

1 **[The R.M.C. 803 session was called to order at 0932,**
2 **23 February 2023.]**

3 MJ [COL ACOSTA]: The commission is called to order.
4 Government?

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

6 MJ [COL ACOSTA]: Good morning.

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

10 All 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; Lieutenant Commander Cherie
14 Jolly; Major James Garrett; Mr. Pascual Tavaréz-Patin; Staff Sergeant
15 Jaune Daniels. Chief Petty Officer Kenneth Traylor will be in and
16 out as will Staff Sergeant Daniels, Your Honor. Mr. Forrest Parker
17 Smith, Mr. Louie Marmo, and our linguist.

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

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1 General Counsel for the FBI attorney Katherine Eisenreich.

2 MJ [COL ACOSTA]: Thank you.

3 TC [MR. O'SULLIVAN]: Thank you, Your Honor.

4 MJ [COL ACOSTA]: Again, the accused is present today.

5 Defense, go ahead.

6 LDC [MR. NATALE]: Good morning, Your Honor. Anthony Natale
7 on behalf of Mr. Nashiri who is present in court with the aid of an
8 interpreter. Also present here in ELC, in addition to myself, is
9 Lieutenant Commander Piette, Ms. Morgan, Ms. Carmon, LN1 Wood, and
10 Mr. Dolphin.

11 In the RHR, we will have Lieutenant Colonel Nettinga,
12 Mr. Roosevelt Roy, Mr. David Bendernagel, Mr. Padilla, and possibly
13 we will have coming in and out, as need be, Staff Sergeant Allison
14 McGuire and Manice Brown. Also the need may have for one of our
15 other analysts to come in who is Scott Hoffmann.

16 All of these people have the necessary clearances to be
17 present at all of these proceedings.

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

19 Today was delayed by about 30 minutes because -- by the 30
20 minutes because of a transportation issue. The defense asked for
21 additional time to speak with their client this morning before we
22 began, and I granted that request for additional time.

23 LDC [MR. NATALE]: Thank you, Your Honor.

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1 MJ [COL ACOSTA]: Today, we're going to take up the
2 government's witness, Mr. Khoury, on AE 461, which is the defense
3 motion to suppress out-of-court hearsay identifications of
4 Mr. al Nashiri, and the government is calling Agent Khoury on that
5 topic.

6 Government?

7 ATC [MAJ ROMEO]: Yes, Your Honor. We'll call him right now.

8 **[The witness, Special Agent Andre Khoury, resumed the witness stand.]**

9 MJ [COL ACOSTA]: Just one minute before you go on. I just
10 have to take care of an administrative issue.

11 ATC [MAJ ROMEO]: Yes, sir.

12 MJ [COL ACOSTA]: All right. Go ahead. You may proceed.

13 ATC [MAJ ROMEO]: Agent Khoury, you can have a seat.

14 MJ [COL ACOSTA]: Agent Khoury, I'd remind you that you remain
15 under oath.

16 Government, you may proceed.

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

18 **SPECIAL AGENT ANDRE KHOURY, civilian, was called as a witness for the**
19 **prosecution, was sworn, and testified as follows:**

20 **REDIRECT EXAMINATION CONTINUED**

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

22 Q. Agent Khoury, thank you for your testimony these past few
23 sessions. You've assisted the parties with testimony about the use

1 of photo books during these investigations.

2 I'm going to ask you a few questions about the composition
3 of the photo books that you used in Yemen during the investigation of
4 the COLE bombing. And the reason why is because there's another
5 issue before the commission that pertains to this.

6 So the first question I have is: How often in your career
7 as an FBI agent have you used photo identifications?

8 A. I've used photo books for identifications -- you know,
9 it's hard to put a number, but I would say in the hundreds. You
10 know, we've talked to -- in any investigation I have worked, we have
11 presented photo books to witnesses and suspects from 1996, starting
12 with the Khobar Tower bombing, through East Africa, USS COLE, 9/11,
13 and all the investigations I have worked in between. So hard to put
14 a number, but a lot.

15 Q. Okay. And just for clarification, when you say East
16 Africa, that's the Kenza/Tanzania **[sic]** bombings?

17 A. That's right. That's Kenya and Tanzania.

18 Q. Okay. So were you involved in putting together the photo
19 books in the investigation of those bombings in Kenya and Tanzania?

20 A. I was always involved in both, yes.

21 Q. Okay. Are you familiar with the KENBOM/TANBOM Photo Book?

22 A. Yeah, of course.

23 Q. Okay. So who was responsible for putting together the

1 ADENBOM Photo Books in Yemen?

2 A. I believe there was -- there was a couple of photo books
3 that were put together in Yemen, if -- again, if my memory serves me
4 right. The first one I ended up working on putting it together with
5 the help of other agents that were working with me on the ground, in
6 coordination with FBI Headquarters and the United States Attorney's
7 Office, the Southern District of New York.

8 Q. Okay. Were the ADENBOM Photo Books -- were they primarily
9 an FBI piece of property?

10 A. If you're asking me if it was only held with the FBI and
11 not any other entity, I would say it was held with the FBI, and
12 potentially some other U.S. intelligence partners had access to it,
13 but no foreign partners had access to it.

14 Q. Okay.

15 A. If that's what you're asking me.

16 Q. Right. And I guess I wasn't too clear. What I was trying
17 to ask ----

18 MJ [COL ACOSTA]: Counsel, slow down.

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

20 Q. What I was asking was: Was the ADENBOM Photo Book an FBI
21 product? Would it be considered an FBI product?

22 A. Yes.

23 Q. Okay. Thank you. So what was the process of putting

1 together these ADENBOM -- these photo books for -- in Aden?

2 A. It was a composition of photos that -- again, in
3 coordination with the FBI Headquarters, United States Attorney's
4 Office out of the Southern District of New York, and the agents on
5 the ground felt that photos would be helpful in our investigation for
6 witnesses and potential suspects to look at and try to identify. So
7 we picked photos that we felt are relevant to our investigation and
8 composed the photo book.

9 Q. Okay. And where did you get the photographs for the
10 ADENBOM books?

11 A. Some of the photos were in FBI holdings, some of the
12 photos were provided by other intelligence partners, and some of them
13 were also collected from foreign partners.

14 Q. Okay. Were any of the photographs provided to you from
15 Yemeni authorities?

16 A. I believe a few were, yes.

17 Q. Were sketches used?

18 A. Yes, we have used sketches.

19 Q. And what would be the policy behind using sketches?

20 A. As long as it's a sketch that is approved by the FBI and
21 no opposition from the United States Attorney's Office to have in the
22 lineup, then we use it.

23 Q. Are you familiar with the January 2nd, 2001, ADENBOM Photo

1 Book?

2 A. Yes.

3 Q. And I believe you've testified to this previously numerous
4 times, but for the purposes of this questioning, is it true that you
5 used this photo book for witness identifications at some point?

6 A. Yes, we have.

7 Q. Okay. Do you recall if that particular photo book had
8 multiple photographs of the same suspects?

9 A. It did.

10 Q. Okay. And what was the policy behind using multiple
11 photos of these same individuals?

12 A. Again, there was no strong policy by FBI Headquarters or
13 the United States Attorney's Office in this matter. They understand
14 and agreed at the time that multiple photos of the same individual
15 can be placed in a photo book for better identification, realizing
16 that some of the witnesses may have different recollection of how
17 they have seen or they have witnessed some of these individuals.

18 Hence, we had put down different photos of the same
19 individual that shows them differently -- some of them with short
20 beard, some of them with no beard, some of them with
21 headdress -- just to better assist in the identification when we are
22 presenting them to witnesses.

23 Q. Okay. Would that be because some of these suspects -- or

1 let me rephrase that.

2 Did some of these suspects have different disguises that
3 they would go by throughout the course of your investigation?

4 A. Of course.

5 Q. Okay. So let's talk about some specific photos. Are you
6 familiar with photograph 20 of the ADENBOM January 2nd, 2001 photo
7 book?

8 A. I probably would be much more familiar if I could see it.

9 Q. Okay. Would it help your recollection if I showed you a
10 copy of the photo book?

11 A. Sure.

12 ATC [MAJ ROMEO]: Okay. Your Honor, I'd ask the court's
13 permission to present AE 461J, pages 29 through 32.

14 MJ [COL ACOSTA]: You may. You may even use it on -- you may
15 publish as well, if you want to put it up or something where
16 everybody can see so we know we're talking about the same thing.

17 ATC [MAJ ROMEO]: Sure. Let's see if this is working, so.
18 Okay.

19 MJ [COL ACOSTA]: If that's a curve ball to our IT people, I
20 apologize. But if you can accommodate, that would be helpful.

21 ATC [MAJ ROMEO]: Okay.

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

23 Q. So you're able to identify photograph number 20 on the

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1 there? And I apologize the numbers aren't that clear over the
2 screen, but ----

3 A. I just want to make -- I just want to make sure that 20 is
4 the second-to-last photo in the first row on top. Just the number is
5 not ----

6 Q. That's correct. And I actually have a picture of just
7 that one that's -- if you need further recollection.

8 MJ [COL ACOSTA]: Counsel ----

9 A. Yeah, I am familiar with that photo.

10 Q. Okay.

11 MJ [COL ACOSTA]: Can you put it back up? We didn't have very
12 long here with it.

13 ATC [MAJ ROMEO]: Oh, sure. Sorry.

14 MJ [COL ACOSTA]: Put it up, and tell us which one you were
15 looking at again, Agent.

16 WIT: Second to the last on the top row.

17 MJ [COL ACOSTA]: Okay.

18 Q. Okay. And who is that?

19 A. That's Mr. Nashiri.

20 Q. Okay.

21 MJ [COL ACOSTA]: And you referred to that as photograph
22 number 20? Is that what you did, Counsel?

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

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1 MJ [COL ACOSTA]: And did you confirm that --

2 Is that, in fact, photograph number 20, Agent?

3 WIT: Yes, Judge.

4 MJ [COL ACOSTA]: All right.

5 Q. So do you recall how you received that photo?

6 A. I believe this photo was -- it was used on a registration
7 of a vehicle in Yemen or maybe on a driver license in Yemen,
8 if -- again, if my recollection serves right.

