

2 Mr. Thibodaux had lost his appeals, but the -- but the
3 district attorney was concerned, and he raised the -- he brought the
4 question to our attention. I took the case. And based on my
5 recommendation, Mr. Thibodeaux was freed from death row. He -- you
6 know, and he went free, and that was the -- that was that. So that
7 happens. It's happened in other disputed confession cases.

8 So the attorneys who come to the practice, there's an
9 understanding and a recognition that we may not necessarily see
10 things their way, and there are times that we'll tell them at the
11 initial phone call: You have a problem with this case. I mean,
12 there are -- the people who will call us. And that contributes to
13 our accepting, you know -- what is it? -- 30 to 40 percent of the
14 cases that are referred to us.

15 You know, there's a good percentage of the cases that are
16 referred that are -- that -- that are -- that are compelling cases,
17 but we feel, just hearing the case, enough to tell the attorney:
18 You've got a problem here, and, you know, I don't think you're going
19 to want to work with us. Go call someone else. Not because we don't
20 like you, but you've got X, Y, and Z problem with this case. And
21 thank you, have a nice day. That's -- you know, that's how that
22 goes.

23 Q. And how many cases, if you can give a rough estimate, have

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1 you consulted on in your career?

2 A. Oh ----

3 Q. Ballpark number.

4 A. It's hard. Hundreds. It's fair to say hundreds of cases.

5 Q. And in these hundreds of cases, have you -- first, have
6 you consulted for both defense and prosecution?

7 A. Yes.

8 Q. And have you testified for both defense and prosecution?

9 A. You mean on the criminal side?

10 Q. Correct.

11 A. I rarely have testified for defense. In -- the last time
12 that I testified for the -- for a criminal defense, I believe was in
13 2001 or 2002; and since then, the outcome of every case that we have
14 consulted to the defense is that both prosecution and defense resolve
15 the case and there was never a proceeding afterward.

16 Q. And you mentioned just previously with the death penalty
17 case that your opinion was -- you could say contrary to the party
18 that hired you, correct?

19 The prosecution hired you, but ----

20 A. Yes.

21 Q. ---- your opinion was more in favor of the accused.

22 Had ----

23 A. Well, in that case, the accused -- ultimately somebody was

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1 released from death row, so ----

2 Q. Right. Have there been any other cases in which you have
3 been retained by one party but your conclusion or opinion has favored
4 the accused or the other party?

5 A. Oh, it happens from time to time. It's not common, but
6 it's not rare. It happens, and when it happens, we will typically
7 notify the attorney immediately that, hey, this is what we've found,
8 this is what we've discovered.

9 And, you know, there are a variety of questions: Either
10 what do you want to do with the case or if -- if the attorneys are
11 just determined, from a trial standpoint, we'll advise them you're
12 not going to want to call us as a witness and then they don't.

13 Q. And in one of the cases in which this happen, was that the
14 Michelle Martens case?

15 A. Yes, that's an example of a case. And that -- that's one
16 where we were called by prosecutors. And that was an Albuquerque
17 case, a very tragic story of a -- of a young girl, Victoria Martens,
18 who was home while her mother was away. And while she was home with
19 someone who had been staying in the home, she ended up dead and
20 really just terribly mutilated.

21 So it was a shocking, shocking case that really stirred up
22 people in the community in a very dramatic way. You know, literally
23 the governor of the state walked into the prosecutor's office and

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1 pointed at her picture and said this woman needs to fry. That was
2 how strongly people felt about it in New Mexico. This is the
3 governor of the state.

4 So the case was presented to us without a dispute of the
5 confession having even been raised, but because the defendant, the
6 mother, was just strange, just a strange person. And the attorney
7 just said, look, I don't know what they're going to raise as a
8 defense for this person, but there's something off about her.

9 So I reviewed the case and went through what I would do in a
10 disputed confession and made a determination that her confession was
11 false; that she had nothing to do with it. And ultimately, she was
12 not held responsible for the murder, and ultimately, as fate has it
13 and further evidence developed in the case, nobody thinks that she
14 has -- had any involvement in the case.

15 It was a -- it's a very tragic case, highly, highly, highly
16 investigated case that still has secrets. I'm just -- it's a
17 qualification. I mean, it's a -- I wish I could wrap a neat bow on
18 it. But nobody thinks she was part of it.

19 So -- but that's how it goes. You don't -- you
20 don't -- when -- when our practice and I get involved in a case, we
21 don't know what we're going to find and we don't know how the story
22 is going to wind. Things take twists and turns, and you find
23 yourself taking a look at some aspect of a case that you never

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1 envisioned. It wasn't part of the first phone call.

2 I think that's part of what makes forensics interesting.
3 Most people who have proximity to forensics think it's like Law &
4 Order. It's not. It's a lot more interesting because you can't fit
5 it into an hour television show because -- no -- but things -- things
6 come up you don't expect.

7 And so that's a perfect example of a case that just sort of
8 had an unusual winding road. And for that matter, it still does. It
9 still does. There's someone out there who was -- someone was
10 convicted of this case. She definitely did it. But there are many
11 people who do not feel that she acted alone and that there's someone
12 out there who will -- who will, God willing, also be brought to
13 justice.

14 Q. And along this same tune, have there been any other
15 high-profile cases in which you've testified?

16 A. A number.

17 Q. Can you go through some?

18 A. I think -- you know, let me make this -- this clear. From
19 the time I started at Bellevue -- Bellevue Hospital is where every
20 case that's on the cover of the *New York Post* gets brought.

21 So the idea of these dramatic cases -- the first day that I
22 was at Bellevue, I had a patient like that. That's what Bellevue's
23 like. These cases that are -- that are -- that are very dramatic.

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1 So you -- you get used to having people brought to you as a
2 psychiatrist in a treating capacity who are charged with very, very
3 dramatic and sometimes very disturbing fact patterns and crimes. And
4 you have to be a physician and you have to be a professional and you
5 have to be nonjudgmental. And this is how physicians and
6 psychiatrists are trained. You know, what the legal system is going
7 to do is what the legal system is going to do, but someone is there
8 expecting to get psychiatric care.

9 So that clinical exposure was something that happened from
10 literally the first day of my Bellevue career. I remember the case.
11 First day that I walked into Bellevue, and it was -- and of course my
12 boss just said, well, you know, welcome to Bellevue.

13 So -- but from the standpoint of -- of high-exposure or
14 high-sensitivity cases -- because there are cases that are not what
15 you would call high profile, but extremely high sensitivity. Nobody
16 is talking about them publicly, but everybody is watching them.

17 We had a case for -- for example, which was the largest
18 competency-to-invest litigation that had ever been brought. Nobody
19 talked about it, but everybody in the investment business world was
20 tracking the case.

21 So that's -- you know, what's the difference? It's a
22 difference of high sensitivity, high scrutiny kind of litigation, and
23 it's something that at The Forensic Panel, we've been

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1 practicing -- I've been working on these cases as well now for -- you
2 know, on a regular basis for the last 20 years.

3 Q. And have you also consulted or testified in cases
4 concerning mass killings or attempted mass killings?

5 A. I have.

6 Q. And can you please just go through some of your experience
7 with those cases.

8 A. I would say that at this point, I've consulted on
9 approximately 15 mass-casualty killing cases, and they span from as
10 far away as the Xerox Honolulu mass shooting, to the James Holmes
11 Aurora theater mass shooting, to the ethnic mass shootings in
12 Pittsburgh, the companion mass shootings of Richard Baumhammers and
13 Ronald Taylor, to the mass shootings targeting homosexuals in
14 New York by Ronald Crumpley. It's just -- you know, there are -- I
15 would -- I would say at this point, 15.

16 Q. And have you ever testified in a case concerning
17 psychotropics?

18 A. Oh, yes.

19 Q. And what are some of the issues that you've seen and have
20 asked -- been asked to be -- to consult or testify on concerning
21 psychotropics?

22 A. Well, it depends. You know, let's go back over the arc of
23 a case, and let's go backwards. You know, let's start from

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1 backwards. Is there something about someone's poor treatment or
2 response to treatment that had an impact on the crime such that their
3 sentencing should be mitigated, or how psychotropics may actually
4 have a direct hand in the crime as a matter of criminal
5 responsibility. Was a person who was on psychotropics legally insane
6 or not?

7 And in some insanity cases, the relationship of the
8 psychotropic to how a condition presented is a key element of that
9 insanity tilt within the courts. People focus on the drama of
10 whatever a person's delusions were and hallucinations, but really a
11 higher magnification is the relationship of psychotropics to a
12 person's mental state and how it evolved and what they were taking
13 and when they were taking it.

14 And so it is with competency. There are individuals -- you
15 know, one very high-sensitivity competency case that the practice was
16 involved in, involved the -- involved a CEO who was tried, criminal
17 charges, and was on psychotropics. And there was a question of
18 whether he was competent to stand trial during his proceedings
19 because of the nature of his psychotropic management and how it
20 affected his relationship -- relatedness to attorneys. It
21 was -- that was a defense case.

22 And then there are the disputed confession questions. Many
23 of the disputed confession questions, not surprisingly, involve

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1 someone who -- you know, man comes in, sits down in an interrogation
2 room, interrogation happens, statement is taken. Police say nothing
3 happened, suspect says this is illegitimate either because of false
4 or force; and then there's no question raised as to medication.

5 But what happens when a similar transaction takes place in a
6 hospital and not an interrogation room involving someone who either
7 has a psychiatric history or someone who has been treated with
8 opiates because they've got some kind of an addiction issue, and then
9 there are questions of what they should be taking and when they're
10 taking it.

11 So that's when psychotropic questions and management may
12 come up, not only from the psychiatric illness perspective but also
13 the chemical dependency perspective in areas of competency to waive
14 Miranda, whether somebody has waived Miranda knowingly,
15 intelligently, voluntarily, or the questions of -- of forced or false
16 confession.

17 Q. And going along those lines of -- I think we've heard the
18 terms be false confession, disputed confessions.

19 Have you testified, as we've heard, in cases concerning
20 disputed confessions?

21 A. I have.

22 Q. What was the first time that you testified -- consulted or
23 testified in a case concerning a disputed confession?

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1 A. In 2001.

2 Q. And what was that case?

3 A. It was a Daubert hearing, actually. Because the area of
4 disputed confessions, it is really very much a novel science. Even
5 now, there's very little research done in it. But false confessions
6 happen and certainly coerced confessions happen. That's not a new
7 phenomenon. It's just the question of what research we have to work
8 with it.

9 So Daubert cases have -- have happened. They do come up.
10 I've been asked to testify in them because there are questions about
11 what experts should actually be talking about when they come in and
12 talk about disputed confessions.

13 So that was a murder case and someone who was contesting his
14 confession of what he had offered to police in interrogation and
15 disputed confession testimony was presented by the defense. And I
16 was asked to look at it in the context of a Daubert proceeding rather
17 than the case itself.

18 Q. And whenever we talk about disputed confessions, are
19 there -- is there a variety of reasons in which someone may dispute
20 or challenge a confession?

21 A. Well, the confession evidence is damaging to a defendant.
22 And so, again, strategically -- it's a strategic necessity to get rid
23 of a confession for a defense team. But if the confession is

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1 illegitimate, it's illegitimate.

2 So it's -- it's -- you know, the -- the reason to challenge
3 is -- based on 30 years of experience, because it's there. Now,
4 that's -- in a sense, that's why suppression hearings happen. It's
5 just a matter of going through evidence.

6 But in terms of the kinds of issues that may come up, the
7 fundamentals are -- they really relate to three aspects coming
8 together. One is the vulnerability of a suspect. Some people may be
9 inherently more vulnerable to offering a false confession or to being
10 coerced into a confession.

11 And then some people -- and -- or they may have certain
12 qualities. The one that's most recognized is suggestibility under
13 certain types of conditions of interrogation. But there are other
14 vulnerabilities that we're starting to have a better feel for.

15 Then there's what did the law enforcement person do to
16 elicit that confession. Now, when the questioning is more abusive
17 and more coercive and an atmosphere within an interrogation -- within
18 the interrogation is created such that a suspect will confess to just
19 get out of the room because it's frightening and the suspect has to
20 put that to a stop, the suspect may have no particular vulnerability,
21 but the atmospherics of the interrogation are so abusive and aversive
22 that that confession happens as it does.

23 And then you have the backdrop of the context in which it

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1 takes place. What is it about this type of case that would make
2 something like this happen? What -- in some cases -- so, for
3 example, this is a case I can't speak about but it's public record
4 that I was part of, so I will just give you context because that's
5 public record.

6 The Central Park Jogger case, this case I consulted on.
7 Everybody knows that when the Central Park Jogger event happened, it
8 was an extremely high -- it was -- it was an event of great public
9 interest, and there was tremendous pressure within the police
10 department, the New York City Police Department, to solve the case.

11 So that's what I'm talking about, context. You have these
12 atmospherics that are going on within a case that may affect, at a
13 subtle and not-so-subtle level, what transpires at the hands of law
14 enforcement that don't happen in other cases.