9 Q. Okay. Would a photo -- would a document indicating this
10 help refresh your recollection?

11 A. Yes.

12 ATC [MAJ ROMEO]: Okay. Your Honor, I'm going to retrieve
13 this. Is that -- and I'd like to put on the ELMO ----

14 MJ [COL ACOSTA]: No. For that, then you just show it to him.
15 You don't need to publish.

16 ATC [MAJ ROMEO]: Okay.

17 MJ [COL ACOSTA]: But for the photographs, where it's helpful
18 to see, then yes. And I believe your question properly asked is: Is
19 there anything that might refresh your recollection, not is there a
20 document which says the thing that I want you to say going to refresh
21 your recollection.

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

23 MJ [COL ACOSTA]: And then he can tell you whether or not

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1 there is.

2 ATC [MAJ ROMEO]: Your Honor, showing the witness Appellate
3 Exhibit 461J, pages 16 through 19.

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

5 ATC [MAJ ROMEO]: Retrieving the document.

6 Q. Does that help refresh your recollection as to how you
7 received photograph number 20?

8 A. Yes.

9 Q. And how was it?

10 A. It was a car registration in Yemen.

11 Q. Okay. Are you familiar with photograph number 21 in the
12 ADENBOM Photo Book?

13 A. Yes, I am.

14 Q. Okay. And once again, do you -- who was that?

15 A. That is also Mr. Nashiri.

16 Q. Okay. Do you recall how you received that photograph?

17 A. I do.

18 Q. Okay. Was photo number 21 previously used in another
19 investigation?

20 A. Yes, it was.

21 Q. Okay. Do you recall which investigation that was?

22 A. It was in the -- the East Africa Bombing investigations.

23 Q. Okay. Are you familiar with photo number 22 in the

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1 January 2nd, 2001, photo book?

2 A. Yes.

3 Q. And who was that?

4 A. That is also Mr. Nashiri.

5 Q. Okay. And do you recall how you obtained that photo for
6 the book?

7 A. I also believe that was obtained from -- by Yemeni
8 authorities.

9 Q. Okay. Are those the only photographs of the accused -- to
10 your recollection, of the accused, al Nashiri, in that photo book?

11 A. I believe that, yes, those three photos were the only
12 three photos.

13 Q. So did you ever use composite photos in the photo books?
14 By composite photos, I mean more than one photo or sketch that's
15 combined to emphasize certain features of a suspect?

16 A. No, we don't use composites in photo books.

17 Q. Okay. So I'd like to ask you about photos 23, also known
18 as UNSUB 4; photo 24, also known as UNSUB 2; and photo 25, also known
19 as UNSUB 3, in the January 2nd, 2001, photo book.

20 Are you familiar with those photos?

21 A. If I could see them. Again, I'm sure I am familiar with
22 them, but if I could see them, I would appreciate it.

23 Q. Okay.

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1 ATC [MAJ ROMEO]: Your Honor, permission to publish the photo
2 book on the ELMO again.

3 MJ [COL ACOSTA]: You may.

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

5 A. 23, 24, and 25?

6 Q. That is correct.

7 A. Okay.

8 Q. Okay. Do you recall if photo 23 was a sketch or a
9 photograph?

10 A. No. Number 23 is a photograph.

11 Q. Do you recall if photo 24 was a sketch or a photograph?

12 A. 24 was a sketch.

13 Q. Okay. Do you recall if photo 25 was a sketch or a
14 photograph?

15 A. 25 is also a sketch.

16 Q. Okay. Were any of these photos, photo 23, photo 24,
17 photo 25, photos of the accused, Mr. al Nashiri?

18 A. No.

19 Q. Okay. Were any of these photos, 23, 24, or 25, composite
20 photos?

21 A. No.

22 Q. Okay. If someone was to testify that any of these photos,
23 23, 24, or 25, were composite photos, would you consider that an

1 inaccurate statement?

2 A. Of course.

3 Q. Okay.

4 A. I don't know why would anybody say that's a composite. I
5 mean, 23 is a real photo. 24 and 25 are sketches.

6 Q. Okay.

7 ATC [MAJ ROMEO]: Your Honor, permission to retrieve the
8 document?

9 MJ [COL ACOSTA]: Yes. Just take it off the ELMO.

10 ATC [MAJ ROMEO]: Thank you.

11 Q. So, Agent Khoury, you previously said that you received
12 photographs from Yemeni authorities. At any time did any of these
13 Yemeni authorities that you received pictures from influence your
14 decision to include or not include them in the photo book?

15 A. Yemeni authorities had no involvement in the composition
16 of the photo book. That was strictly FBI prerogative on putting the
17 photo book together. So the answer is no, Yemeni authorities did not
18 have any input or any other say in what to include and what not to
19 include in the photo book.

20 Q. Okay. Did you use all the photos that the Yemenis gave
21 you?

22 A. No.

23 Q. So I believe you also touched on this in your prior

1 testimony in the other matter before the commission, but did you see
2 any evidence of witnesses being forced to select a picture due to
3 pressure from Yemeni authorities?

4 A. No.

5 Q. Okay. Were there any other concerns that any of the
6 photos shown by the Yemenis to the witnesses before you showed them
7 were overly suggestive?

8 A. I'm sorry. Can you say that again? Did you say the
9 Yemeni authorities showing photographs ----

10 Q. When they came and said to you, hey, here's some photos,
11 did you believe that any of the photos that you used in the photo
12 book were overly suggestive?

13 A. No.

14 Q. Okay. Can you describe any similarities and differences
15 with the photo books in the Kenya investigation and the USS COLE
16 investigation? And I'm talking about the process of putting the
17 photo books together.

18 A. I mean, I believe the process was very similar. It's to
19 try to put photos for identification of potential suspects for
20 witnesses to be able to identify. And again, that's a process that
21 FBI agents go through often, in coordination with the leadership
22 within the FBI, United States Attorney's Office, you know, conferring
23 amongst ourselves on which photos would be beneficial, which photos

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1 would not be beneficial. So it's very similar.

2 Q. Okay. Were there any formal policies from the FBI that
3 you were required to follow during the creation of these photo books?

4 A. I mean, the only -- the only policy the FBI has is to
5 ensure that no photos are going to be totally different than the
6 other photos in -- in the lineup. And what I mean by that is, you
7 can't have a photo of a person sitting in a car where all the other
8 photos are passport-size photos or, you know, something to that fact.
9 So as -- as long as the photos are similar in nature, in size, there
10 is no -- there is no other requirements.

11 Q. Okay. So finally, you mentioned earlier that there were a
12 number of versions of the ADENBOM Photo Book throughout the
13 investigation. All these updates and changes of the photo books, was
14 that common?

15 A. That's normal practice. I mean, in all of our
16 investigations, you create several photo books by taking photos out,
17 including photos in. And as a rule, by the FBI and the United States
18 Attorney's Office, any change to a photo book will have to be
19 renamed, so you'll have different versions, photo book number 1, 2,
20 3, and the like. But that's common practice in all of our
21 investigations, not just in the USS COLE investigation.

22 Q. Okay.

23 ATC [MAJ ROMEO]: May I have one minute, Your Honor?

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1 MJ [COL ACOSTA]: You may.

2 **[Counsel conferred.]**

3 Q. Agent Khoury, just a couple follow-up questions.

4 You mentioned that you didn't use the -- all of the photos
5 that the Yemenis would give you. Why not?

6 A. Again, this is a -- it's something that -- that we, as
7 agents, believe that we have the prerogative on choosing which photos
8 to use, based on our investigation, our knowledge, some of the photos
9 that were provided by Yemenis and other foreign partners. And we had
10 other photos from FBI holdings that we did not use.

11 It's just, you know, we decided to use those photos at that
12 time based on the investigation and where we were in the progress of
13 resolving some of the suspects in the USS COLE attack. So there is
14 really no reason, specific reason. It's just we felt at the time
15 that some photos we should use and some photos we shouldn't use.

16 Q. Okay. And then finally, do you know -- and once again,
17 understanding, you know, that we're in an open session, but as far as
18 you can in this session, do you know who was involved in assisting
19 you with the ADENBOM Photo Book that you did, as well as the
20 subsequent photo books in the COLE investigation? Do you have any
21 idea of who was involved?

22 A. I don't recall specifically the agents that were on the
23 ground with me during that time, but I know that, you know, we must

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1 have had conversations with at the time AUSA David Kelley, who was in
2 charge of the USS COLE investigation. So we must have had
3 conversations with him, and definitely conversations with
4 FBI Headquarters at the time, mainly the Counterterrorism Division.
5 And I don't remember who was the section chief or the assistant
6 director at the time either, but I'm sure those discussions must have
7 been had.

8 And in New York, I believe the SAC at the time also was
9 aware of us putting the photo book together, God rest his soul, Mr.
10 John O'Neill. So there -- it will be the hierarchy of the FBI and
11 the United States Attorney's Office, mainly.

12 Q. Okay. And how about, like -- I'm talking about, like,
13 right on the ground, like the -- the agents who were putting it
14 together? Do you recall?

15 A. I don't remember who the agents that were with me.
16 Maybe -- maybe George Crouch could have been someone. I'm not sure
17 if Ali Soufan was on the ground at that time. He would have been
18 another one. Maybe Bob McFadden from NCIS. He could have been a
19 third. I mean, I'm just naming the people that I believe I -- you
20 know, I could remember that I have worked with during that period.

21 ATC [MAJ ROMEO]: Okay. No further question, Your Honor.
22 Thank you.

23 MJ [COL ACOSTA]: Defense, cross?

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RE-CROSS-EXAMINATION CONTINUED

2

Questions by the Defense Counsel [MR. PADILLA]:

3

Q. Good morning again.

4

A. Good morning.

5

Q. So I know you've testified a lot in the last few months about some of the witness statements. But I do want to sort of maybe go back a little bit in terms of the investigation, just to sort of get clear for the purpose of this hearing on this issue, so that there's a clean sort of transcript of you getting to Yemen and some of the things you guys did when you first arrived. Okay?

11

A. Sure.

12

Q. All right. And I may have asked you some of these things when you initially testified in October, perhaps, or was that December? I can't remember. So there may be some of the -- some of the questions may seem familiar to you, but included in here are obviously new ones too. Okay?

17

So just to sort of be clear, COLE -- the attack on the COLE happened October 12, 2000, correct?

19

A. Yes.

20

Q. Can you recall when you arrived in Yemen, approximately?

21

A. I honestly don't remember. I know we went -- we went over this again -- or previously, but I don't remember the exact time when I -- when I arrived. But if I had to guess, it probably was . . .

23

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1 Q. Let me ask you this. Let me -- let me put something out
2 there and see if you can remember, if this helps you remember.

3 At the time that you arrived in Yemen, were any law
4 enforcement agencies doing any interviews of any potential witnesses?

5 A. I don't believe they had started doing interviews when I
6 arrived in Yemen.

7 Q. Okay. So is it -- is it possible that you arrived before
8 the Bodine memo was ratified, let's say?

9 A. That would be fair to say.

10 Q. All right. Okay. And again, the COLE attack happens
11 October 12. A large contingent, is it fair to say, of FBI and Navy
12 investigators, support staff, people arrive in Yemen to begin
13 investigating the COLE?

14 A. Correct.

15 Q. And also fair to say that the purpose of that, the purpose
16 of the U.S. contingent going to Yemen, was to investigate this for
17 potential criminal prosecution somewhere in someplace? Maybe
18 that had not been decided in October-November of 2000 but that was
19 the purpose, correct?

20 A. It's the purpose of every criminal investigation, yes.

21 Q. Right. You're going out there. You're going to
22 investigate and identify suspects, potentially arrest somebody, and
23 bring them to court for a trial or something at some point down the

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1 road?

2 A. Correct.

3 Q. And that's what happened in the East Africa bombings as
4 well, right?

5 A. Correct.

6 Q. U.S. investigators go out, identify suspects, arrest
7 somebody, bring them -- in that case, they brought -- that case was
8 brought in the United States, right?

9 A. Yes.

10 Q. Okay. And prosecuted here in the United States?

11 A. In New York, yes.

12 Q. In New York. Okay.

13 So, again, this is what's happening with the COLE as well.
14 We're sending some people to investigate, make a case, and we'll
15 bring it -- again, wherever that may be?

16 A. Correct.

17 Q. Okay. And again, along with that is sort of all the
18 things that maybe you would associate with an investigation. And
19 I -- and we've talked about this a lot and we're not going to get
20 into it. We're really not. But Yemen was different, right? Some
21 challenges there?

22 A. Yes.

23 Q. All right. But despite those challenges, is it fair to

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1 say that you and the rest of the people there investigating this case
2 did the very best based on your training and experience and protocols
3 that you had learned with the FBI or the Navy or wherever agency they
4 may be from and employed those as best that you could in Yemen?

5 A. Correct.

6 Q. And it was the training and experience that you had from,
7 in your case, like, the FBI, that you used while you were
8 investigating this case in Yemen?

9 A. Yes.

10 Q. And, again ----

11 A. I would say background, language, cultural understanding
12 also played a big role. That's not something that is taught by the
13 FBI but just -- just to ----

14 Q. Okay. And I think the point I think I'm saying, and I
15 think you're saying it, agreeing with me, is that you bring all those
16 things with you to Yemen, right?

17 A. Correct.

18 Q. All those things come with you to Yemen to investigate
19 this case, right?

20 A. Yes.

21 Q. And with that is, again, you have experts down there on
22 the ground, crime scene people, forensics, legal -- we talked about
23 some legal people. All those things go to Yemen in support of this

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1 investigation, correct?

2 A. Correct.

3 Q. And again, I think that this is an obvious point to make,
4 but in building a criminal case, that would necessarily involve
5 evidence, right?

6 A. Yes.

7 Q. Physical evidence, items, pieces -- you know, paper,
8 objects, things like that. And then also testimonial evidence,
9 right? People that you talked to, interviews that you conduct,
10 right?

11 A. Correct.

12 Q. And again, going into this situation, going into a foreign
13 country with the purpose of investigating the case to bring to a
14 criminal process, criminal trial, conclusion, you wanted to make sure
15 at least that the things that you did in terms of gathering those
16 pieces of evidence, that you did the very best so that wouldn't
17 jeopardize some prosecution later down the road?

18 A. True.

19 Q. So whether that was collecting evidence, witness
20 statements, like that, those things are -- you know, we talked about
21 them being -- you know, getting things suppressed, but that's a real
22 concern, right?

23 A. What -- I'm sorry. I'm -- what is a concern?

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1 Q. The concern is that you want to make sure that you do it
2 right, whether that's collecting a piece of evidence or getting a
3 statement from somebody ----

4 A. Correct.

5 Q. ---- so that at some point down the road, a lawyer like me
6 is not up here saying you did it wrong, and, Judge, I want you to
7 throw it out, right?

8 A. Correct.

9 Q. You don't want to be that guy, right?

10 A. No.

11 Q. Okay. So, again, these were some of the, I would think,
12 things that you are thinking about as you arrive and as you begin the
13 course of your investigation, correct?

14 A. Yes.

15 Q. And when you get to Yemen, did you learn that the Yemenis
16 had already collected some evidence in the case?

17 A. I believe so.

18 Q. You weren't there when that happened?

19 A. No.

20 Q. All right. Is it possible that you learned later on that
21 the Yemenis had first been on crime scenes and recovered items of
22 evidence?

23 A. I mean, I know that later, as you said, I did learn that

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1 Yemen did have some evidence, but I still -- I'm not familiar with
2 exactly what they had because this was not my purview as an
3 investigator.

4 Q. All right. And I think I've asked you this before in
5 terms of -- I think you answered it a little bit here, but I want to
6 get a little bit further, and that is sort of any guidance, any
7 formal guidance that you or members of the team received either from
8 your office or lawyers on the ground there about how the
9 investigation would proceed?

10 A. Sure.

11 Q. How things would be done in Yemen?

12 A. Sure.

13 Q. Did you have discussions about maybe -- I think I know the
14 answer, but did you have any discussions -- again, I think this had
15 already happened, but about collection of evidence? Do you ever
16 remember being in meetings where they said, hey, look, if you're
17 going to pick something up, if you're going to get a piece of
18 evidence, this is how we want it handled?

19 A. I mean, I was not part of the -- of the evidence
20 collection part of this case initially. Obviously, I was aware of
21 some of the evidence that probably was collected later, but the
22 initial -- the initial evidence collection, Evidence Response Team, I
23 was not involved with them on the ground.

1 Q. Okay. What about any formal memos or briefings or policy
2 statements from either the FBI or any of the legal team that was down
3 there about getting statements from witnesses and how that would
4 happen?

5 ATC [MAJ ROMEO]: Your Honor, I'm going to object to
6 relevance. This issue is about photo identifications and photo
7 books.

8 MJ [COL ACOSTA]: Defense, response?

9 DC [MR. PADILLA]: Judge, it is relevant, and the next
10 question I have -- the next topic is about the book. So I'm just
11 going sort of in a logical process about what he knew about how
12 things were going to be done.

13 MJ [COL ACOSTA]: Overruled. I'll allow it as you're saying
14 you're getting to the portion that I think you're getting to. Go
15 ahead.

16 Q. Again, were there any sort of formal memos, policies,
17 either from the FBI or any of the U.S. Attorneys who were there about
18 how the statements -- how you would -- how you were going to get the
19 statements from the potential witnesses or suspects here?

20 A. I mean, you know, outside of the memorandum of
21 understanding that is listed in our 302s, talking to witnesses is
22 not -- there is no -- there is really no rules of how to talk to
23 witnesses.

1 So, you know, I know that the discussions were you have to
2 abide by the rules. You have to speak with the Yemenis, our
3 counterparts, when you are conducting these interviews. If they
4 allow you to do something, you do it. If they don't allow you to do
5 something, see if you can sway them the other way. I mean, those
6 were the discussions.

7 But I don't -- like, I don't think there was a memo that
8 says outside of the memorandum of understanding, you know, this is
9 how you should conduct witness interviews. I've never experienced
10 that in any of my investigations.

11 Q. Okay. And that's a good point because we know that
12 there's a -- the Bodine memo that we've been calling it,
13 about -- that sort of outlined how the interviews were going to be
14 conducted by U.S. investigators, correct?

15 A. Correct.

16 Q. And we talked about this a lot, but, in fact, in every 302
17 the second or third paragraph is mentioning the Bodine memo, about
18 how the interviews would be conducted, correct?