15 So you have essentially a three-legged -- a three-legged
16 stool of suspect vulnerability, law enforcement or
17 investigator/interrogator activities, and then context in which it
18 takes place. And that's what you look at.

19 Q. All right. I want to go now into some of your
20 publications and lectures.

21 At one time, The Forensic Panel regularly published *The*
22 *Forensic Echo*. Can you tell us what that is?

23 A. Yes. *The Forensic Echo* was a monthly publication that I

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1 published and was editor in chief of that covered original material
2 of the intersection of -- or actually the front -- the frontier of
3 law, psychiatry, and public policy, and then law and other
4 disciplines of medicine and public policy.

5 The simple way of putting that is that there were new -- new
6 studies and new understandings within the behavioral sciences people
7 were doing research on, had their own interest in it, were publishing
8 things that from a forensic vantage point were fascinatingly relevant
9 to the law community. And the law community had no idea what was
10 being discovered about panic disorder and about gender dysphoria
11 or -- but things that nobody was talking about, but they were in our
12 literature that attorneys and judges had no idea. But if they knew
13 this information, they -- it would be applicable to what they were
14 doing on a regular basis.

15 And then vice versa. There were case decisions at appellate
16 levels that were implicating very significant scientific frontiers
17 that nobody was asking questions about and that we in the behavioral
18 science community needed to be asking these questions because nobody
19 knew the answers.

20 You know, DSM -- DSM's great, but DSM's embeddedness in the
21 law is sometimes imperfect; not because there's a flaw with DSM but
22 because on some level -- and all of us who work in the litigation
23 arena know this. Sometimes you're encountering life

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1 at -- at -- you're encountering events of life before they become
2 widely discussed. They're court cases. Nobody's bothered to think
3 of them as significant. And then people are -- people are touched by
4 a case that's raising an issue.

5 So *The Forensic Echo* was all about that. That was
6 our -- that was our nerve center and what powered, you know, that
7 passionate project for five years.

8 Q. And how many publications were there of that publication?

9 A. Every month for about five years. And then I got tired.
10 I just was tired. I don't ever want to publish -- I don't ever want
11 to have a publication again.

12 But -- but, no, it was -- it was a lot of hard work, and we
13 had our -- you know, we had our -- our readership, and it was kind of
14 a little boutique publication that I'm sentimental about, but it was,
15 oh, so many -- it was -- it was done when it was done.

16 Q. Were there any articles that were published within
17 that -- within *The Forensic Echo* concerning post-traumatic stress
18 disorder?

19 A. Oh, yes.

20 Q. And were there any publications that discussed coercion,
21 freewill, voluntariness as well?

22 A. Yes, but less so. The whole area of disputed confessions
23 really started to gain discussion in the late 1990s and I actually

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1 discovered it through the process of *The Forensic Echo*.

2 I first encountered a false confession as a clinician at
3 Bellevue, but nobody was really talking about it at all until the
4 late 1990s, and that was when I had first encountered it and then
5 started working on it at the case level in 2001.

6 So we had various aspects of voluntariness questions that we
7 were raising, but they weren't -- they were related to other areas of
8 the psychiatry-and-law interface.

9 Q. But in those issues, when you're talking about
10 voluntariness, is it still the exercise of one's freewill ----

11 A. Oh, yes.

12 Q. ---- in just different situations?

13 A. Absolutely. Absolutely. And understanding how to assess
14 it and understanding what kinds of things to -- what kinds of
15 things -- what kinds of evidence reflect upon that, yes.

16 Q. Have you authored any publications concerning terrorism?

17 A. I have.

18 Q. And can you go through some of those, please?

19 A. The first -- the first time I wrote about terrorism was in
20 2001 in *The Echo*. I wrote specifically about al Qaeda and how what
21 we understood about it then was very reminiscent of what had been
22 written in our literature about destructive cults. And that
23 was -- that was really at a time when -- when al Qaeda was suddenly

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1 on the radar of people who hadn't concerned themselves with it
2 before. That's in the immediate post-9/11 world.

3 I went on to write a variety of things over time. One thing
4 that stood -- stood out for me was a book chapter that I wrote a few
5 years later in a forensic science textbook on psychopathy and its
6 relationship to the media and the -- and how the two of those related
7 very closely to the root of terrorism; how terrorism uses the media
8 and how terrorist leaders who are psychopathic -- how -- how
9 communication and psychology are instrumental to the
10 success -- indeed, the oxygen -- of terrorism.

11 So that was -- so there were just various different aspects
12 of terrorism that -- that one might take an academic interest in,
13 but, you know, that -- those are two examples that immediately come
14 to mind.

15 Q. Thank you.

16 And have you also lectured on disputed confessions?

17 A. I have.

18 Q. When -- when or how many times have you lectured on
19 disputed confessions?

20 A. I've lectured several times. The first time that I
21 lectured was at the American Academy of Forensic Sciences annual
22 meeting, and I did with other colleagues as part of a symposium of
23 those who had a lot of exposure and involvement in that, both from

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1 the evaluating side and the legal side. And in -- and what we
2 presented was a methodology for how to examine cases of disputed
3 confessions and what questions one would be exploring.

4 Q. And in those lectures, when you were talking about
5 disputed confessions, did the underlying topics or issue of
6 voluntariness ever come up in those lectures?

7 A. Sure.

8 Q. Okay.

9 A. Yeah.

10 Q. And have you chaired a symposium on disputed confessions?

11 A. Yes, that's the one that I'm talking about.

12 Q. Okay. And when was that?

13 A. That was 2003.

14 Q. Can you explain to the court what the Crime Classification
15 Manual was, is, and what your involvement in it is?

16 A. The Crime Classification Manual is something that has been
17 put -- put out by the FBI and -- in order to be able to distinguish
18 crimes and subtypes of crimes and organize them and using criminology
19 principles, behavior principles, very much influenced by the
20 Behavioral Sciences Unit.

21 I have been researching a number of things, but one of the
22 areas that I have been researching for over 20 years is a
23 standardized distinction for the worst of crimes. The project is

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1 called The Depravity Standard.

2 So earlier in the research, the -- the editors of the Crime
3 Classification Manual invited me to contribute a chapter on
4 classifying crimes by severity because the depravity standard is a
5 nondenominational project; in other words, it's advantageous to
6 prosecutors, it's advantageous to defense. It depends on the case.

7 But really what it centrally relates to is the idea that
8 when courts and statutes have language that say if a crime is heinous
9 or atrocious or cruel or depraved, what does that mean? And that
10 when the -- when one considers the gravity of what's associated with
11 those findings, wouldn't it be good if we had a standardized
12 operationalized way to define what's a depraved murder? What's a
13 more depraved murder? What a less depraved murder? What's a more
14 depraved robbery? What's a less depraved robbery? Why?

15 So for 20 years and in a multisystem multitiered research
16 effort, that's something that I have been doing and pursuing, and the
17 Crime Classification Manual had me publish a chapter based on that
18 research.

19 Q. And have you ever consulted to Congress?

20 A. I have.

21 Q. And in what capacity?

22 A. After Sandy Hook happened in Connecticut, I was invited by
23 the House Oversight Committee; I believe it was 2013. They -- the

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1 chairman of the committee wanted to take up the issue of what can we
2 do to prevent mass homicides.

3 And I've worked on mass homicides for a number of years, and
4 it is a crime I very much understand. I very much understand the
5 perpetrators. I have lived those cases for many years. And I think,
6 most importantly -- and I don't necessarily feel this way about other
7 crimes -- I absolutely understand how they can be prevented. So
8 I -- and it's a very important societal imperative, putting aside all
9 of people's pet -- pet interests.

10 So I was asked in 2013 to come in and testify, really, out
11 of the blue, by this -- this Congressman's staff. I went in. I
12 testified at the hearing. And that led to a much more far-flung
13 effort than anticipated.

14 The Congressman was Congressman Tim Murphy of Pennsylvania,
15 who happens to be a child psychologist. So he envisioned an
16 opportunity to actually use the tragedy of Sandy Hook to embark on
17 long-needed mental health reform in the United States, and I began
18 working closely with him over the next three years, really, into
19 developing the largest mental health reform bill that passed in
20 decades, which President Obama signed into law in late 2016; and the
21 bill was the Helping Families in Crisis Mental Health Act.

22 That all started with a focus on mass homicide and
23 mental health needs, but it graduated into a variety of different

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1 areas and corners of the mental health system that need much more
2 cultivation and wiser investment.

3 Q. And have you testified before state legislators as well?

4 A. I have.

5 Q. And which states have you testified before?

6 A. Texas, Pennsylvania, Illinois. Those are three -- and
7 New York, those -- those four.

8 ATC [LT SCHWARTZ]: Your Honor, I know we've been going for a
9 little bit here. I don't have much longer, probably 15 minutes.
10 Would you prefer to take a break now?

11 MJ [COL ACOSTA]: Nope. Finish your part, and then we'll take
12 the break before I allow Mr. Natale to voir dire the witness.

13 ATC [LT SCHWARTZ]: Thank you, sir.

14 Q. Concerning -- I want to talk about now your research, and
15 I know this is a big part of your job. Are you familiar with
16 research protocols and methodologies?

17 A. I am.

18 Q. And can you explain your familiarity with us?

19 A. Well, I mentioned The Depravity Standard, and it's -- it
20 was -- it started with a very inscrutable idea. And we had to run a
21 variety of different models and research protocols because we were
22 aiming to learn things where one could have a valid, reliable way of
23 defining depravity and to apply it in a way that was fair and

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1 objective and replicable and easy.

2 So there are all kinds of things that one has to consider in
3 terms of setting up research protocols, but the key thing is, what is
4 it that you're trying to measure? And then are you able to arrive at
5 outcomes that are free from bias, that on their own will achieve
6 reliable and valid results of measuring what it is that you intend
7 for them to measure.

8 So there are a variety of aims of research, but certainly
9 through that challenge and one that began over 20 years ago,
10 culminated of course in publication and all of the findings that we
11 had. But most certainly, we had to tool and retool research
12 methodologies based on critical thinking about what flaws might be
13 there in the research and how to overcome them.

14 Q. And you mentioned its eventual publication. Was that
15 publication peer reviewed?

16 A. Yes. The Depravity Standard has been validated for
17 application to homicide, violent cases, and nonviolent cases; and its
18 work has been published in peer-reviewed publications. There's -- we
19 now have several publications relating to The Depravity Standard, and
20 there are more in the offing.

21 Q. Can you go over any other original research that you've
22 conducted in your career?

23 A. Yes. Well, we at The Forensic Panel developed the first

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1 prospective peer review methodologies for application to forensic
2 work, and what -- the specific aims were to replicate what happens in
3 the best of clinical medical centers.

4 If you go to a medical center with chest pain, you'll see
5 somebody in the emergency room. And in the best of medical centers,
6 what's going to happen is one person is going to see you and then
7 will go and take in the input of colleagues about what you might have
8 and what tests should be ordered, and then come back to you, ask the
9 questions that other people said, well, did you ask this, did you ask
10 that, did you get this, did you get that history? And then come back
11 to you, complete the history, do the tests, and then hopefully arrive
12 at a more informed and ultimately more valid and reliable result.

13 And so I sought to replicate that when I started
14 The Forensic Panel. I thought that it would be a really stimulating
15 and useful contribution. Again, this is 1998, so this is five years
16 after Daubert, and that's what was inspiring it.

17 How -- how could we upgrade forensic practice? And the way
18 we could do it is by making it replicate what happens in a hospital.
19 So we optimized the method in which there would be a primary
20 examiner, and the primary examiner would report to peer reviewers who
21 would provide oversight prospectively and with a specific aim to
22 ensure the objectivity, the diligence, and the reflection of
23 standards of the field. Because the science is always changing.

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1 So as a practical matter, it would be -- and you've talked
2 about how cases come into The Forensic Panel. The way a case comes
3 into The Forensic Panel is there's a primary examiner assigned; that
4 person reviews the record. And then after all those records are
5 reviewed, that primary examiner then has a case conference with
6 assigned peer reviewers who listen critically and give input about a
7 variety of explanations and possibilities that that primary examiner
8 has to resolve with follow-up questions or follow-up records or
9 collateral sources of information. And the peer reviewers have
10 complementary areas of expertise.

11 You know, if -- the primary examiner may have a really good
12 feeling for substance abuse in a case with substance abuse issues,
13 but there's a peer reviewer who has a better feel for
14 methamphetamine, and methamphetamine is of particular interest in
15 that case.

16 So that primary examiner is qualified in his own right but
17 is benefiting from that collateral expertise of somebody on his
18 shoulder saying, it's not my case, but I'm hearing all of it, and
19 here's what you should be looking into based on my current
20 understanding of the field.