19 A. Correct.

20 Q. And is it fair to say that outside of the memo, you and
21 the rest of the investigators were allowed to ask the questions and
22 conduct an interview as you saw fit in the moment?

23 A. Correct.

1 Q. And we see that in the memo -- in the 302s that you
2 drafted, and the other members of the team drafted, because despite
3 the fact that there were these written instructions in the Bodine
4 memo about how the questioning would go, those were not followed to
5 the letter, correct?

6 A. I can't speak if they were followed by other investigators
7 that did not speak the language that conducted interviews. I can
8 speak of myself, and as I repeated during my testimony previously,
9 the memo never held water when we were sitting there conducting
10 interviews, you know, in native Arabic with witnesses. But I can't
11 speak of others.

12 Q. Right. And again, the point that I'm making is once you
13 got into the interview room, it was up to you guys how that was going
14 to be done as -- again, as things evolved in that interview process?

15 A. Fair to say, yes.

16 Q. Okay. And as it relates to the ADENBOM book and the
17 creation of that and then the later use of that book, was there any
18 discussions among the FBI or any U.S. Attorney about how that process
19 was going to happen?

20 A. I mean, the discussions probably would be very minimal
21 because, as FBI agents, we know how to use photo books and we know
22 how to put photo books together. So I don't think there was any
23 documentation on to create a photo book, this is what you need to do.

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1 It was more of the rule is from A to Z, and then you just
2 have to be in between that, keeping in mind what I mentioned before,
3 you know, ensuring that the photos are similar in size and the like,
4 not being over-suggestive by, you know, putting in a photo of, you
5 know, someone standing while all the others are sitting, or someone
6 in a car while it's the only photo, you know, or as we used to refer
7 to it in the FBI, a lineup with a refrigerator. So, you know, as
8 long as it's not something that is so obvious to be over-suggestive.

9 Q. Got it. Tell me if I'm wrong about this.

10 So is it fair to say, then, that there may have been an
11 agreement early on, or an understanding early on, that a photo book
12 would be generated and used during the interview process?

13 A. Of course.

14 Q. Okay. But in terms of compiling the book, building the
15 book, and then using the book, again, the agents on the ground in the
16 interviews were allowed and left alone to use their best judgment
17 about how that was done?

18 A. Correct. On how -- how it's being presented, correct,
19 yes.

20 Q. Can you remember a time where any -- I know you mentioned
21 David Kelley.

22 A. I'm sorry?

23 Q. I know that you mentioned David Kelley ----

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1 A. Yes.

2 Q. ---- as someone being down there, right?

3 A. Sure.

4 Q. A former Assistant United States Attorney for the Southern
5 District who was there on the scene, right?

6 A. Yeah.

7 Q. Besides Mr. Kelley, can you recall any other Department of
8 Justice lawyers being there on the ground?

9 A. I honestly don't remember. I know we worked with the
10 Southern District a lot. I don't know at the time if Ken Karas was
11 involved to a certain extent. I know he's a judge in New York. But
12 at the time, I don't know if he was still involved. Mike Garcia for
13 that fact too. I'm not really sure.

14 But I know David Kelley was the main person that we dealt
15 with on the USS COLE.

16 Q. Okay. So let me ask you maybe a different way.

17 Is it your memory that beyond David Kelley, there were, in
18 fact, other Assistant United States Attorneys there that were on the
19 ground?

20 A. I honestly don't remember.

21 Q. Okay. All right. But you do remember Mr. Kelley being
22 there?

23 A. Yeah, I would have spoke -- yeah, of course Mr. Kelley was

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1 the -- was the main attorney helping on this case.

2 Q. Okay. Can you recall any meetings that you were involved
3 with where Mr. Kelley was present where he talked about use of
4 certain photos or including certain photos in the book or taking out
5 certain photos in the book for whatever reason?

6 A. I know some of these discussions have taken place. I
7 don't remember if I was part of them or not, but I know of them. But
8 I don't know if I was in the meeting or not when those happened or
9 when -- when those conversations were taking place.

10 Q. Okay. Can you recall what you learned? If you weren't in
11 the meeting, did you learn later on that, hey, by the way, we talked
12 to Kelley and he said this about the book? Anything like that?

13 A. I do know that, you know, when they created -- when a
14 second book was created, some photos were taken out of that book.

15 Q. Do you know why?

16 A. I honestly -- I can tell you what I understand or at the
17 time what I understood. I understood that a photo -- one of the
18 photos was sensitive in nature on how it was obtained, and it
19 should -- it shouldn't have been in the book. That's my
20 understanding of why this photo was taken out. But I cannot really
21 talk any more about -- about the specifics of that.

22 Q. Okay. So it had nothing to do with, let's say, the photo,
23 per se -- right? -- any sort of legal basis for the photo being in or

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1 not. It had to do with potentially revealing information about how
2 that photo was obtained?

3 A. I believe so.

4 Q. Beyond that photo, do you have a memory of any other
5 photos being removed or added and why that may have been done?

6 A. No, not that I can recall.

7 Q. Is that the only instance that you can recall that a
8 lawyer, someone above the investigative unit, got involved with the
9 photo bomb -- the ADENBOM book?

10 A. To my recollection, yes.

11 Q. And you don't have any memory of meeting directly with
12 Mr. Kelley, again, about the composition, how the book was being
13 created or used?

14 A. I don't recall if he was on the ground or, you know, he
15 was sent a copy or it was discussed with him, you know, via secure
16 communication. I don't recall that, that detail.

17 Q. Can you recall if there was any discussion, again with
18 you, directly back to the New York Office, the New York FBI Office,
19 about the creation of the book and how it was going to be used?

20 A. I am sure there have got to be communications somewhere
21 with the New York Field Office about the book. I mean, I'm -- I'm
22 almost certainly positive. It could be -- again, it could be e-mail.
23 It could be electronic communication.

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1 I mean, again, you know, the leadership knew that we were
2 putting this book together and we were going to be using it. So I am
3 sure they were privied and they had the say in yes, no, why, all of
4 these questions ----

5 Q. Okay.

6 A. ---- I'm sure.

7 Q. So I would agree it makes sense that the New York Office
8 would be involved in communication about creating and using the book,
9 right? It's their case. They would be involved in those
10 discussions, right? That makes sense.

11 A. I mean, it will be the leadership of the New York Office.

12 Q. Right. So my follow-up question to that is -- excuse
13 me -- beyond sort of maybe general or maybe normal traffic about,
14 hey, we're using a book. We're going to -- you know, we're putting
15 the book together. We're going to use it. We're interviewing people
16 and people are identifying, you know, things in the book.

17 Can you recall if leadership at the New York FBI office had
18 any input with the actual photos, putting in photos, taking photos
19 out, anything like that?

20 A. Again, I don't think the FBI leadership will advise on
21 which photos to use, which photos not to use. They usually defer
22 that to the agents and the AUSAs. They are usually just involved in
23 the process, but I don't think they give direction on take this photo

1 out, put this photo in. This is something that they leave to AUSAs
2 and the people on the ground who are conducting the investigation.

3 Q. Again, and I think that that's consistent with what we
4 talked about with the statements, which is we're going to do
5 statements, we're going to trust that you guys are going to take the
6 statements. We're going to create a book, and we're going to trust
7 that you're going to use the book, right?

8 A. Fair.

9 Q. I want to ask you some questions about the actual creation
10 of the ADENBOM books. You mentioned that a couple books were put
11 together, right?

12 A. Yes.

13 Q. And you mentioned that that was put together with other
14 agents, U.S. Attorney's Office, and I think you mentioned
15 intelligence partners, correct?

16 A. Yes.

17 Q. I know the government showed you that initial ADENBOM
18 book. If you just look at those pictures, could you tell us -- I'm
19 not going to ask you, but could you tell us of the, whatever, 30
20 photos that are in that book, where each of those photos came from,
21 where they originated?

22 A. I don't know if I would be able to specifically say where
23 every one of those photos came from, but I can in general repeat and

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1 say that some of them were FBI holdings, some of them were
2 intelligence, some of them were foreign partners.

3 Q. Would you have known at the time -- would you have known
4 in December, January, February -- December 2000, January 2001,
5 February 2001, would you have been able to answer that question then?
6 I know photo number 7 came from -- whatever it was?

7 A. I'm pretty sure back then I would have been much more
8 comfortable answering that.

9 Q. Right. And that makes sense. You know, you're getting
10 photos from all over the place. You want to make sure that it's
11 coming from a legitimate source as opposed to, you know, somewhere
12 that you don't know.

13 A. Sure.

14 Q. And when you were putting the book together, is that,
15 again, you and your team, all of the agents there together working
16 together on this? Was it, you know, sitting around the table?
17 I -- you know, and just, okay, these are the photos we're going to
18 use in putting it together? Did it evolve over days, weeks of time?
19 Can you recall any of those details?

20 A. I don't recall, but I -- again, I don't believe, like, the
21 entire FBI contingent was involved in putting the book together. You
22 know, they were what FBI Headquarters and the United States Attorneys
23 considered as, you know, lead investigators on this case and there

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1 were others that were there to assist.

2 So I would say that putting the book together would have
3 been a discussion or somewhat conferring amongst the leaders or what
4 were considered the lead investigators in this case.

5 Q. You also mentioned that you were provided some photos by
6 Yemeni law enforcement, correct?

7 A. Correct.

8 Q. And that you didn't use all of the photos that were
9 provided to you by Yemeni law enforcement, correct?

10 A. Correct.

11 Q. When you say that you rejected some of those photos, are
12 you talking about photos of people that you already had or are you
13 talking about other suspects that the Yemenis brought to you and
14 said, hey, we think this person may be involved? You know, his name
15 is, you know, John Smith. And then you said you know what, we're not
16 going to do that.

17 A. So most -- again, if I remember correctly, some of the
18 photos that were provided would have been photos that were overly
19 suggestive with the way the photo was provided, so we couldn't have
20 used it. Some of the photos were a duplicate of a photo that we had
21 already obtained. And, I mean, that would be the majority of why we
22 would not use a photo that was given to us versus some of the others.

23 Q. Okay. Can you recall if there was a time where the Yemeni

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1 law enforcement came to you and said we have this photograph of a
2 person, we think he's a suspect, maybe you want to put it in the book
3 or show it to people, and that turned out to be someone who you
4 didn't consider to be a suspect?

5 A. No, I'll -- I'll repeat again: The Yemenis had no input
6 on the creation of the photo book. They did not tell us put this
7 photo in the photo book, take this photo out of the photo book.
8 Yemenis used to give us photos, and we decided if we should include
9 them or not. Yemen had -- the Yemeni authorities had nothing to do
10 with the creation of the photo book at all.

11 Q. You mentioned that you -- you -- and maybe better, the
12 FBI -- had used photo books in the past, right?

13 A. Yes.

14 Q. I mean, I think you mentioned specifically the East Africa
15 bombings case where there was a photo book generated in that case,
16 correct?

17 A. Sure.

18 Q. Were you involved in the actual interviewing witnesses in
19 that case and showing witnesses photo bomb book **[sic]** in that case?

20 A. Yes.

21 Q. All right. Is it fair to say that witnesses identified
22 suspects in that case?

23 A. They did.

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1 Q. Can you -- again, that case was prosecuted in the Southern
2 District of New York, correct?

3 A. Correct.

4 Q. Can you recall if the -- did you testify in that case, the
5 trial?

6 A. I did not.

7 Q. Can you recall if the KENBOM book was introduced as a
8 piece of evidence in that case?

9 A. I don't -- I don't -- I really don't know if it was or
10 not.

11 Q. Can you recall if any of the witnesses who ever identified
12 anybody from that book, whether that evidence was introduced as an
13 identification in the trial in New York?

14 A. I don't know. I wasn't involved in the trial piece of the
15 East Africa Bombing. I was involved in the investigation side, but I
16 was never called to testify. It was run out of the New York Field
17 Office, and at the time I was -- I was assigned, you know, overseas,
18 so I was not really called in. So I don't know the mechanics of what
19 was introduced and what was not introduced.

20 Q. Was there any -- during the -- during the generating of
21 the ADENBOM book and its use, was there any discussion, again,
22 whether with the agents or with the lawyers, about this is going to
23 be used at evidence in trial?

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1 A. I mean, I am sure that any photo book in any
2 investigation, the ultimate goal is for this photo book to be used in
3 a trial if witnesses had identified some of the potential suspects in
4 it. So, I mean, that's a goal of the creation of a photo book ----

5 Q. Okay.

6 A. ---- is to be able to use it at some point and say this
7 person identified that person, this person identified that person.

8 Q. Okay. And the reason I ask that question is as opposed to
9 using the book as an investigative tool.

10 A. I mean, it's a combination, correct? It's -- kind of they
11 go hand in hand. I mean, you have to use the photo book as an
12 investigative tool because you want to make sure that you are
13 following the proper leads into the potential suspects.

14 And that's -- that's why the photo books are very valuable,
15 because then they hone in the investigator on, you know, the way the
16 investigation is going. If all the witnesses that you are
17 interviewing are looking at a photo, and the investigation or the
18 investigators believed that the -- another photo was the potential
19 suspect, that will change the course of the investigation.

20 Q. Along those same lines, if there were discussions about
21 why the photo book was going to be used and the understanding perhaps
22 that it was going to be used in a criminal trial, was there -- can
23 you recall if you were in any meetings where there was discussion

1 about using a photo book as opposed to a standard photo array?

2 A. I don't recall that.

3 Q. Do you have any idea why the photo book method -- those
4 are two different things, right? I mean, let me -- let's make that
5 clear.

6 A. Yeah, yeah.

7 Q. A photo book is a book generated -- you know, in this
8 case, I think there were 34 photos, 34 photos and at least in that
9 January book, 34 photos but only 20 people, right? There were
10 multiple photographs of -- of several people, right?

11 A. Yeah.

12 Q. The book was shown -- I think we've gone over this a lot.
13 You brought the book into the interview room, the book was provided
14 to the witness, and I think the only sort of instruction that you
15 gave was take a look at the book, see if you -- see if you recognize
16 anyone, right?

17 A. Yes.

18 Q. Okay. A photo array is different, right? That's
19 typically where you have a set of photographs, six usually, that I've
20 seen in U.S. law enforcement. Six photographs, one suspect,
21 everybody else is not involved. And you show that photo array to the
22 witness: Can you identify anybody from this -- six pack is usually
23 what it's called. Can you identify anybody from -- from the photos

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1 I'm showing you, right? Those are two different ways of doing it?

2 A. Sure.

3 Q. Okay. And you don't recall any discussions with the FBI
4 agents there on the ground or any lawyers about the decision to use
5 the photo book as opposed to a photo array?

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

7 Q. You mentioned that you had used photo books in the past.
8 Had you also been involved in investigations where the photo array
9 lineup was done instead?

10 A. I was part of some investigations where an array was
11 involved, but it was not an overseas investigation. It was, you
12 know, local investigations inside of the United States.

13 Q. Okay. And there are -- there are very formal, strict
14 procedures in how photo arrays are conducted, right?

15 A. Correct.

16 Q. The photos that are chosen, right? The way that they
17 look, they have to be similar. The background has to be similar.
18 Usually the witness is asked to -- if they can make an identification
19 and then sign that photograph identifying the person, correct?

20 A. Correct.

21 Q. Usually the witness is asked to make a certainty
22 determination about their identification. In other words, all right,
23 I -- you've identified number 3. How certain are you that that is

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1 the same person? Usually it's done on a percentage, right?

2 A. Sure.

3 Q. All of those things are associated with the photo array
4 process, right?

5 A. Correct.

6 Q. I think it's also true that during the photo array
7 process -- and again, to eliminate, as you mentioned, suggestiveness,
8 that it may be helpful that the law enforcement officer
9 administering the photo array have no idea who the suspect is in the
10 photo array, has no idea who is the person and who isn't the person,
11 again, to protect the process.

12 A. Are you saying that in photo arrays the FBI agent does not
13 know who the suspect is?

14 Q. The actual agent -- correct. The actual agent with the
15 witness may not know who the person -- someone knows, obviously, but
16 maybe not the person showing it to the witness, again, to avoid any
17 issue about suggestiveness.

18 A. I mean, of course, there may be instances like this, but I
19 have been part of photo arrays where ----

20 Q. You knew who it was?

21 A. ---- I know who the suspect is.

22 Q. Okay. But again, that -- that process, a lot more formal
23 and a lot different than what was happening with the -- with the

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1 photo books in this case?

2 A. They're two different processes, yes.

3 Q. And again, in the photo books that were used in this case,
4 they were all suspects, right?

5 A. I don't remember all the photos. I'd have to take a look
6 at it again, but I don't know if all of them were -- were suspects or
7 not.

8 And that's the difference between -- again, my own opinion,
9 the difference between a photo book and an array. You know, when you
10 show an array, as you mentioned, it's six photos, you have one
11 suspect. You go ahead and show it.

12 In an investigation at the scale of the East Africa Bombing
13 or the USS COLE or the Khobar Tower bombing or 9/11, I mean those are
14 massive investigations where there was multiple suspects, there's
15 multiple aides, there's multiple individuals who are involved if it's
16 logistical or financial. So showing photo arrays may prove to be not
17 as productive because who are you going to show and what are you
18 going to show?

19 So, again, I'm just -- from an FBI agent's point of view and
20 experience, I believe this is why in large-scale investigations that
21 span the globe, photo books are used to show because there will be so
22 many photos.

23 I mean, if you remember the photo book of the KENBOM/TANBOM,

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1 it was even larger than the photo book of the USS COLE, so ----

2 Q. I think you mentioned this, but I saw a note here, so I
3 want to make sure. I just mentioned that there were multiple
4 photographs of the same person in the ADENBOM book, right?

5 A. Yes.

6 Q. And I think you mentioned this, but I want to make sure
7 about this. For example, if there were five or six photos of the
8 same person, is it your understanding, your memory, that those photos
9 would have been perhaps a photo of the person when they were younger
10 and then maybe a photograph of -- maybe a more recent photograph of
11 that person included within that selection of photographs?

12 A. I mean, again, I believe the reason -- not believe. I
13 know the reason why we had included several photos of individuals is
14 because we wanted to make sure that the witnesses had the chance of
15 looking and saying I remember this person this way, not that way.

16 Because they were -- they were changing. Some of them, you
17 know, they go in with a beard one day, they shave the beard one day,
18 they had a mustache one day, they wore glasses one day. So -- and
19 witnesses in Yemen -- and I repeat that again. Yemen is such a
20 simple place, and the people are very, very simple there. So they're
21 not -- they're not sophisticated people who have been through
22 something like this in the past.

23 We wanted to just give them the chance of saying yes, I

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1 remember this guy, and that's why we used to ask for a description
2 and show the photo book, because we wanted to make sure that their
3 description somewhat fit what they chose. And some of them, as you
4 can tell from the photo book, chose photo number -- I don't remember
5 the photo numbers, but some of them chose number 20, some of them
6 chose number 22.