21 And then those peer reviewers are ultimately chosen based on
22 how the practice comes to become fluent in the fine points of the
23 case. Then the primary examiner will then circle around and conduct

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1 an interview and the peer reviewers will look at that interview
2 before it happens and say, oh, make sure that you ask about this and
3 ask this series of questions.

4 So it goes into really enriching the quality of information
5 that one can yield. So at the end, when the primary examiner says,
6 well, I'm going to write a report, and this is what I think, you
7 know, this is my synthesis of this, the quality of information that
8 they've gathered is more relevant, more rich, more approximating with
9 updated standards of the field and just better positioned to be a
10 last word, which is the expectation of what people have when they
11 come to The Forensic Panel.

12 So it's something -- it's a protocol that we optimized.
13 Back in 1998, people were not practicing forensics this way.
14 The -- the -- their -- the forensic pathology participants of our
15 practice were very much turned on by that model, and now I know
16 across -- across forensic pathology in many medical examiners'
17 offices, they employ exactly the same method.

18 You've got somebody doing the autopsy. That person is
19 responsible. They have colleagues that they know who they trust.
20 They present the case. There's a critical hothouse. And in
21 different areas of medicine, the idea of peer review and oversight by
22 colleagues is a much more dynamic way of practice.

23 We published on the protocols in peer-reviewed literature.

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1 Other people have cited to it in other forensic sciences that I don't
2 understand. So they understand how it applies; I don't.

3 But the point is, it's the idea of learning from your
4 colleagues and enabling them to really fortify your brain power.
5 Because you can't know everything, and you can't read every article.

6 So the -- the -- I -- the -- that's -- so forensic peer
7 review, that's another area The Forensic Panel researched, and we
8 keep tweaking over time based on experiences. I think that we
9 probably do things a little bit different from the way we did five,
10 six, seven years ago and -- and better; and that's really in the
11 pursuit of a best practices model.

12 So that's another example of what we've researched.

13 Q. And what about everyday evil? Can you tell us about that?

14 A. The -- there's a misconception that trauma begins and ends
15 at post-traumatic stress disorder. Simply put, every single person
16 in this room, if -- if every single one of you reflect, what's the
17 worst thing that anyone has ever done to me, everybody can answer
18 that question. And what that means is that everyday evil is
19 ubiquitous. It's ubiquitous, but it's not defined. So the
20 behavioral sciences have never appreciated that construct.

21 Every single person walks around this earth, whether they
22 think about it or not, has had something happen to them that's the
23 worst thing that ever happened to them that indelibly impacted them,

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1 for whatever reason. And it may be because someone intended for that
2 to happen and intended to have that effect, but there's nothing
3 criminal about it.

4 So we operate at a misunderstanding, a misconception that
5 evil begins and ends with Ted Bundy; and it's wrong. You don't have
6 to be a serial killer to do something if you -- you know, you can
7 call it what you want to call it, but we all know of it as evil.

8 So this -- I was inspired by writing -- by reading an author
9 who is a psychiatrist. His name was Scott Peck. He wrote a book
10 called *People of the Lie*, and I thought, wow, I never even thought of
11 things this way.

12 And so ultimately, what I did was I developed something
13 called the Welner Inventory of Everyday Extreme and Outrageous, but
14 it has nothing to do with forensics. It was developed for clinical
15 application because -- because when you're in the forensic arena and
16 you're working, you see the endpoint of Humpty Dumpty having fallen
17 off the wall, and nobody can put the pieces back together again.

18 So what if -- what if clinicians -- look, parenthetically,
19 we train clinicians to recognize child abuse. They've got an
20 inventory of what you look for to recognize when child abuse is
21 happening. And we do it why? To prevent child abuse. Because if
22 people aren't looking for subtleties and they don't see it, well,
23 then somebody walks out the door and the abuse continues. And so

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1 it's the same token with the WIEEO.

2 The purpose is to create an inventory that clinicians can
3 use so that if they're treating patients or if they're treating
4 perpetrators, they can flag something and then make an intervention.
5 Oh, this is a clinical problem.

6 We flag suicide as a problem. We flag homicide risk as a
7 problem. But what if things were flagged before any agency gets
8 called? So a treater says I have this person in my office, I can
9 make a difference, I can detoxify this situation, and then have an
10 impact on a home, a school, a neighborhood.

11 So it's a prime -- it's a secondary prevention measure, and
12 I researched it to a point where I was able to get it published in
13 the peer-review literature last year, and now it will then get its
14 legs to continue to evolve and inspire a broader participation.

15 Q. And has the research that you've conducted, including
16 these pieces, has that helped inform you to inform your
17 expert -- your ability to provide expert testimony and consultation?

18 A. Sure, because you appreciate much -- you appreciate life
19 at a granular level beyond the constraints of a criteria of
20 diagnosis. We have to respect the criteria of diagnosis in order to
21 give a diagnosis, but just because a diagnosis is not present, it
22 doesn't mean that there's nothing to look at. You know that -- that
23 psychiatry is a much -- should be a much more granular pursuit at a

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1 clinical level and also at a forensic level.

2 When you -- when you appreciate the enormity of things that
3 go beyond diagnosis, then I think it assists your efforts as a
4 forensic examiner.

5 Q. And, Dr. Welner, do you keep a current résumé or
6 curriculum vitae that documents your achievements, accolades, and
7 that informs your current work?

8 A. I have a CV that's up to date on my publications and most
9 of the other things that people put on CVs.

10 ATC [LT SCHWARTZ]: Your Honor, permission to approach the
11 witness to hand him what the court reporters already have down south,
12 which is Dr. Welner's CV.

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

14 ATC [LT SCHWARTZ]: I've handed the witness the document.

15 Q. Dr. Welner, could you please look through that and let me
16 know if you recognize it.

17 A. I do.

18 Q. What is it?

19 A. It's my -- it's my CV, and it is -- looks like it's
20 updated.

21 Q. Is everything that you see as you flip through accurate to
22 reflect your employment and other various accolades in your career as
23 a forensic psychiatrist?

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1 A. It reflects that, yes.

2 ATC [LT SCHWARTZ]: Retrieving the exhibit.

3 MJ [COL ACOSTA]: All right. It's marked as AE 467II. That's
4 467-India-India.

5 ATC [LT SCHWARTZ]: Your Honor, if I may have the court's
6 brief indulgence.

7 MJ [COL ACOSTA]: You may.

8 **[Counsel conferred.]**

9 ATC [LT SCHWARTZ]: As far as qualifications, Your Honor, I
10 don't have anything further.

11 MJ [COL ACOSTA]: All right. We're going to take a -- we're
12 going to recess until 1615.

13 Dr. Welner, I'll remind you you remain on the stand and
14 remain under oath. Don't discuss your testimony with anybody during
15 the recess, and we'll have you back on the stand in about 20 minutes.

16 **[The witness was warned, and withdrew from the RHR.]**

17 MJ [COL ACOSTA]: The commission is in recess.

18 **[The R.M.C. 803 session recessed at 1555, 19 April 2023.]**

19 **[The R.M.C. 803 session was called to order at 1617, 19 April 2023.]**

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

21 Government, all parties again present as before?

22 TC [MR. O'SULLIVAN]: Yes, Your Honor, only this time also
23 including Ms. Sanders.

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1 MJ [COL ACOSTA]: Defense?

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

3 **[The witness, Michael Welner M.D., resumed the witness stand.]**

4 MJ [COL ACOSTA]: Defense, the accused is still listening,
5 correct?

6 LDC [MR. NATALE]: I'm sorry?

7 MJ [COL ACOSTA]: The accused is still at the -- in the ELC
8 area and able to hear?

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

10 MJ [COL ACOSTA]: Yes. Thank you. All right. You can
11 proceed.

12 I remind you again, temper your -- the speed of your
13 responses. Again, live translation of everything you say as you say
14 it is going to the accused in another language and it takes time for
15 them to be able to translate that and also to be able to listen as
16 well.

17 Go ahead.

18 LDC [MR. NATALE]: Your Honor, at my age, slow seems to come
19 naturally.

20 **CROSS-EXAMINATION**

21 **Questions by the Learned Defense Counsel [MR. NATALE]:**

22 Q. I'd like to focus us on the beginning of -- and go through
23 the sequence of questions you were asked, sir.

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1 Are you aware that the government provided a notice dated 31
2 March of this year as to what you would be opining on?

3 A. I'm not aware of the government's notice to you,
4 Mr. Natale.

5 Good afternoon, by the way.

6 Q. Oh, good afternoon.

7 Did anyone -- they never consulted with you to determine
8 what would be the area of expertise that they would articulate?

9 A. I think we had discussions about it, but I didn't look at
10 a notice that they were providing in its written form.

11 Q. Did you give them any suggestions as to what they should
12 put in their notice?

13 A. I didn't write it for them. I don't know what they put in
14 it. But we talked about what I'd be testifying about, and so
15 that -- that's -- that was my understanding.

16 Q. Okay. Is ----

17 A. Again, I haven't seen the notice, so I can't speak to what
18 degree it reflects our discussions.

19 LDC [MR. NATALE]: Your Honor, I'd like to have Defense
20 Exhibit AE 542 Attachment B -- if I could publish it, Your Honor, so
21 the witness could see it while I'm going through it?

22 MJ [COL ACOSTA]: You may.

23 Q. Okay. Dr. Welner, I've put on the screen what is

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1 Attachment B to government's notice -- it's actually Attachment B, AE
2 542, of my motion, but it's the notice that I was given from the
3 government.

4 And I'd like to go through it, if I can, with you to confirm
5 that what is actually said in there is consistent with what you
6 thought your testimony was going to be about.

7 A. Yes, sir.

8 Q. Now, if you -- let's go to page -- item b.

9 A. Item d.?

10 Q. b. B as in baker, boy, and bravo.

11 The opinion he will provide: He will opine that the accused
12 at the time he provided the statements at issue in 467 ----

13 A. Uh-huh.

14 Q. ---- that he did not exhibit learned helplessness.

15 Were you aware and did you consult with them before March
16 31st as to whether that's something that you would be able to testify
17 to?

18 A. Oh, yes. Certainly.

19 Q. And by the way, I got from your testimony that you'd been
20 working with them prior to having to come in and testify on the
21 motion that we're here for, which is the voluntariness of the
22 statements, which is AE 467.

23 A. I've been working on the case for a number of months, sir.

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1 Q. Okay. And what precipitated, if you know, you beginning
2 to work on this case months before any motion was even filed or we
3 were even noticed that you were going to be a witness?

4 A. I was only aware that there would be mental health issues
5 that related to Mr. Nashiri and that I would be a consultant who
6 was -- who was essentially explaining different questions to them.
7 And that's really been my role.

8 I've been reviewing documents from the discovery file for a
9 number of months and have reviewed a number of those documents over
10 time. And as these proceedings were taking place, I was really more
11 involved in the documents and meeting with them periodically about
12 different mental health issues that came up, a couple of which are
13 being raised here in this case.

14 And what you just mentioned about learned helplessness was
15 certainly something that we had discussions about, but we had
16 discussions about what I was deriving from those materials of
17 psychiatric interest and of psychiatric legal interest.

18 Q. It goes on to say that -- that he did not reflect symptoms
19 of PTSD.

20 Is that something that you discussed with them ----

21 A. Yes.

22 Q. ---- in advance, that you would be able to testify that
23 there was -- that he did not at the time reflect any symptoms of

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1 PTSD?

2 A. At the time that he provided the statements at issue in
3 467, yes.

4 Q. Well, we're going to get into that in more detail, but I
5 want to make sure that this is correct.

6 Moreover, at the time he, meaning Mr. Nashiri, was capable
7 of making a voluntary statement to law enforcement.

8 A. At that time, yes.

9 Q. And is that something which you discussed with them, and
10 you said yes, I can ----

11 A. Yes.

12 Q. ---- opine on that?

13 A. I -- we had that discussion.

14 Q. And I believe it goes on to say and demonstrated choices
15 in that regard.

16 A. Yes.

17 Q. And when it says choices in that regard, is that in regard
18 to the voluntariness of the statement or in regard to other matters
19 that were associated with the statement?

20 A. In regard to the statement that he was making.

21 Q. Okay. Thank you.

22 Now -- and that you were going to -- that your opinions were
23 going to be subject to things that you read and future testimony and

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1 future information that you would be provided?

2 A. Yes.

3 Q. And not only that, they go on in part c., paragraph c., of
4 AE 4 -- excuse me, 542, that you've reviewed the motion that we wrote
5 to suppress the statement. You reviewed AE 467, which is -- C, as in
6 Charlie?

7 A. Uh-huh.

8 Q. ---- which was a document relating to that series, and you
9 also reviewed -- right? -- AE 459?

10 A. You're going to have to help me with what the motion was
11 because ----

12 Q. Okay.

13 A. ---- the number -- I may well have, but I don't think of
14 them in number terms.

15 Q. You know, here we've been doing everything by numbers, and
16 it took me a while to get used to too.

17 A. I'm still at the acronym phase.

18 Q. Yeah, well, let's start -- AE 459 is a motion that the
19 defense filed to dismiss the charges based on gross governmental
20 misconduct as it relates to what happened to Mr. Nashiri in the black
21 sites.

22 A. Yes. I read that.

23 Q. Did you read it?

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1 A. I did.

2 Q. And did you read the attachments to that?

3 A. Yes, I did.

4 Q. Okay. And I believe 467 is just the motion that we're
5 saying that the statement wasn't voluntary. And if I have it
6 correct, I believe that 467C, as in Charlie, is the government's
7 response.

8 A. I'll take that. You know, I read the government's
9 response.

10 Q. Okay. And you obviously read our motion?

11 A. I did.

12 Q. Okay.

13 A. Yes.

14 Q. Now, I don't need to go any further, so I think I can at
15 this point take that away, if I may.

16 Now, as it relates to your decision to testify in this case,
17 based on your testimony, I've got a few impressions. And I
18 want -- so I don't have any false impressions, maybe you could help
19 to correct me if I do.

20 I get the impression that you're the sort of person who
21 likes precise language and precise definitions for terms; is that
22 correct?

23 A. I like -- I like to make sure that people are

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1 understanding what I say as I mean it, and I like to understand what
2 people say as they mean it.

3 Q. Okay. And as I ask questions, I'm going to try, to the
4 best I can, to use conventional English. Sometimes my accent may be
5 a little disruptive, so ask me.

6 Now, one of the things that you mentioned in there is
7 that -- this word "choice." Do you recall that?

8 A. Yes.

9 Q. And choice is defined as an act of selecting or making a
10 decision when faced with two or more possibilities.

11 Would you agree with that?

12 A. Fair enough. Sure.

13 Q. Okay. Now, there was also in there the mention of capable
14 or capability.

15 A. Yes.

16 Q. Would you agree that capable means having the ability, the
17 fitness, or the quality necessary to do or achieve a specific thing?

18 A. Yes.

19 Q. Okay. So, for example, I have the capacity to speak.
20 That doesn't mean I'm going to speak well, but it just means that I
21 have that capacity.

22 ATC [LT SCHWARTZ]: Your Honor, objection as to relevance. I
23 thought we were going through qualifications.

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1 LDC [MR. NATALE]: Your Honor, this goes directly to the
2 qualifications based on the definitions and has -- what they said he
3 was going to be talking about. These are foundational issues that
4 gets to whether or not there's the qualifications and then later
5 whether or not there was a methodology to determine whether or not
6 these words were fulfilled.

7 MJ [COL ACOSTA]: Understood that -- that seems to be more
8 focused on the second part of the examination of this witness that
9 will occur.

10 What I'm interested in now is hearing if you have any
11 objections or questions regarding his qualifications in the areas of
12 expertise -- in the areas of expertise that he's going to testify
13 about, and that is, by the government's own proffer, in forensic
14 psychiatry.

15 Q. How many times did you meet with the prosecution regarding
16 your testimony in this case?

17 A. I met with the prosecution yesterday ----

18 Q. Uh-huh.

19 A. ---- and I met with the prosecution the day before.

20 Q. And for how many hours?

21 A. Well, I was reviewing records in the SCIF, so off and on.
22 I would say a few hours in total.

23 Q. Now, the number of records that you looked at fall into

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1 three main categories: There's classified, which would be Top Secret
2 and Secret; and then there's the unclassified.

3 Obviously, we're not going to talk about anything at this
4 point, but you looked at all three levels of those?

5 ATC [LT SCHWARTZ]: Your Honor, objection. Again, I believe
6 this gets into the second part of what he's reviewed.

7 MJ [COL ACOSTA]: Counsel, we're -- we're talking about his
8 qualifications. And I know that the government's presentation
9 of -- of evidence to qualify him as an expert went very far.

10 LDC [MR. NATALE]: And that's why ----

11 MJ [COL ACOSTA]: However, I'm trying to get you to focus on
12 his qualifications as an expert, as a forensic -- pardon me, as a
13 forensic psychiatrist and his ability in that field ----

14 LDC [MR. NATALE]: Your Honor ----

15 MJ [COL ACOSTA]: ---- not about what he's reviewed and about
16 the quality of it. I told you, I'm going to give you all of the room
17 you need to question the foundation of the opinion he will offer and
18 to the quality -- and to attack that as you see fit. But we're
19 talking about his qualifications right now, so ----

20 LDC [MR. NATALE]: So I understand ----

21 MJ [COL ACOSTA]: The objection is sustained, but go ahead.

22 LDC [MR. NATALE]: Your Honor, so I understand, I am not
23 allowed to elicit questions that relate to the testimony he provided

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1 during the government's presentation at this time ----

2 MJ [COL ACOSTA]: No, that ----

3 LDC [MR. NATALE]: ---- only to qualifications?

4 MJ [COL ACOSTA]: No. Counsel, I don't know -- that was not
5 part of their presentation, as far as what you just asked about
6 their -- their amount of consultation with him. How many times he
7 consulted with them is not related to his -- his ability to serve as
8 an expert.

9 LDC [MR. NATALE]: Now, but I guess there was a number of
10 other areas, Judge, that they went into, so I guess we'll have to do
11 it area by area?

12 MJ [COL ACOSTA]: No. You can do -- you can ask the questions
13 about his qualifications. They let the -- our witness there -- their
14 witness answer very broadly some questions -- some -- some questions
15 that were asked that might not have gone into qualifications;
16 however, that's what you're here to ask about.

17 What we're doing right now is to determine his
18 qualifications as an expert based upon his education, experience, and
19 training. So if your questions are about that, that's -- that's what
20 I want to hear about, if you have questions about that, to qualify
21 him as an expert.

22 The quality of his opinion and the foundation of that
23 opinion come later, and I will give you all of the room that you need

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1 to ask those questions after the government presents such.

2 Q. Sir -- excuse me. Dr. Welner, I didn't mean to -- just to
3 call you "sir."

4 Dr. Welner, did your professional qualifications -- would it
5 be consistent that you would take notes of the things that you read?
6 Is that part of your -- what would qualify you as an expert, that you
7 took accurate notes of what you read and looked at?

8 A. It's not part of my qualifications.

9 Q. Okay. Now, I learned yesterday that you had reviewed the
10 Istanbul Protocol; is that correct?

11 A. I have.

12 Q. And in reviewing that protocol, was that the first time or
13 had you reviewed that protocol before?

14 ATC [LT SCHWARTZ]: Your Honor, objection. This is going to
15 what he reviewed for the basis of his testimony.

16 LDC [MR. NATALE]: Your Honor, it goes his background as to
17 what his qualifications are to opine on the facts of this case.

18 MJ [COL ACOSTA]: I'll allow the question about the protocol.
19 Overruled. You can ask that question.

20 Was that the first time that you'd ever reviewed the
21 Istanbul Protocol?

22 WIT: Yeah, I reviewed the Istanbul Protocol some time ago.

23 MJ [COL ACOSTA]: No, no, no. The question was: Was

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1 that -- when was the first time that you reviewed it?

2 WIT: The first time that I reviewed it was some time ago.

3 Q. And when you did the -- as far as your qualifications go,
4 would looking at a document relating to the area that you're going to
5 be testifying about, would that include, in this case, looking at
6 something like the Istanbul Protocols?

7 A. It depends on the nature of the question. Not -- it does
8 not -- the Istanbul Protocols do -- do not directly relate to the
9 areas that I'm speaking to in my testimony in these proceedings. I
10 did review them some months ago in connection with another question
11 that I -- that was brought to my attention for which it was much more
12 directly approximated.

13 Q. Did -- in that reading, did it in any way inform you about
14 international standards regarding PTSD and the other sequelae that
15 torture victims have?

16 A. I think it's very informative in a variety of ways.
17 What's informative to me about post-traumatic stress disorder is the
18 medical literature, the scientific literature. There are -- in the
19 Istanbul Protocols, there are guidelines primarily relating to
20 assessment but things that also relate to legalities and
21 administrative aspects and protocols.

22 And those -- you know, they may be procedurally important at
23 some point. They may be things that I have to directly relate to.

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1 But as a forensic psychiatrist, I'm always going to be concerning
2 myself most with questions of assessment and data and data integrity.

3 So was it informative to me? I think that I found it a
4 useful resource in the sense of its aspirations for looking and be
5 able -- being able to detect the undetected. So I think that from
6 the standpoint of being an examiner, it was a useful for informative
7 document.

8 From a standpoint of what PTSD is, no, I did not. That's
9 stuff that I rely upon, the scientific literature more directly, and
10 that's more of an organizational document. It's useful and it's
11 informative, but it's not something that's -- that's hard research.
12 It's more just recommendations for protocols, and it has its place.

13 Q. How many people have you diagnosed with PTSD in the
14 criminal context? I understand from your testimony there's a lot of
15 civil personal injury stuff, but how many people did you diagnose as
16 having PTSD in the context of a criminal case?

17 A. Probably somewhere around ten.

18 Q. Okay. How many did you treat in the context of a criminal
19 case that were the defendant, the accused in the case?

20 A. I don't have a practice that mingles. There's a
21 consultation aspect of the practice and a treatment practice. So I
22 haven't treated people that I've consulted.

23 Now, there are cases in which I've been consulting on in a

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1 forensic capacity in which I've made recommendations to treating
2 people because there are things that came up in the course of a
3 forensic examination that the treater may not have been aware of.

4 So I've provided that kind of clinical feedback, but I
5 haven't been charged with providing treatment because it's a -- it's
6 a dual -- it's a mingled agency. The two are necessarily kept apart.

7 Q. So I understand that you haven't done the treatment of
8 people who have PTSD?

9 A. I have.

10 Q. But they are people who were diagnosed by someone other
11 than you?

12 A. No. I've had a clinical -- I had a clinical practice for,
13 you know, close to 30 years and had many people recommended to me and
14 people that I treated who I ultimately diagnosed with post-traumatic
15 stress disorder and treated as my patients ----

16 Q. Right.

17 A. ---- in the community.

18 Were any of them ever in prison and did they ever -- any of
19 them ever develop PTSD based on their experiences in prison and as
20 inmates? Yes. But I didn't assess them in a forensic capacity.
21 They were people who I ultimately diagnosed with PTSD, but people
22 who -- who were -- who were -- who had been -- who had done time
23 and -- and who had been in the system at one time.

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1 Q. And to summarize: What do you understand the criteria in
2 DSM-5 to be for PTSD?

3 A. The criteria involve the exposure to a life-threatening
4 event or an event that is a risk of great personal injury or a
5 prolonged period of severe injury as a signal event, and then on the
6 basis of that event, a person develops a series of symptoms that come
7 from several categories.

8 One are loosely referred to as intrusion symptoms. Those
9 symptoms may be nightmares and dreams that are reflective of that
10 original event and the very painful experiences of it that are
11 persistent and that are intense or they may be reexperiencing that
12 occurs during the daytime that's so intense and that's so vivid that
13 a person feels that they are reliving the event.

14 Or another aspect of intrusion symptoms is that the -- the
15 person has persistent, extremely painful memories that are unwanted
16 but keep coming back. So that's the -- those are what contribute to
17 the quality of intrusion symptoms.

18 Then there are avoidance symptoms, symptoms where people
19 avoid relating to the event, avoid putting themselves in a position
20 to reexperience the event or in certain ways make sure that they
21 won't be reminded of the event in one way or another.

22 Then there are events that reflect changes in a person's
23 cognition and mood but in a more profound way of how they relate to

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1 the world; that they relate to the world with -- in a world view
2 that's either numb or with loss of interest or cognitively changed or
3 much more dark and attributing things on the basis of their
4 experience and in a way that they did not before.

5 And then there are symptoms of hyperarousal where a person
6 reacts to certain things going on around them that others may not
7 have such pronounced reactions but they have pronounced
8 physiological -- or actually they have pronounced personal reactions
9 that may be much more angry, much more irritable, and
10 disproportionate to the kinds of things that are going on around
11 them.

12 This isn't something that's caused by substance abuse. It's
13 not something that's a result of another condition. But it is
14 something that persists. It's something that lasts a particular
15 length of time and causes significant effect on a person's social
16 life, occupational life, personal life.

17 It's not just symptoms that a person has, but the key thing
18 that makes it a disorder is that it truly impacts a person and their
19 functioning.

20 Q. What about the criteria for complex PTSD?

21 A. Complex PTSD incorporates PTSD but it's with a twist. It
22 specially considers circumstances that, at least for the most part to
23 this point, account for very abusive and deprived youth; where folks

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1 don't necessarily have very dramatic experiences in their childhood
2 but they may have profound personal neglect or deprivation or other
3 kind of abusive experiences of their formative years and that, as a
4 result, they do develop symptoms not only of PTSD -- they may have
5 many symptoms of PTSD, even most, perhaps not the full constellation;
6 but on top of that, they have other kinds of symptoms that many
7 people recognize to be associated with borderline personality
8 disorder.