7 So that's -- that's why we had put in photos of
8 different -- from -- of the same person but in different -- they
9 looked -- when they looked differently.

10 Q. Right. You're casting a wider net. You know, if a -- if
11 you put in just one photo that's old, that person may not ----

12 A. Correct.

13 Q. ---- recognize it.

14 If you put in the new one, the -- so you're casting as wide
15 a net on a potential suspect as possible in the hope that someone is
16 going to make an identification?

17 A. True. I mean, we wanted to make sure that if they saw
18 them in a certain way and we had the photo in a different way, they
19 did not miss it.

20 Q. I want to ask you some questions about the photos from
21 that first ADENBOM book that the government went over with you, okay?

22 A. Please.

23 Q. So initially, the government went over with you the three

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1 photos of Nashiri, 20, 21, and 22, right?

2 A. Correct.

3 Q. And I think you testified that on photo number 20, that
4 you identified as Mr. Nashiri, that that photo -- and I'm using this
5 word specifically here. You received that photo from a vehicle
6 registration in Yemen, correct?

7 A. Correct.

8 Q. All right. Now, when you say received it, I know what
9 you're saying is that you got the photo from the registration, car
10 registration in Yemen, right?

11 Do you actually know how you got that photo?

12 A. Let me explain a little bit, if I may.

13 Some of the photos -- I mean, the -- ultimately, we had
14 received this photo from the Yemeni authorities. But sometimes we
15 may have had that photo, but we couldn't put it in the book because
16 we knew that the Yemeni authorities had it, so we just had to ask
17 them to give it to us in a diplomatic way. I really can't discuss
18 that. I think -- I think you know -- you know what I'm saying.

19 But the ultimate goal is, yes, it was provided to us by
20 Yemeni authorities, and then we include it in the book.

21 Q. Although you may have had that previously?

22 A. Correct.

23 Q. And can you -- again, without getting into, you know, some

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1 of the things that maybe you can't testify about in a session like
2 this, but can you recall when you may have initially gotten that
3 photo?

4 A. I don't recall.

5 Q. You also mentioned -- you also talked about photo
6 number 21, and again, I think that you only mentioned that that was a
7 photograph that you obtained in a previous investigation, right?

8 A. Yes.

9 Q. Beyond that, can you tell us any more details about that
10 photograph and how you obtained that photo?

11 A. I don't think I can discuss that photo in this type of a
12 session.

13 Q. The government asked you a couple questions about the
14 merging or composite photographs. Do you remember that?

15 A. I do.

16 Q. And you said that you couldn't remember or you didn't
17 believe that any of the photographs were composites, right?

18 A. No, I actually said they were not composites.

19 Q. Not composites. Okay.

20 And we've talked a lot during the sessions about -- even
21 today, about meetings you had and -- with the other agents and maybe
22 lawyers and your counterparts in Yemen and about being involved in
23 some of those meetings, and then drafting reports and memos detailing

1 what happened during those meetings, right?

2 A. Yes.

3 Q. That's a pretty common occurrence, normally, and certainly
4 true in Aden, correct?

5 A. Yes.

6 Q. All right. Can you recall that -- being in a meeting in
7 November of 2000 where merging of sketches was done to create a
8 composite photograph? Do you have any memory of that?

9 A. I don't remember specifically that instance, but it could
10 have possibly happened.

11 Q. If I showed you a document, would that maybe refresh your
12 memory ----

13 A. It could.

14 Q. ---- about having a discussion about that?

15 A. Could.

16 Q. And this is AE 461P at page 106.

17 DC [MR. PADILLA]: Judge, if I could approach the witness?

18 MJ [COL ACOSTA]: You may.

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

20 A. I mean, I see it but I honestly don't recall. Oh, I'm
21 sorry.

22 DC [MR. PADILLA]: That's okay. Okay. I've retrieved the
23 document.

1 Q. Does that refresh your memory about being involved in a
2 meeting where it was discussed combining photographs to create a
3 composite photograph?

4 A. I -- it refreshes my memory that I see it now, but I
5 don't -- I don't actually recall that meeting, but ----

6 Q. Okay. But it's clear based on your review of this that
7 there was a discussion about that, about the use of composites in the
8 ADENBOM book?

9 A. Well, this -- if I may clarify, this document does not
10 state the composites to be used in the Aden photo book. It stated
11 that there was a composite that was provided to the Yemenis. So
12 that's two different things.

13 Q. Is it still your position that no composite sketches were
14 included in the ADENBOM book?

15 A. Yeah, I don't believe at all there was a composite. I
16 know there was some sketches, but not composites in the photo book.

17 Q. Okay.

18 DC [MR. PADILLA]: Judge, if I could have just a couple
19 minutes here?

20 MJ [COL ACOSTA]: You may.

21 **[Counsel conferred.]**

22 DC [MR. PADILLA]: Judge, just a couple last questions here.

23 Q. I think you mentioned this, but there were obviously

1 different versions of the ADENBOM book that were created and used in
2 this case, correct?

3 A. I believe there was more than one.

4 Q. Okay. Once a new book was created, were there any
5 instructions from any lawyers or supervisors, or amongst yourself,
6 that once the new book was generated, to not use the old book?

7 A. I believe that that's the reason why a new book is
8 created.

9 Q. Right.

10 A. So the answer would be, yes, the -- a new book is created,
11 and from the time it was created onward, that book should be used.

12 Q. Right. And again, that makes sense, right? That's why
13 you're creating a new book, to not use the old book, for whatever
14 reason?

15 A. That's what I would believe, yes.

16 Q. Okay. A couple questions about the actual interviews and
17 the use of the books during the interviews.

18 Can you recall if -- while your team was conducting
19 interviews at the PSO, were there other teams also there conducting
20 their own interviews at the same time?

21 A. Possible, but I don't -- I don't remember. I want to
22 say -- I want to say no, but it could be possible that sometime we
23 had a split team because, you know, again, there was a -- some

1 information, some threat or something and we needed to just do
2 something and then leave. So it could have happened, but I just
3 can't recall any instances that I could defer to in that instance.

4 Q. When you created a new book, or the creation of the
5 original book, was there just one copy of that that all of you used,
6 or were there multiple copies of the same edition of the book?

7 A. I would -- I would say there probably was more than one
8 copy of the book, so in case somebody else, as you just said -- that
9 would be my -- my guess. But again, I cannot recall if -- if there
10 was another copy or two.

11 DC [MR. PADILLA]: One more second, Judge. Thank you.

12 MJ [COL ACOSTA]: Yep.

13 **[Counsel conferred.]**

14 DC [MR. PADILLA]: Judge, that's all I have.

15 MJ [COL ACOSTA]: All right. Thank you, Counsel.

16 Government, redirect?

17 ATC [MAJ ROMEO]: Yes. One moment, Your Honor.

18 **[Counsel conferred.]**

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

20 MJ [COL ACOSTA]: Counsel, go ahead.

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

22 **[END OF PAGE]**

23

1

REDIRECT EXAMINATION CONTINUED

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

3 Q. Agent Khoury, I just have a few follow-up questions.

4 Can you elaborate on the relationship between the AUSA and
5 the FBI agents on the field doing these investigations?

6 A. I mean, the relationship between the AUSAs and the FBI
7 agents is super close because, for the same reason defense mentioned,
8 we want to make sure that we are following guidelines, legal
9 guidelines that does not jeopardize the investigation if it ever
10 reached a courtroom.

11 So we confer with the AUSA on their legal decisions or legal
12 guidance when it comes to that. So we work very collaboratively with
13 them. Matter of fact, I know in some of my investigations I actually
14 conducted interviews with AUSAs in the room, so very, very close.

15 Q. Okay. And that close relationship happened as soon as you
16 first landed in Yemen; is that true?

17 A. It probably starts before we even get to Yemen. I mean,
18 you know, as soon as there is an incident and an AUSA is assigned,
19 then there is a collaboration right from -- from that moment.

20 Q. Okay. So you were in contact with Dave Kelley even
21 before -- regarding this issue, even before you first got to Yemen?

22 A. I believe so.

23 Q. Okay. So when the AUSA gives you recommendations on

1 things that are on the ground, like, hey, this might be difficult for
2 my case, this -- this is okay, are they recommendations or are they
3 orders or is there ever a point where there's -- you may have a
4 disagreement, let's say, with an AUSA's recommendation and your need
5 to finish your investigation?

6 A. I mean, there's always disagreements with the AUSAs when
7 it comes to investigations because they're very -- they're bound by
8 their legal rules and boundaries, and sometimes there will be some
9 disagreements on how to proceed in an investigation.

10 You know, when it comes to legal matters, then we defer to
11 them. But when it comes to investigative matters, sometimes AUSAs
12 like to intervene and FBI agents don't like that. So we do have
13 disagreements. As Good Samaritans, we can always end up agreeing.

14 But, yeah, sometimes it does get a little contentious when
15 an AUSA is trying to intervene in how an investigation should be done
16 versus, you know, providing legal advice on how best we could help
17 them in prosecuting a case if it ever reaches that point, if that
18 makes sense.

19 Q. So basically the FBI agents, they're responsible for
20 conducting the investigation, and then the AUSA's in charge of
21 determining whether that could be used at trial and whether it's, you
22 know -- but as far as the investigation itself, that's handled by the
23 folks on the ground; is that correct?

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1 A. Yeah, exactly.

2 Q. Okay. So when you first went to Yemen and you were
3 conducting these interviews and putting together these photo books,
4 can you -- were you required to provide updates to your supervisors?

5 A. Always.

6 Q. Were you required to brief FBI HQ?

7 A. Always.

8 Q. Were you required to brief to the director of the FBI?

9 A. Yes.

10 Q. So they were aware of what was going on with the aspects
11 of your investigation throughout this whole process?

12 A. Exactly.

13 Q. Okay. Now, I know there were some questions brought up by
14 my colleague on the defense about photo arrays as opposed to photo
15 books. Is there a functional difference in your mind between a photo
16 book and a photo array?

17 A. I mean, I know there was a differentiation as defense
18 noted. But to me, as I mentioned before, a photo array is when you
19 have one suspect that you -- and six photos, you're limited in what
20 you can provide. It's six photos. It's one suspect. And then, you
21 know, you're showing that photo array.

22 In large-scale investigations, I personally have not heard,
23 and I have been involved in the Khobar Towers, the East Africa

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1 Bombing, the USS COLE, and 9/11, which are considered probably the
2 biggest-scale investigations the United States Government ever
3 conducted. I have never seen a photo array being presented
4 to -- when you are interviewing witnesses at a large scale.

5 You know, if you have one witness, you have one suspect or
6 you have a couple of witnesses and one suspect, then yes. But when
7 you have -- you know, when you're interviewing scores of witnesses
8 and you have multiple suspects -- or potential suspects, I should
9 say, then photo arrays don't work because there is -- we want to know
10 about people who assisted them.

11 We want to know about people who provide them finances. We
12 want to know about people who helped them drive car. We want to know
13 about people who helped them rent, you know, apartments and the like.
14 And it's going to be very difficult to just use a photo array.
15 That's my own opinion and from my experience. That's how I can
16 describe it.

17 Q. Okay. You mentioned that you were aware that some
18 photographs were taken out of later versions of the ADENBOM Photo
19 Book; is that correct?

20 A. Yes.

21 Q. Okay. I believe you told my colleague on the defense just
22 now that there was a photo that was taken out for sensitive reasons.

23 A. Correct.

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1 Q. Do you know the details of that, what you can say here?

2 A. I mean, I can't discuss the detail of why that photo was
3 taken out. Again, I believe that was because of the sensitivity on
4 how this photo was obtained. I could be wrong, but that's how I
5 understand it.

6 Q. Okay.

7 A. So -- and I cannot discuss that in more detail.

8 Q. All right. One thing you can discuss here, though, in an
9 open session, was the photo, photo number 21?

10 A. Yes.

11 Q. Okay. So I know you've spoken at great length about the
12 relationship with the Yemenis, both to myself and my colleague here.
13 Just a follow-up.

14 Can you -- can you describe the specific process, to your
15 knowledge, how the Yemenis presented these photos to you? And by
16 that, I mean, you know, like you received a -- you know, a -- you
17 know, you received a vehicle registration or ID, for example. What
18 would be the process of how you would receive those photographs?

19 A. I mean, those photographs or those documents were not
20 received during interviews of witnesses or interviews of potential
21 suspects. Those documents were exchanged in meetings that we had had
22 with the leadership of the Yemeni government.

23 When we are interested in a document and we knew that a

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1 document existed, we asked for it, and that -- sometime it took a
2 while for them to obtain it to give to us. Sometimes there was a lot
3 of back-and-forth on why we need it and how did we find out about it.
4 So it was not, like, an easy process where we just asked, can we have
5 this, and they give it to us.

6 Now, having said that, in few instances, Yemeni officials
7 did come to us and say here's a document that we found. Would this
8 be of any help to your investigation? And that would be from -- as I
9 discussed before, there was people who were sympathetic to the FBI
10 and the U.S. Government and the West, and there were people who were
11 sympathetic to the extremists. Obviously, the first group would be
12 the one that used to say here's one or ask for this. You know, this
13 exists. Why don't you ask for it.

14 So there was not a linear process on how to -- how to obtain
15 them, but it was in meetings with the hierarchy of the Yemeni
16 government.

17 Q. Okay. All right. So you weren't privy to any
18 conversations of, well, you know, one of our local Yemeni police, you
19 know, got this photo from good police work or, you know, we received
20 it from other means?

21 A. No. I mean, I -- we never really asked how was that photo
22 obtained. You know, did -- you know, was it through sources that
23 they had in Yemen? Was it through good police investigators? It

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1 really didn't matter to us. What mattered to us is actually
2 obtaining the documents or obtaining the evidence that we were
3 looking for.

4 Q. Okay.

5 ATC [MAJ ROMEO]: Your Honor, if I could have one minute?

6 MJ [COL ACOSTA]: You may.

7 **[Counsel conferred.]**

8 ATC [MAJ ROMEO]: Those are all the questions I have. Thank
9 you.

10 MJ [COL ACOSTA]: All right.

11 **EXAMINATION BY THE MILITARY COMMISSION**

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

13 Q. Agent Khoury, I want to ask you: Do you have any specific
14 memories of sitting down and, like, at a table and selecting the
15 photographs to put into the book for this case?

16 A. Yeah, of course.

17 Q. Okay. So you remember -- you were personally involved in
18 going, okay, here's the photos, the first three photos are of this
19 individual, then we have two other individuals, and just selecting
20 each one, correct? Is that accurate?

21 A. Yeah, exactly.

22 Q. Okay.

23 MJ [COL ACOSTA]: Any other questions based upon mine?

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1 ATC [MAJ ROMEO]: None from the government, Your Honor.

2 MJ [COL ACOSTA]: Defense?

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

4 MJ [COL ACOSTA]: All right. Any objection -- temporary
5 excusal for the purpose of this motion or permanent excusal for the
6 purpose of this motion in this session, Government?

7 ATC [MAJ ROMEO]: Your Honor, if I could consult with defense
8 counsel one minute, I would be able to provide that answer.

9 MJ [COL ACOSTA]: All right.

10 **[Counsel conferred.]**

11 ATC [MAJ ROMEO]: Permanent, Your Honor.

12 MJ [COL ACOSTA]: Permanent for the purposes of this? No
13 objection, Defense?

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

15 MJ [COL ACOSTA]: All right.

16 Agent Khoury, thank you for your testimony the past couple
17 days, as counsel already thanked you.

18 For the purposes of this hearing, you're permanently
19 excused. Don't discuss your testimony or your knowledge of this case
20 with anyone other than counsel for either side. You can step down.

21 WIT: Thank you, Judge.

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

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

2 MJ [COL ACOSTA]: All right. We're taking back up 461 next
3 week again, Government, correct, with Mr. Kelley?

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

5 MJ [COL ACOSTA]: All right. Let's see if we can address a
6 couple of things that may not -- that I -- we'll see how long they'll
7 take.

8 Specifically, without getting into the contents of these
9 topics, if we can stay clear of some of it, the motion to -- we're
10 talking about AE 529. Essentially where we are -- where are we,
11 Government?

12 This is the defense motion to compel related to the KSM
13 case. You essentially said, yes, we're going to turn it over. Let's
14 get it over. I think the last thing was a one-pager, the last thing
15 that was turned over.

16 Is discovery complete?

17 MATC [MR. WELLS]: Your Honor, it's -- discovery is complete
18 regarding the AE 726 filings.

19 MJ [COL ACOSTA]: Okay. The 726 number that you're using is
20 related to -- is the other case's filings ----

21 MATC [MR. WELLS]: Yes, sir.

22 MJ [COL ACOSTA]: ---- so -- right? And they asked for -- and
23 that's what the defense asked for?

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1 MATC [MR. WELLS]: Yes. Both the classified and unclassified,
2 and also the AE 631 in the other case filings.

3 There were two other matters that were requested by the
4 defense which we had in 529A; I believe it's 120AA. That matter
5 relates to an individual that you directed the government was direct
6 and substantial.

7 We have a motion to submit to you on that matter and we hope
8 to finalize that either -- it's being presented to you today. It's a
9 505.

10 MJ [COL ACOSTA]: You have a 505 matter on that which you
11 believe completes the 120AA document ----

12 MATC [MR. WELLS]: Yes.

13 MJ [COL ACOSTA]: ---- that they requested?

14 MATC [MR. WELLS]: Yes, sir.

15 MJ [COL ACOSTA]: Okay. The first one was -- was -- pardon
16 me. Was 627 -- was that ----

17 MATC [MR. WELLS]: 726.

18 MJ [COL ACOSTA]: 726. There's numbers. I apologize.

19 MATC [MR. WELLS]: I know, sir.

20 MJ [COL ACOSTA]: 726. And then the second one was ----

21 MATC [MR. WELLS]: I think AE 631 series.

22 MJ [COL ACOSTA]: ---- 631 complete?

23 MATC [MR. WELLS]: Yes, sir.

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1 MJ [COL ACOSTA]: Okay. And 120AA you're getting to me today
2 to ----

3 MATC [MR. WELLS]: Yes, sir.

4 MJ [COL ACOSTA]: ---- review for -- for ----

5 MATC [MR. WELLS]: Yes.

6 MJ [COL ACOSTA]: ---- for disclosure, correct?

7 MATC [MR. WELLS]: Yes, sir.

8 MJ [COL ACOSTA]: And what's the last one?

9 MATC [MR. WELLS]: Sir, item four relates to an additional AE
10 474 material that's pending security coordination which is complete.
11 And we'll be submitting a 505 motion to you. We anticipate that we
12 will finalize that and submit that to you next week. So we will then
13 be complete and be prepared for the April sessions.