9 They have very unusual and fragile attachments. They are
10 very emotionally ----

11 Q. Is that part of the criteria, though, for complex in the
12 DSM?

13 A. Complex PTSD is not a DSM construct, but it's something
14 that's attracting a lot of vibrant ongoing research.

15 Q. Are you saying that it's not included in the DSM-5?

16 A. It's noted in the DSM-5, but it's not separated from
17 DSM -- from PTSD. It's essentially PTSD-plus.

18 Q. Right. It's part -- but it's in the DSM-5 as something
19 that exists and that can be diagnosed?

20 A. Yes.

21 Q. Okay.

22 A. It can be diagnosed, but it ----

23 Q. And it isn't limited to just ----

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1 MJ [COL ACOSTA]: Counsel, I need ----

2 LDC [MR. NATALE]: Okay.

3 MJ [COL ACOSTA]: Both of you ----

4 LDC [MR. NATALE]: One at time.

5 MJ [COL ACOSTA]: Yes. What I need is one at a time and slow.

6 If you think it's hard for an interpreter to translate one of you at

7 a time, two of you at the same time is impossible. And also my court

8 reporters can only type the words that one person says at a time.

9 Please don't talk over each other and please slow down.

10 You may continue.

11 WIT: I apologize. I wasn't done with my answer ----

12 LDC [MR. NATALE]: Don't apologize.

13 WIT: ---- but you know what, I've provided enough of an

14 answer, and please, you know, go ahead and ask the next question.

15 Q. Does it require that the trauma had to occur at a young

16 age?

17 A. No, it doesn't. I'm more speaking to what the research is

18 showing of what it associates with. There are other phenomena that

19 can be associated with it, but -- but a lot of the research in this

20 area is really pointed to how complex PTSD arises in situations that

21 don't have the drama of these signal events of life -- acute life

22 threats, and yet someone develops these symptoms because of the

23 length of time and the deprivation and abuse that takes place.

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1 Q. Exactly. But it doesn't have to be in their youth, does
2 it?

3 A. Correct.

4 ATC [LT SCHWARTZ]: Your Honor, objection to this line.
5 Looking at questions for qualification, so relevance.

6 LDC [MR. NATALE]: Your Honor ----

7 MJ [COL ACOSTA]: Overruled. I'll allow this. This is an
8 area that has come up. PTSD and his experience with PTSD in its
9 various forms is relevant. His knowledge of that is relevant.
10 Continue.

11 Q. What, if any, specialized training do you have in
12 diagnosing or the treatment of torture survivors?

13 A. I don't have specialized training in the treatment -- in
14 the assessment or treatment of torture survivors.

15 Q. What if -- what peer-reviewed articles, if you have any,
16 that you published relating to diagnosing or treating people who
17 suffer from either PTSD or complex PTSD?

18 A. I'm not published in the area of complex PTSD, which is a
19 pretty new area of academic development.

20 In the area of PTSD, what I've actually published, I'd
21 really have to go back and look at my CV, but it hasn't been an area
22 that I've focused in my publications.

23 Q. And if you did have a publication, you think that it would

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1 be some time ago so -- and you don't remember?

2 A. It would have been some years ago. Certainly, I've not
3 published on a PTSD-related issue in the last several years, that I
4 can remember.

5 Q. Have you ever treated anyone who was subjected to what we
6 now know to be the EITs? Do you know what I mean when I say EITs?

7 A. I do.

8 Q. Have you ever treated someone who suffered that list of
9 EITs?

10 A. I have not treated someone who has gone through an EIT
11 program.

12 Q. Have you diagnosed anyone who went through the EIT
13 program?

14 A. Have I diagnosed -- I haven't evaluated for diagnosis
15 anyone who has gone through the EIT program.

16 Q. Now, have you had any experience in either diagnosing or
17 treating people who were held in captivity during which, after being
18 hooded, a firearm was racked and placed to their temple?

19 A. I do not.

20 Q. What about having an electric drill turned on and off
21 right by their head when they're hooded? Any experience with
22 someone -- have you diagnosed anyone that had that happen to?

23 A. No, although let me go back to the previous answer. I

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1 have had patients who have had post-traumatic stress disorder from
2 wartime experiences, and I can't recall whether any of those
3 experiences would have occurred -- would have involved a gun being
4 cocked.

5 Electric drill, definitely not. I haven't had an
6 experience. That's a -- that's a story I don't recall hearing.

7 But a gun being cocked is -- that's -- that's not something
8 I'm not so sure I haven't heard before as a clinician.

9 Q. As a clinician, have you diagnosed or treated anyone who
10 had their hands tied and legs behind them and then were lifted off
11 the ground to such a degree that a person -- other people seeing it
12 were concerned that the person's -- they may have dislocated his
13 arms?

14 ATC [LT SCHWARTZ]: Your Honor, objection to whether he can be
15 qualified as a forensic psychiatrist.

16 MJ [COL ACOSTA]: Defense, I know that this is about his
17 experience on that. I'm not sure that you haven't covered this in
18 your previous questions about whether or not he's treated anybody
19 that was subjected to the EITs or beyond or somebody who's been a
20 victim of torture.

21 LDC [MR. NATALE]: Your Honor, this is -- the questions I'm
22 asking now are non-EIT-approved actions, so they are not assumed in
23 my question previously. And I think that they are absolutely

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1 relevant to the qualifications as to whether the person has seen and
2 experienced in either diagnosing or treating someone who has specific
3 conditions happening to them.

4 MJ [COL ACOSTA]: Who's had particular events happen to them
5 that might result in a condition, you mean?

6 LDC [MR. NATALE]: Yes. Yeah. If they don't know ----

7 MJ [COL ACOSTA]: Counsel, again, hold on.

8 You can ask about his experience about treating people that
9 have had, you know -- I'll allow you to continue with the particular
10 events, but we need to move on pretty quickly from there.

11 LDC [MR. NATALE]: Then I'll have to speak faster.

12 MJ [COL ACOSTA]: No, don't speak faster. Just get through
13 the events that you want to talk about and move from that to his
14 qualifications as a forensic psychiatrist, please.

15 Q. Do you have any experience dealing with a person who
16 suffered what I just described as being hung?

17 A. I don't recall that kind of experience.

18 Q. How about someone who was forced to kneel with a
19 broomstick behind their knees and lean back for a long time? You
20 ever have anyone that you diagnosed or treated who experienced that?

21 A. No.

22 Q. How about someone who was anally raped more than once?
23 Any experience?

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1 A. Well, I've had experience with people who have been anally
2 raped.

3 Q. Okay.

4 A. You know, I've had a number of those experiences, of
5 treating and assessing people who had that experience.

6 Q. Now, how many people have you diagnosed or treated who
7 were subjected to what was a sophisticated program over a number of
8 years that was administered by two Ph.D. psychologists whose goal was
9 to condition the person to be compliant? Have you ever had a case
10 like that?

11 A. Well, what you're -- excuse me -- asking me is have I had
12 patients who were former detainees who were part of this specific
13 program. Because I don't understand that there are other programs
14 that necessarily exist that were undertaken in the way that this was
15 in other places. This is something that's particular to the events
16 that brought us here.

17 Q. I'm -- what I'm trying to find out is what's your
18 experience with the events that we know transpired here?

19 A. I haven't treated any of those people as a patient.

20 Q. Okay. And have you ever diagnosed or treated someone who
21 was conditioned to respond in a certain way or received the sort of
22 punishment that I went through?

23 A. I have. In slightly different contexts, but I have.

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1 Q. And in that context, did it involve the planned and
2 sophisticated conditioning by two Ph.D.s in psychology?

3 A. Well, in my experience, it involved people who were less
4 educated and more sophisticated because they were using -- they were
5 using methods that were -- that -- that were subtle and manipulative
6 and dealing with individuals in whom they were exploiting a
7 particular dynamic and doing exactly that.

8 So they weren't trained, but they were cunning, and they
9 were doing different things that were at times improvisational but
10 clearly intentional and absolutely having those effects on the person
11 who was targeted and who ultimately ended up in my care and with the
12 diagnosis that I was treating that person for.

13 Q. Am I correct that your answer is that you haven't had
14 anybody who would have gone through the program that you know was
15 imposed on Mr. Nashiri?

16 A. No. I haven't treated anyone who's been through the EIT
17 program.

18 Q. Now, I believe you said that it's important to stay on top
19 of the current literature in your field.

20 A. True.

21 Q. And that part of being a forensic psychiatrist would
22 involve, as we've been talking about, PTSD, right?

23 A. Sometimes.

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1 Q. Yeah.

2 A. I mean, there are many things in PTSD that have absolutely
3 nothing to do with either areas of forensics or areas of forensics
4 that I would concern myself with.

5 Q. Right.

6 A. That doesn't make them not relevant, but it just means
7 that they're not likely what I'm going to prioritize for what I'm
8 going to be reviewing and staying on top of.

9 Q. Did you review -- did you try to review the literature
10 regarding the use of torture as far as the effects that it has on a
11 person?

12 A. Well, I have some familiarity. There's very little in the
13 scientific literature that speaks to the issue of torture per se.
14 There -- there are a lot of articles in academic literature about
15 torture and theoretical literature about torture and legal literature
16 about torture, but in terms of scientific articles that speak to
17 areas that a forensic psychiatrist uses as a matter of practical
18 day-to-day work, that literature is much less developed.

19 So I have reviewed what I know to be out there in the past
20 as it might be relevant to what I was doing at the time, and if there
21 are other new and emerging articles, I'm always open and welcome to
22 seeing them when they come.

23 Q. I guess my question is: As it relates to your

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1 qualifications to testify on what we need -- the government wants you
2 to testify about, is it fair to say that you did not consult nor can
3 you point me to any peer-reviewed medical article that informed your
4 opinion?

5 A. I don't think that is true. The government has asked me
6 to testify about disputed confession. They've asked me to testify
7 about diagnosis, about the diagnosis of a person receiving custodial
8 care from psychiatric services, and doing so at a time that he
9 provided statements that are being disputed.

10 The question of a backdrop of torture is not what the
11 government has asked me to testify about. If ultimately you ask me
12 questions about it, you're going to ask me questions and it's your
13 prerogative.

14 But the government has asked me to testify about a period of
15 time spanning July -- January 31st to March 14th, 2007, and your
16 client specifically, and the information that can be derived from a
17 variety of sources of evidence available and how it speaks to
18 disputed confession issues and the relevant diagnoses at the time.

19 Torture is a phenomenon that sometimes is associated with
20 PTSD; sometimes it's not. Just as if you and I were standing
21 together at the World Trade Center, we may get PTSD, we may get other
22 conditions, and we may not.

23 So torture is a life experience. The government is not

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1 asking me in this proceeding to testify about a life experience. You
2 may ask me about it, but I reviewed the literature that's pertinent
3 to what I have been asked to testify about.

4 Q. So the government -- in making your assessment, based on
5 your experience and qualification, it wasn't important to know what
6 happened to him prior to the dates of the interviews in which the
7 statements ----

8 A. That's not what I -- that's not what my testimony was.
9 You asked me about literature that I reviewed.

10 Q. Well, yeah. I'm saying did you ----

11 A. So I -- what -- I reviewed information to inform me, as
12 much as possible, about what he had been -- what his experiences were
13 and a variety of other aspects that would set a context for my review
14 and my -- of that pertinent period in question and my opinions on
15 that time.

16 As to the nature of literature that I would need to review
17 in order to -- in order to provide opinions on those issues, my
18 answer doesn't change. You asking me if I read articles about
19 torture. That doesn't mean that I didn't review materials as they
20 relate to this case. That -- that -- in which that could potentially
21 be implicated.

22 But in terms of literature based on the questions that I was
23 asked in this case, there are no questions in this case that would

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1 require me to have any familiarity with the literature of torture
2 insofar -- insofar as it is different in its presentation of
3 diagnoses and all of the other conditions that a person may be
4 exposed to that lead to either PTSD or complex PTSD or other
5 conditions.

6 Q. Sir, part of your opinion -- am I correct to say that part
7 of your opinion was based on what you learned of what happened to
8 Mr. Nashiri while he was in the black sites?

9 ATC [LT SCHWARTZ]: Your Honor, objection as to relevance.
10 We're getting into opinion testimony at this point.

11 LDC [MR. NATALE]: I asked ----

12 MJ [COL ACOSTA]: Hold on.

13 LDC [MR. NATALE]: It's part of his qualifications to look at
14 that.

15 MJ [COL ACOSTA]: Part of his qualification? No, that's part
16 of the basis of his opinion, not about his qualifications as an
17 expert. That's for basis of his opinion, not qualifications as a
18 forensic psychiatrist.

19 Again, you will be allowed to ask all of those questions
20 when they come up. But the question is whether or not he is
21 qualified as a forensic psychiatrist to testify about the
22 things -- the areas which you've appropriately asked probing
23 questions on about the opinions he will provide and his areas of

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1 expertise.

2 Q. You -- you keep saying a disputed confession.

3 A. Yes.

4 Q. Okay. What's your definition of a disputed confession?

5 A. It is that you say it's not admissible and they say it is,
6 so there's a dispute.

7 Q. Okay.

8 A. And it's a term that enables me to be objective. It
9 implicitly -- I don't have a side I'm taking. I'm just trying to
10 figure something out.

11 If I say that I evaluate false confessions, well then it
12 presupposes that I've decided that it's a false confession, and it
13 may and may not be. So by calling something a disputed confession,
14 it enables me to give, from my vantage point, something neutral in
15 approaching it.

16 Q. So the way you use "disputed" could be involuntary or
17 voluntary?

18 A. Correct.

19 Q. It could be coerced or noncoerced?

20 A. That's the same thing as involuntary or voluntary. In
21 other words, it could be involuntary versus voluntary or it can be
22 false versus not false.

23 Q. Right. And it can be false in either the contents of

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1 what -- whether the contents of the confession is consistent or
2 inconsistent with other known factors?

3 A. Well, that -- that's, I mean ----

4 Q. That could be a dispute over that, right?

5 A. It could be -- simply put, it could be false because the
6 person is innocent, or the person is guilty. Because sometimes facts
7 contradict what's in a confession -- there are many reasons why they
8 would -- and the individual is still guilty. And sometimes someone
9 offers a false confession because they're innocent.

10 Q. So when you're talking about the difference, you're
11 including anything that would question the viability, from a legal
12 perspective, of the confession?

13 A. Yes, for all intents and purposes. But I think in some
14 cases, there's a much broader range of possibilities. In other
15 instances, the position of each side is -- is clearly bordered and
16 easy to understand. And then there are other possibilities that just
17 aren't under consideration, unless, of course, I take a look at the
18 case and say nobody is asking this question and they should be.

19 And that happens sometimes. Sometimes there is a case where
20 both sides have their own view of the case, but there's actually a
21 third -- a third take that -- that hasn't yet been perhaps fully
22 appreciated.

23 Q. Dr. Welner, is it correct for me to understand your

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1 testimony that during your board certification exams, there were
2 specific either areas or questions relating directly to learned
3 helplessness?

4 A. No.

5 Q. Is that your testimony?

6 A. No.

7 Q. Okay.

8 A. My testimony was that ----

9 Q. Is it ----

10 A. My testimony was that at a very preliminary level of
11 psychological theory, you're exposed to understanding what learned
12 helplessness is about. But board certification is really for
13 purposes of practice. And in practice, while that may have come up
14 on my psychiatric board exam -- it may, it may -- I just remember
15 learning about it at a -- at a very early didactic stage of my
16 training. That's all.

17 Q. My questions are directed as to whether or not they were
18 specifically on the examination.

19 For example, voluntariness, was that an area when someone is
20 trying to get board certified, as you were, that there would be a
21 certain area where they question you about voluntariness?

22 A. There are questions of voluntariness that come up in the
23 forensic context on our board exam.

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1 Q. Okay. And -- now, you mentioned the Superior -- you
2 mentioned the Superior or the Supreme Court?

3 A. Supreme.

4 Q. Now, doesn't New York have a sort of strange way
5 of -- yeah, you know what I mean ----

6 A. Yes.

7 Q. ---- right?

8 A. Yes.

9 MJ [COL ACOSTA]: Counsel, you all need to stop talking over
10 each other.

11 A. I know what you mean.

12 Q. Would you explain to the judge what you and I both know
13 about the way the New York system refers to their courts.

14 A. Okay. The Supreme Court is -- some people may feel that
15 the Supreme Court is a highest court in the state, but it's not. The
16 appellate level -- the appellate court or the Court of Appeals is a
17 higher court. So it's a -- it's a lower court, but it refers to
18 itself as the Supreme Court.

19 Q. Yeah, that's the name.

20 MJ [COL ACOSTA]: The commission ----

21 A. That has ----

22 MJ [COL ACOSTA]: The commission -- the commission has -- the
23 commission takes judicial notice of its knowledge of the structure of

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1 the appellate -- of the trial and appellate levels of the New York
2 state courts.

3 Please move on.

4 Q. So it's a trial-level court.

5 A. Yes.

6 Q. Now -- so the panel you're on is one at the trial level?

7 A. Yes.

8 Q. Okay. Now, I'd like to ask you some questions about The
9 Forensic Panel.

10 A. Yes.

11 Q. Who created that?

12 A. I did.

13 Q. And when you created it, did you incorporate it in any
14 way?

15 A. Yes.

16 Q. And is it a PA? It is an LLC or ----

17 A. It's a -- it's a -- it's a corporation. It's a practice.

18 Q. Okay. And you're the president?

19 A. Yes. Or the chairman.

20 Q. You're the chairman. Okay.

21 In your -- who are the corporate officers and who selected
22 them?

23 A. We don't have corporate officers. I'm the chairman of the

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1 practice, as one would be in a department. Like, there's a
2 department chairman, and that's how it is in The Forensic Panel. I'm
3 the chairman of the practice.

4 Q. Right. But for legal purposes, you're a corporation ----

5 A. Yes.

6 Q. ---- correct?

7 And is it a nonprofit corporation or for-profit?

8 A. It is not. It's a for-profit corporation in terms of its
9 structure.

10 Q. Now, who selects the people who are on the panel?

11 A. Well ----

12 Q. At least when you first began. Let's start there.

13 A. Let me -- let me explain.

14 The participants in the practice are independent contractors
15 that work on particular cases. They are -- they're not on the panel,
16 per se, unless they continue to work with the practice in an ongoing
17 way, and then their relationship with the practice becomes more
18 perhaps formalized and understood.

19 There isn't a -- there isn't a selection process as there
20 is -- has been in the past in order that we become more familiar with
21 people's work and their continued efforts in cases ongoing, and also
22 just to account for changes that they may have that sometimes no
23 longer allow them to have a formal affiliation with another practice

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1 entity.

2 So, for example, certain people who have hospital
3 affiliations, they are not contractually allowed to have a formal
4 relationship with another practice; however, they are allowed to
5 consult to some outside entity periodically within limits.

6 So we do that in order to allow people to have occasional
7 relationships with us and not to have it take on anything more than
8 some other outside consultation that they would do.

9 Q. Maybe my question wasn't clear enough.

10 Who selected the people to be on the original panel?

11 A. Ultimately, the decision rests with me.

12 Q. And the decision rests with you as to who is considered to
13 be part of the panel?

14 A. Absolutely.

15 Q. Now, these people who are on the panel are independent
16 contractors?

17 A. Yes.

18 Q. And they are contracted by the corporation, which is
19 called The Forensic Panel?

20 A. Yes.

21 Q. Okay. And The Forensic Panel corporation is basically
22 you?

23 A. It's a practice.

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1 Q. Yeah, it's a practice.

2 A. It's all of us.

3 Q. Okay.

4 A. I happen to be its chairman. And so because I'm chairman,
5 as any chairman should, the responsibility rests with me. If we make
6 a decision to involve somebody in a case, ultimately the
7 responsibility rests with me that that person be a superior
8 professional. And so ultimately, I'm going to make that decision.
9 But it's all of us.

10 There are cases that I have very little to do with, but
11 ultimately, because my name as the chairman of the practice is as it
12 is, I take that responsibility very seriously.

13 Q. Is it accurate that you do not have a standing board of
14 directors like a regular corporation would have?

15 A. Sure, because we're not a regular corporation. We're a
16 practice like a law practice. We're a -- you know, and
17 we're -- we're -- and insofar as a law practice may have a board of
18 directors, it's because law practices are a lot more financially
19 motivated. We're just trying to -- we're just trying to work our
20 cases. That's what we do.

21 Q. Now, when you get in a case, you decide who you want to
22 subcontract with?

23 A. Yes, that's correct.

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1 Q. And those subcontractors get paid independently by the
2 client or do they get paid through you?

3 A. They get paid by the practice. It's exactly the way it
4 would in a medical center.

5 Q. So ----

6 A. When you're a medical center and you have doctors that
7 work for you, people hire the medical center. The bills go to the
8 medical center. The medical center pays a portion to the individual
9 doctors working on a case. They pay for overhead otherwise and other
10 kinds of expenses.

11 It works no different in our practice than from others. So
12 they are paid through the practice at agreed-upon fee and ----

13 Q. A fee or percentage?

14 A. It's not a percentage. It's an agreed-upon fee for what
15 they do, because what we bill on a particular case may vary from case
16 to case. But our arrangement with that particular individual is when
17 you work for The Forensic Panel, this is what your hourly is going to
18 be. And we make that arrangement ----

19 MJ [COL ACOSTA]: Need you to slow down. Need you to slow
20 down.

21 Q. And out of that hourly ----

22 A. I'm sorry, may I finish? Let me just finish.

23 The -- I'm just slowing down.

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1 Q. Yeah, okay.

2 A. The arrangement that we make for what people are going to
3 be paid hourly is something that we set up when we first agree to
4 work together, just as we would with all of the other employees of
5 the practice who are non-consultants. This is what your hourly rate
6 is going to be, and then that's what they are paid going forward
7 unless and until they get a higher amount.

8 Q. They're billed on an hourly, and do they get paid the full
9 hourly that they're billed at or a percentage of that?

10 ATC [LT SCHWARTZ]: Your Honor, objection. Relevance.

11 MJ [COL ACOSTA]: Defense?

12 LDC [MR. NATALE]: Your Honor, I think that it's relevant ----

13 MJ [COL ACOSTA]: You can ask ----

14 LDC [MR. NATALE]: ---- because they're referring to the
15 people of the group as the peer group. And to know what the
16 financial arrangement is, I think, is very relevant.

17 MJ [COL ACOSTA]: I believe that was provided to you. Do
18 you -- you have his fee arrangement, do you not?

19 LDC [MR. NATALE]: I just want to make sure that it's
20 a percentage of their hourly rate versus what their hourly rate is.

21 MJ [COL ACOSTA]: I believe you've been provided what the
22 government has -- has paid, correct? Is that what you're -- where
23 you're going, Defense?

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1 LDC [MR. NATALE]: Not paid to him, Your Honor, paid to the
2 people who he employees or contracts. That's what I'm talking about.

3 MJ [COL ACOSTA]: Well, you can ask him about the fee
4 structure as it gets to bias, but I don't know that that gets towards
5 his -- his qualifications as an expert in the field.

6 Experts get paid. It's a fact of life. You can talk about
7 that as far as bias, and it is a fact that you can elicit, but it
8 doesn't go towards his qualifications. So move on.

9 Q. Now, you talked about peer review.

10 A. Yes.

11 Q. And in the academic and scientific community, peer review
12 relates to people independent from the authors who review what
13 authors have done.

14 And in reviewing it, they look at the methodology, they look
15 at the amount of data, the application of the methodology to the
16 data. They look at whether the application was precise or not. And
17 then they look at the conclusions to see if the conclusions meet with
18 what they know collectively as an appropriate standard.

19 Is that your understanding of peer review?

20 A. I think, you know, there are many ways in which peer
21 review expresses itself. And you said academic and scientific, and
22 so that's ----

23 Q. Yes.

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1 A. ---- just -- that's not true.

2 I think there are publication -- you're describing a
3 publication peer review, actually, and there are many different
4 applications of academic and scientific peer review.

5 I mentioned scientific peer review in the clinical context,
6 which is what we patterned The Forensic Panel after, the way
7 clinical -- clinical peer review happens in hospitals, where clinical
8 peer review happens within the same department, just as it happens in
9 The Forensic Panel.

10 But -- but the -- the -- I want you to understand there are
11 people that we bring in as peer reviewers in some instances that
12 we've never had a relationship with before. Sometimes we involve
13 people that we have worked with before. Sometimes we have involved
14 people that we haven't worked with before. And it really just
15 depends on the case, the nature of the questions, the expertise, and
16 the people that we're aware of and whether we feel
17 that -- that -- that they will contribute to the responsibilities
18 that we need from them.

19 With respect to the role of peer review in the clinical
20 sense, that's a scientific peer review that's closer to ours.

21 Publication peer review is oriented around reading an
22 article and deciding, based on, for all intents and purposes, most of
23 what you've described, whether it should be published or not.

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1 Clinical peer review is all about saving patients' lives or
2 figuring out how to better care. And the model of The Forensic Panel
3 follows that because there is no such thing as like, well, this is
4 going to be rejected or accepted in publication. No.

5 The issue is we have a case, and prospectively we need to do
6 the most competent effort possible in order to arrive at accurate and
7 reliable findings, translating to the clinical model, which is this
8 is our patient. We're not going to tell him go home and reject him.
9 He's our patient. What can we do, and let's get our minds together
10 to think of, okay, let's do this, let's do that, let's ask this
11 question, and that will enhance the care of this patient.

12 So that's scientific peer review. It's very different
13 from -- it's different in the clinical setting from, say, morbidity
14 and mortality, when there's -- when something bad has happened and
15 there's a peer review over what should have been done.

16 But it's prospective in nature, and it literally patterned
17 the scientific model in -- in clinical hospitals and teaching
18 hospitals. That's where it came from.

19 Q. So ----

20 A. And so there are various aspects of scientific peer review
21 that extend to grant proposals, and so there -- and even with ----

22 MJ [COL ACOSTA]: Please slow down. Please slow down.

23 WIT: Pardon.

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1 MJ [COL ACOSTA]: And I don't need a treatise on the grant
2 proposals.

3 A. Okay.

4 MJ [COL ACOSTA]: We can go to the next question.

5 A. So there are various aspects of publication peer
6 review -- and -- or I should say academic and scientific peer review.

7 Q. If I understand what you're saying then, the peer review
8 that you refer to is the clinical peer review that you yourself do
9 internally; is that correct?

10 A. Within The Forensic Panel, that's correct.

11 Q. Okay.

12 A. Within our practice as others do in their respective
13 departments in medical centers.

14 Q. I understand. But it doesn't involve outside people
15 unrelated to The Forensic Panel looking at and evaluating reports or
16 publications of The Forensic Panel.

17 A. It -- it does not involve some external entity until it
18 presents itself in a court setting and an attorney has an opportunity
19 to cross-examine or depose on it.

20 Q. Now, the -- is it fair for me to believe that -- well, let
21 me ask you this:

22 Do you agree that you're qualified to opine on cases and
23 people's psychological makeup that you have never interviewed and all

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1 you know is what has been in police reports or reported on the news?

2 A. Well, you're ----

3 Q. I'm referring to all the people on different news channels
4 that you have made diagnosis of.

5 A. Well, I think if you want to present something specific
6 from my review and say do you think that you are qualified to offer
7 that opinion and why, then I'll take it up on a case-by-case basis.

8 I think that the short answer to your question is that I am
9 careful about what I say in the public domain based on the
10 information available to me and allowing that there is other
11 information that I don't know that may engender more -- or
12 that -- that -- that there's more information that I don't know that
13 might otherwise allow me to speak more than I am already speaking.

14 Q. But nonetheless, you have spoken publicly about people's
15 psychological condition and their motivation and you spoke as a
16 forensic psychiatrist without ever talking or meeting them?

17 A. Oh, I think that at times motivation is very clear, and at
18 times ----

19 Q. The question is not ----

20 A. I'm answering your question.

21 Q. No, my question is ----

22 A. My motivation is very clear ----

23 MJ [COL ACOSTA]: Counsel -- counsel and witness.

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1 A. At times, motivation is very clear. That may be what I'm
2 speaking about in a particular instance, but again, as I noted, it's
3 a case-by-case basis.

4 You -- you can present something to me, and depending upon
5 the information that's available, I may at the time decide that I
6 feel comfortable saying something, and if I don't, I decline to be
7 involved.

8 Q. My simple question is: Have you made comments about
9 people's psychological condition without having interviewed them?

10 A. Yes.

11 Q. Okay. Have you made similar diagnoses or statements,
12 whatever you want to call it, about people who not only you had not
13 interviewed, but all of the information was not yet public?

14 A. I don't know -- I -- I don't know that I'm tracking the
15 question.

16 Q. Okay. Let me try to phrase it this way:

17 You've admitted that you've given opinions as a forensic
18 psychologist on people you haven't ----

19 MJ [COL ACOSTA]: Psychiatrist.

20 Q. ---- psychiatrist that you have not interviewed, correct?

21 A. Yes.

22 Q. You have also given those sorts of statements, as a
23 forensic psychiatrist, about people who you don't have a full history

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1 or background on?

2 A. Well, again, as I said in my earlier answer, I have
3 calibrated what I have said and what I have gotten into based on the
4 nature of the information available to me, allowing that more
5 information might alter my opinion; and so I've set boundaries for
6 what I was willing to speak of.

7 In certain instances when certain data was available
8 that -- that -- that was quite clear, in those instances, I was
9 comfortable saying what I said based on that particular information.
10 But it's all a case-by-case basis and it's -- it's very ----

11 Q. So subject ----

12 A. ---- it's very much dependent upon what information is
13 available.

14 Q. And it's your subjective opinion whether that information
15 is sufficient for you to give an opinion?

16 A. In -- in a -- for purposes of the public information that
17 I've been asked to participate in?

18 Q. Yes.

19 A. Yes.

20 Q. Yeah.

21 A. Yes.

22 Q. And that am I to understand that when I look through the
23 different things that you've testified on radio and on TV about, that

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1 there will always be this caveat that I'm saying this but I really
2 don't know everything that I would like to know?

3 A. No, because I'm not asked about everything that I -- that
4 one would know in a particular -- in a particular setting. If -- in
5 a public appearance, the nature of the questions is very carefully
6 sculpted, and the answers are -- are -- I attempt to be precise in
7 order that I go as far as I can based on the information that's
8 available and not farther. Because nobody wants to be wrong ----

9 Q. Well ----

10 A. ---- and nobody wants to be irresponsible, and you always
11 want to be able to allow for certain information that's not
12 available.

13 And yet, at the same time, in certain instances one can be
14 very instructive and instructive in a way that contributes to public
15 understanding and does not cause misunderstanding because of a lack
16 of professional input.

17 Q. Well, and also, there could be someone hearing that you
18 are this forensic psychiatric expert and take that as gospel and not
19 know any more, and that could create a misconception of what is
20 really involved, correct?

21 ATC [LT SCHWARTZ]: Objection. The question calls for
22 speculation.

23 MJ [COL ACOSTA]: Counsel, sustained. I understand what

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1 you're -- that you're trying to get to people may hear his opinion
2 and think a particular thing if he says it on -- in a public media
3 appearance.

4 I'm here to hear evidence in an evidentiary hearing. I will
5 take -- I am not listening to him on the radio. We're going to hear
6 him, and you're going to have a question -- you're going to have the
7 ability to cross-examine him about what he based his opinion on.

8 Please move on to questions about his qualifications, his
9 experience, and his education to testify as an expert in the field of
10 forensic psychiatry, please.

11 Q. You testified that you had a fellowship at the University
12 of Pennsylvania.

13 A. Yes.

14 Q. A fellowship?

15 A. Yes.

16 Q. In forensic psychology.

17 A. Psychiatry.

18 Q. Psychiatry?

19 A. Yes.

20 Q. Right?

21 Have you ever checked to see if the University of
22 Pennsylvania at that time had a fellowship in forensic psychiatry?

23 A. If they didn't have it, I wouldn't have been there.

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1 Because in order to be there, I had to contact the fellowship
2 director, Dr. Robert Sadoff, and come down and participate in his
3 program -- first of all, to be invited; then to make arrangements
4 with my own residency training program; then to go down at the
5 schedule that he set up for me; then to follow him and tag along with
6 him in his own forensic work, and to do so according to his schedule;
7 to follow through the assignments that I had, which included doing
8 actual examinations of forensic cases that had been referred to him;
9 and to write it up and to present it to my peers; and then to go
10 through the entire didactic schedule and demonstrate a familiarity
11 with that material; and then following that, to receive a diploma
12 from the University of Pennsylvania, which -- which I maintain in my
13 office for having completed the fellowship.

14 So that's -- and whether University of Pennsylvania did that
15 or I was going to some -- some -- some unknown location that was a
16 facsimile of the University of Pennsylvania in Philadelphia, no.

17 I participated in all of those steps between 1991 and 1992,
18 and it had to have been listed or I would never have been in a
19 position to contact Dr. Sadoff and make those arrangements. And he
20 made the arrangements with the -- with Beth Israel Medical Center in
21 order to account for all of my responsibilities that I was doing
22 simultaneously.

23 Q. You classify what you did as a fellowship. Did the

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1 university advertise this or put this out that this was a fellowship?

2 A. I don't know. But they sent me a diploma where they
3 called it a fellowship, so ----

4 Q. Okay. And that was -- the doctor you mentioned gave
5 certain lectures in the course that was taught by a Dr. Marc Sageman?
6 Sageman?

7 A. No. If Dr. Sageman was involved -- he's in sort of a
8 younger level, and he went through University of Pennsylvania much
9 later.

10 Q. He -- at the time he was -- you're saying he was not ----

11 A. He wasn't around then. I think ----

12 Q. He wasn't a faculty?

13 A. ---- I think he was in high school or something. You
14 know, I -- he wasn't -- he's ----

15 Q. Okay.

16 A. He was at a younger stage of his life.

17 MJ [COL ACOSTA]: Pardon me. I don't know if this was a
18 miscommunication or if you asked that question particularly. Did you
19 mean to say Dr. Sadoff, who is whom Dr. Welner referred to as the
20 director or at least his supervisor in the fellowship, Mr. Natale?
21 Or do you ----

22 LDC [MR. NATALE]: No, I meant Dr. Marc ----

23 MJ [COL ACOSTA]: You were purposely mentioning a different

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1 name?

2 LDC [MR. NATALE]: That's correct.

3 MJ [COL ACOSTA]: Okay.

4 LDC [MR. NATALE]: A Dr. Marc S-A-G-E-M-A-N.

5 MJ [COL ACOSTA]: Okay.

6 Q. Now, you mentioned, as part of your qualifications,
7 the -- your depravity schedule and your criteria and your research on
8 that.

9 A. I mentioned The Depravity Standard.

10 Q. Yeah. And that was mentioned in the questioning of your
11 qualifications.

12 A. About my familiarity with research methodology, and I gave
13 it as an example of research that I have conducted and had to devise
14 protocols for and ultimately published in the peer-reviewed
15 literature as an example of that research.

16 Q. So if I ask you questions about that, that would relate to
17 your qualifications?

18 A. That's up to the court. And that's, you know ----

19 Q. No. In your mind, would it?

20 A. It just depends. I mean, I -- look, I didn't -- I didn't
21 make a determination ----

22 MJ [COL ACOSTA]: Hold on. Here we go.

23 A. ---- of what Ms. Schwartz would ----

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1 MJ [COL ACOSTA]: Excuse me. We don't need to have -- I don't
2 need a running debate about relevance between the witness and
3 the -- and the attorney.

4 If you can ask him the questions that you want to ask,
5 Mr. Natale, let him answer the question. And then if there's an
6 objection as to relevance or a sua sponte mention of relevance by the
7 commission, it will be done.

8 Go ahead and ask your questions.

9 Q. Based on your depravity index or scale, was one of the
10 things the intent to emotionally traumatize a victim and maximizing
11 terror through humiliation or intent to create an indelible emotional
12 memory of an event?

13 A. Yes, that's one of the items.

14 Q. As part of your qualifications, would waterboarding
15 someone fit in that category?

16 A. Possibly.

17 Q. How about putting a gun to their head?

18 A. Possibly.

19 ATC [LT SCHWARTZ]: Objection. Asked and answered and
20 relevance again to qualifications.

21 MJ [COL ACOSTA]: Counsel, again, this can go to the
22 foundation of his opinion and the basis of the opinion, not his
23 qualifications.

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1 His -- he talked about his qualifications, that -- that
2 scale as far as his familiarity -- familiarity with research
3 protocols ----

4 LDC [MR. NATALE]: Okay.

5 MJ [COL ACOSTA]: ---- not about ----

6 LDC [MR. NATALE]: The research ----

7 MJ [COL ACOSTA]: Counsel, much like when you pause, sometimes
8 you take a long pause, I'm talking a pause here.

9 The -- what I need you to do is focus on his training,
10 education, and experience which make him either qualified or not
11 qualified as an expert in the field of forensic psychiatry, please.

12 Q. Sir, the methodology that you used to develop your
13 depravity index ----

14 A. Standard.

15 Q. ---- standard, did that methodology include cases where a
16 jury found either -- the person not guilty?

17 A. No.

18 Q. Did it ----

19 A. All of the -- let me explain.

20 Q. Well, let me ----

21 A. I appreciate the question. I'll be brief.

22 Q. Well ----

23 A. It only included cases that were confirmed -- it only

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1 studied cases that were confirmed convictions of murder because we
2 did not want to be researching from cases where there was some
3 uncertainty as to what happened. So we did that in order to
4 contribute to the validity of what it was we were studying.

5 Q. Your methodology would exclude any factors that resulted
6 in a verdict of not guilty or a life recommendation, correct?

7 A. Our research would not have included any case in which the
8 individual was not convicted of murder. So in other words, if it was
9 someone tried for murder and ultimately the conviction was a
10 manslaughter, we did not research those cases because we ultimately
11 were -- were focusing on data mining from cases where there was no
12 doubt of what had happened with respect to each of the 25 items, so
13 that we could then -- could then further scrutinize them.

14 Q. Well, why would you say there would be a doubt as to the
15 facts or actions that occurred in cases where someone was found not
16 guilty or a jury concluded that those facts were not sufficient? You
17 only looked at cases where a jury said that it was sufficient.

18 A. Yes.

19 Q. So by doing that, there could be a factor that one jury
20 said was significant but another jury said wasn't significant.

21 ATC [LT SCHWARTZ]: Objection. Speculation and relevance.

22 A. But you're missing what I'm saying.

23 MJ [COL ACOSTA]: Hold on. No. There's an objection, Doctor.

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1 WIT: Sorry.

2 MJ [COL ACOSTA]: When that happens, we stop talking. Other
3 people besides me stop talking, and we wait.

4 Okay. Defense, what's your response to the objection for
5 relevance and calling for speculation?

6 LDC [MR. NATALE]: As far as relevance, this goes directly to
7 the methodology and his qualifications to have a methodology that's
8 sound.

9 And I think that the government went into this in great
10 detail, and I think that it's important for the court to understand
11 that it is not speculation because this is the research that he
12 designed. And as he said, it was intended to try to articulate
13 specific actions, intents ----

14 Q. Right, intent?

15 MJ [COL ACOSTA]: Hey, no. Counsel, you're talking to me
16 still. We're not doing it -- you're not asking him questions again.
17 You're still responding to the objection.

18 Where I'm at is the question was about did he -- what -- was
19 he familiar with scientific methods, this one, the foundations of
20 that scientific method that he used for this research protocol or
21 this study. If it -- it is relevant if it was used in this -- in his
22 analysis for this case. It was generally used as the other.

23 You can ask him when we get to the portion where

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1 we're -- where the foundation of his opinion is being given about the
2 methods that he used for that, but I don't need a historical study of
3 his research methods in another study that is not being used here.

4 So you can ask him if he used that depravity -- pardon me,
5 scale or -- that he came up with in this case, or not. If he didn't,
6 then I don't know that I necessarily -- that it's relevant that he
7 used poor research methodologies for that unless you can prove
8 otherwise.

9 Go ahead.

10 LDC [MR. NATALE]: Your Honor, then I'd ask to have the court
11 strike all of the testimony that he gave when the government was
12 asking these questions in an effort to bolster his credentials. And
13 anything that they asked which they say went to their credentials of
14 this individual, his qualifications that I cannot get into now ----

15 MJ [COL ACOSTA]: No, Counsel ----

16 LDC [MR. NATALE]: ---- I'd ask that it be struck.

17 MJ [COL ACOSTA]: Counsel, first of all, we don't
18 strike -- striking of testimony does not happen in military courts.
19 There's no striking. You can ask me to not consider it, if you'd
20 like; however ----

21 LDC [MR. NATALE]: Don't consider it ----

22 MJ [COL ACOSTA]: Counsel ----

23 LDC [MR. NATALE]: ---- as it relates to qualifications.

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1 MJ [COL ACOSTA]: Counsel, his question -- the questions were
2 whether or not he was familiar with research methodologies. He said
3 yes, and I used it on this particular topic.

4 He has stated that he used it in response to your questions
5 about -- that he only considered in coming up with the -- the scale
6 that the cases -- and I don't know if this is a form of confusion or
7 people are not certain what he's saying.

8 But I believe what the witness is testifying to is that to
9 be sure that the events occurred in the cases, that -- to be sure of
10 those events, they only considered cases that resulted in a
11 conviction. If that's incorrect -- and I doubt that I'm incorrect on
12 that.

13 So I don't know where you're going with asking questions
14 about nonconviction cases and whether or not he considered those acts
15 to be a -- on the depravity scale.

16 LDC [MR. NATALE]: Your Honor ----

17 MJ [COL ACOSTA]: You're saying the reason -- I believe --

18 I will ask the witness: Dr. Welner, in your study of the
19 cases in which you were coming up with this -- your -- your depravity
20 scale ----

21 WIT: Depravity Standard.

22 MJ [COL ACOSTA]: ---- did you only consider cases in which
23 the individual was convicted because those are the ones that you felt

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1 were at least found beyond a reasonable doubt to have actually
2 occurred?

3 WIT: Yes.

4 MJ [COL ACOSTA]: Okay.

5 WIT: Yes, Your Honor. And briefly, if I may ----

6 MJ [COL ACOSTA]: No. No.

7 WIT: Okay.

8 MJ [COL ACOSTA]: I have the information -- no.

9 WIT: Your definition is correct. Your ----

10 MJ [COL ACOSTA]: Dr. Welner ----

11 WIT: ---- your assessment is correct.

12 MJ [COL ACOSTA]: Dr. Welner, I've got it.

13 Counsel, do you have a question that will clarify or expand
14 upon that, what I just asked? The only reason that they -- that he
15 did the -- the only reason that they did conviction-only was to have
16 as sure a possible method as they could to determine what actually
17 happened. You can expand upon that if there is some other failure or
18 fault that you could cite in that research.

19 Please proceed.

20 Q. In that research that you made that -- looked for that
21 narrow source, did you adjust your database if any of those
22 convictions were subsequently reversed?

23 A. Yes. In other words, we only considered cases that had

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1 not only been to convicted but had survived all appeals. So this was
2 a sample going back quite a number of years.

3 Q. And did you include jurisdictions throughout the country?

4 A. Yes.

5 Q. And you only included jurisdictions, obviously, that had
6 the death penalty?

7 A. No, because they were murder cases. They weren't death
8 penalty cases only; they were murder cases. So some of them were
9 death penalty jurisdictions and some were not.

10 Q. And you decided which cases -- murder cases to look at?

11 A. No. They were random samplings. What we did was we
12 reached out to as many prosecutors' offices as we could because they
13 had the data. And whoever chose to participate in the research and
14 whoever was willing to give us access to their data, we didn't
15 discriminate. But they didn't select the cases.

16 The -- the requirement was just give us all of the files,
17 the complete files that you have for all of these murder cases
18 spanning X period of time. And so we covered different jurisdictions
19 in the country according to who was willing to participate. Kansas
20 City gave us their cases. Syracuse gave us their cases. Lake
21 County, Illinois, gave us their cases. But other people chose not
22 to.

23 So that's where we drew -- we drew them from a number and

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1 came up with approximately 700 cases.

2 Q. And what percentage of that would be of all the murder
3 convictions that occurred during the time frame?

4 A. I don't know. But 700 murder cases in justice research is
5 pretty impressive. Usually justice research involves a much smaller
6 number. That we were able to get that many, I'm very grateful and
7 appreciative to the offices that gave it to us.

8 Q. I understand that that's your opinion as to what was
9 enough.

10 My question is: How many other cases, murder cases that the
11 information contained therein, was not provided?

12 A. Oh, of course.

13 Q. Thousands?

14 A. Thousands, sure. Sure.

15 Q. And in your -- your opinion is that the 700 was
16 sufficient?

17 A. Well, beyond my opinion, we did a statistical analysis
18 with my research director, who is highly qualified, and the other
19 people who were part of our practice and team, and identified that we
20 could reach statistically valid determinations of the data we had.
21 The articles and their data were submitted for peer review. The peer
22 reviewers agreed, and the article and our findings were published.

23 Q. Was the peer review predicated on the review of the 700

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1 cases or was it based on what would be the universe of the data that
2 exists?

3 A. It was based -- it was predicated on the data that we
4 submitted, and the journals felt that it was sufficient for murder.
5 We had used a completely different data set for the nonviolent cases
6 but followed the same protocols, and that was -- was accepted for
7 publication as well as for the nonviolent cases.

8 Q. During your direct, the prosecutor mentioned a case
9 involving Gallaudet University?

10 A. Yes.

11 Q. And that was a case where the -- your testimony was
12 prohibited, excluded?

13 A. Yes, sir. Excluded, yes.

14 Q. And it was excluded on the grounds that there was an
15 insufficient -- the court found there was an insufficient database
16 and that in other factors, it did not -- your opinions did not meet
17 the Daubert standard; is that correct?

18 A. I believe so.

19 Q. And there have been other cases where parts of your
20 opinion have been restricted or prohibited because they didn't meet
21 the Daubert standard as well?

22 A. I don't know that that's correct. But if you want me to
23 speak to a specific case and a specific ruling, I'm happy to take a

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1 look at it. I know that there are certain instances in which I may
2 have been limited and not permitted to go into certain areas, but not
3 necessarily on Daubert grounds, but just by virtue of a judge setting
4 the lanes for a particular case. But ----

5 Q. Which means one of those cases involved your use of
6 information that he decided -- the judge made a ruling was
7 inadmissible, correct?

8 A. You'd have to show it to me.

9 Q. Okay.

10 LDC [MR. NATALE]: Your Honor, I will get to that later, but
11 that's all that I have, given Your Honor's rulings on qualifications.

12 MJ [COL ACOSTA]: Counsel, let me be clear. That's what I was
13 trying to determine -- that's what I'm here to determine is his
14 qualifications to talk as an expert. You can question the basis and
15 his actual opinion from -- completely when we get to that portion.

16 Do you have any -- Government, what is your request?

17 ATC [LT SCHWARTZ]: The government requests that Dr. Michael
18 Welner be certified as an expert in forensic psychiatry before this
19 commission.

20 MJ [COL ACOSTA]: Whether or not I recognize him as an expert
21 in the fields of what?

22 ATC [LT SCHWARTZ]: Forensic psychiatry.

23 MJ [COL ACOSTA]: All right.

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1 Defense, do you have any objection to his being qualified as
2 an expert in the field of forensic psychiatry?

3 LDC [MR. NATALE]: Your Honor, I have an -- I have an
4 objection to him being qualified as a person who can give the
5 opinions that they have listed.

6 MJ [COL ACOSTA]: Based upon ----

7 LDC [MR. NATALE]: Merely having ----

8 MJ [COL ACOSTA]: Hold on, Counsel. Is that based upon his
9 qualifications or is that based upon the -- upon what he will have
10 reviewed and his opinion being insufficient?

11 LDC [MR. NATALE]: I think that it's based on both because, as
12 you know, we're no longer under a Frye standard; we're under a
13 Daubert standard. And I don't think that the fact that someone has a
14 résumé or an education and then has opinions makes them an expert to
15 testify on the particular area that the government has noticed.

16 MJ [COL ACOSTA]: The commission will recognize Dr. Welner as
17 an expert in the field of forensic psychiatry.

18 Defense, you are more than free to question -- question the
19 basis of that opinion before the commission tomorrow, and we'll
20 proceed from there. Thank you.

21 All right. We're going to start at 0900 tomorrow.

22 Defense, did you have something else before I excuse the
23 witness for the evening?

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1 LDC [MR. NATALE]: No, Your Honor, but there's another matter
2 which we need to bring to the court's attention and I think
3 Mr. Padilla was going to ----

4 MJ [COL ACOSTA]: Yes. Can I ----

5 LDC [MR. NATALE]: ---- rise to tell you that.

6 MJ [COL ACOSTA]: Can I ----

7 LDC [MR. NATALE]: Yes, you can excuse ----

8 MJ [COL ACOSTA]: ---- please excuse the witness?

9 LDC [MR. NATALE]: Yes.

10 MJ [COL ACOSTA]: Okay, thank you.

11 Dr. Welner, for this evening -- hold on, Dr. Welner. Have a
12 seat. There you go.

13 All right. You are temporarily excused. We'll see you back
14 at 0900 tomorrow. While the commission is in recess, do not discuss
15 your testimony with anyone other than counsel for either side.

16 Please step down. See you tomorrow at 0900.

17 **[The witness was warned and withdrew from the RHR.]**

18 MJ [COL ACOSTA]: Now, Mr. Padilla, do you have
19 something -- you have something.

20 DC [MR. PADILLA]: Judge, that's news to me. So I think there
21 is an issue. There is an issue.

22 MJ [COL ACOSTA]: Besides communication?

23 DC [MR. PADILLA]: I don't know the full scope of that issue

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1 so -- take it away.

2 LDC [MR. NATALE]: Your Honor, it was -- I thought that he
3 was, given his geographic location. However, Lieutenant Colonel ----

4 MJ [COL ACOSTA]: Lieutenant Colonel Nettinga?

5 DC [Lt Col NETTINGA]: Yes, sir. We're asking for a brief 802
6 in place once we recess for the day to bring something to the court's
7 attention.

8 MJ [COL ACOSTA]: The topic being?

9 DC [Lt Col NETTINGA]: We're happy to get into that outside
10 the presence of the public, Your Honor.

11 MJ [COL ACOSTA]: You realize that I have to summarize 802s on
12 the record when we come back, correct?

13 DC [Lt Col NETTINGA]: Yes, Your Honor, and I'm confident that
14 you can do so in a way that protects what we're seeking to have
15 protected.

16 MJ [COL ACOSTA]: Okay.

17 All right. Government, is there anything else before we
18 recess for the evening?

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

20 MJ [COL ACOSTA]: All right. We'll do an 802 immediately
21 after this. Please -- the IT folks, please shut down the feeds as
22 soon as I recess the commission. Nobody needs to stand up when I
23 recess the commission for the evening.

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1 The commission is in recess.

2 **[The R.M.C. 803 session recessed at 1752, 19 April 2023.]**

3 **[END OF PAGE]**