14 MJ [COL ACOSTA]: Okay. All right. Thank you.

15 MATC [MR. WELLS]: Thank you, sir.

16 MJ [COL ACOSTA]: Defense?

17 DC [MS. CARMON]: Judge, I don't have anything to add. That
18 was the ----

19 MJ [COL ACOSTA]: Just making sure.

20 DC [MS. CARMON]: ---- message given to me by Mr. Wells as
21 well.

22 MJ [COL ACOSTA]: The burden will shift to me to complete my
23 505 reviews as soon as I get them. And, as you know, as soon as I

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1 get them, I turn them around pretty ----

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

3 MJ [COL ACOSTA]: ---- quickly.

4 DC [MS. CARMON]: Thank you.

5 MJ [COL ACOSTA]: Within a -- depending on whatever else is on
6 the schedule of -- of time. If I get something this week here for
7 505, I will get -- I will try to get it to you before -- if I get it
8 this week, like he says, for 505, I will get it to you before we
9 leave.

10 If I get a 505 next week, to the extent that's -- depending
11 on the size of these items, right?

12 DC [MS. CARMON]: Sure.

13 MJ [COL ACOSTA]: To the extent possible, I will get that -- I
14 will get it to you within a week of getting it. That is my -- my
15 goal. And that -- that's the -- the best assertion I can make for
16 you on that. Okay.

17 DC [MS. CARMON]: Thank you.

18 MJ [COL ACOSTA]: That gets us down to the next one to talk
19 about, which is 532, AE 532, the motion to compel discovery related
20 to al Hilah. And this is the one that I want to make sure we're
21 staying in an unclass setting without talking about the -- the
22 contents, et cetera.

23 Government, your update?

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1 MATC [MR. WELLS]: Yes, sir. This matter relates to a number
2 of documents which have cleared security review. It's just a matter
3 of putting together the 505 motion to you.

4 MJ [COL ACOSTA]: They have cleared security review?

5 MATC [MR. WELLS]: Yes, sir. So ----

6 MJ [COL ACOSTA]: When did they clear it? How about that?
7 Can you give me a date on that?

8 MATC [MR. WELLS]: I think about a week ago. But I have to
9 draft the motion, submit that to you, and our target is to present
10 that to you next week.

11 MJ [COL ACOSTA]: And that's all of them? That's everything
12 that you have?

13 MATC [MR. WELLS]: Yes, sir.

14 MJ [COL ACOSTA]: Again, I'm not asking you to talk about
15 things that you don't know or where they are, whatever. The things
16 that you have that you have searched for and found ----

17 MATC [MR. WELLS]: Yes, sir.

18 MJ [COL ACOSTA]: ---- you're ready to give them to me next
19 week ----

20 MATC [MR. WELLS]: Yes, sir.

21 MJ [COL ACOSTA]: ---- in order to review to give to them to
22 the defense?

23 MATC [MR. WELLS]: Yes, sir.

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1 MJ [COL ACOSTA]: Okay.

2 MATC [MR. WELLS]: I will highlight for you, subject to our
3 continuing responsibility and obligation, reviewing those documents
4 and other documents -- I'm still conducting further inquiry -- but
5 the ones that we have identified that were directly relevant and
6 material to the request, we need to present those to you to get them
7 to the defense, sir.

8 MJ [COL ACOSTA]: Okay. And you'll get those to me next week
9 as well?

10 MATC [MR. WELLS]: Yes, sir.

11 MJ [COL ACOSTA]: All right. Defense, understood?

12 DC [MS. CARMON]: Yes, sir. Nothing to add.

13 MJ [COL ACOSTA]: Same -- the same best efforts on the part of
14 the judiciary will be to get the -- the commission will get them to
15 you as soon as possible after that. Okay. All right.

16 The next issue is the -- I think it's 534F. This is the
17 motion to compel witnesses. Is it F? It's F and G are the two
18 defense motions to compel witnesses, correct? Is that right,
19 Lieutenant -- or Commander? Sorry.

20 DDC [LCDR PIETTE]: Yes, Your Honor. That's correct.

21 MJ [COL ACOSTA]: You want to come on up? I want to talk
22 about it briefly. It's 534. And you can listen while you walk. I'm
23 sure you can do both of those things.

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1 534 is a motion to dismiss capital referral because of
2 the -- because of incomplete medical records, correct?

3 DDC [LCDR PIETTE]: Yes, sir.

4 MJ [COL ACOSTA]: And as part of that, in your original motion
5 you said here's the witness that we're going to call, and it's
6 Dr. Crosby, correct?

7 DDC [LCDR PIETTE]: Yes, Your Honor.

8 MJ [COL ACOSTA]: First page of your -- I don't know if it's
9 the first page. Maybe it's at the end of the page, but I can see
10 where it is on the page. I can't remember which page it was.

11 Then later, much later, right before we came down here, you
12 filed another motion that said we want the chief medical officer and
13 the senior medical officer on this, correct? And the psychiatrist.

14 MATC [MR. WELLS]: Yes, Your Honor.

15 MJ [COL ACOSTA]: Three. Sorry, three.

16 And then yesterday -- yesterday, I got another request
17 for -- to compel -- you filed another motion to compel the
18 interpreter, right?

19 DDC [LCDR PIETTE]: Yes, Your Honor.

20 MJ [COL ACOSTA]: Those are pretty late. And I'll tell you,
21 it's -- it's not like they're surprising that's who you want, when
22 you read the documents that you attached to your motion, because
23 the -- one of the documents attached to the motion is an e-mail or a

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1 written communication -- or a communication from your client that
2 says here's the -- I -- the interpreter was there. This is what I
3 said. The interpreter can back me -- you know, will -- will tell you
4 what I said.

5 So why is that so late on those?

6 DDC [LCDR PIETTE]: The interpreter, I have -- there's no good
7 reason for that. That was an oversight on my part. I noticed too
8 late that I hadn't ----

9 MJ [COL ACOSTA]: Right. Got it.

10 DDC [LCDR PIETTE]: ----- that I hadn't requested it.

11 MJ [COL ACOSTA]: Now, let me ask you this. The other
12 individuals that the government has said, look, we don't even mind
13 producing a -- you know, two of those -- you know, they're on island,
14 and that's the SMO and the -- and the -- and the CMO, right?

15 DDC [LCDR PIETTE]: They only agreed to one of those, the SMO.

16 MJ [COL ACOSTA]: Oh, just the SMO?

17 DDC [LCDR PIETTE]: Yes.

18 MJ [COL ACOSTA]: Okay. And then do you know if any of those
19 other witnesses that you requested then -- that leaves
20 the -- the -- the chief medical officer, the psychiatrist, and the
21 interpreter, do you know if they're here or not?

22 DDC [LCDR PIETTE]: That's my understanding, that they're
23 here.

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1 MJ [COL ACOSTA]: That's your understanding, that they are
2 here?

3 DDC [LCDR PIETTE]: Yes.

4 MJ [COL ACOSTA]: Okay.

5 DDC [LCDR PIETTE]: But I don't know for sure.

6 MJ [COL ACOSTA]: All right. Let's -- all right. Thank you.

7 Government, can you speak as to the location or the
8 availability of all the -- of these witnesses, if they're able to be
9 produced? From the -- oh, sorry. Normally for things on island we
10 get the island ----

11 ATC [Capt DANIELCZYK]: Yes, Your Honor.

12 MJ [COL ACOSTA]: Do you know if that -- there's -- you said
13 you can produce the senior medical officer but you don't -- but not
14 the chief medical officer, the psychiatrist. And you just got the
15 request for the interpreter. Do you know if those people are located
16 here on island with me?

17 ATC [Capt DANIELCZYK]: Sir, I have an update as to the senior
18 medical officer. I can tell you that I do believe the psychiatrist
19 and the interpreter are on the island.

20 MJ [COL ACOSTA]: Okay. That's three of four.

21 ATC [Capt DANIELCZYK]: Well, sir, pertaining to the -- the
22 senior medical officer, after we got the request he had a medical
23 issue, had to leave the island. We do believe he is due back -- the

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1 last update we received, he's due back today.

2 MJ [COL ACOSTA]: On island?

3 ATC [Capt DANIELCZYK]: Yes, sir.

4 MJ [COL ACOSTA]: Okay.

5 ATC [Capt DANIELCZYK]: We do not know his status and
6 availability due to -- you know, if he has any medication that he has
7 to take that would affect his ability to come here and testify.

8 MJ [COL ACOSTA]: Okay. So ----

9 ATC [Capt DANIELCZYK]: As to the chief medical officer, my
10 understanding is there may be offices both stateside and on the
11 island, and so at this time we do not know if the chief medical
12 officer is on island during this session.

13 MJ [COL ACOSTA]: Okay. Let me see if I can recap. The SMO
14 is -- is here or will soon be, but subject to medical availability?

15 ATC [Capt DANIELCZYK]: Yes, Your Honor.

16 MJ [COL ACOSTA]: The psychiatrist is here and available?

17 ATC [Capt DANIELCZYK]: Yes, Your Honor, I think for the
18 majority of the week. There is a day of ----

19 MJ [COL ACOSTA]: If they're here, they're available, so ----

20 ATC [Capt DANIELCZYK]: Copy that. Yes, sir.

21 MJ [COL ACOSTA]: That will leave the interpreter, and that
22 person is here and available?

23 ATC [Capt DANIELCZYK]: Yes, Your Honor.

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1 MJ [COL ACOSTA]: And you don't know the location of the chief
2 medical officer?

3 ATC [Capt DANIELCZYK]: Correct. Yes, sir.

4 MJ [COL ACOSTA]: And when will you know that answer for me?

5 ATC [Capt DANIELCZYK]: If Your Honor orders an evidentiary
6 hearing and orders production, we will get that as soon as possible.

7 MJ [COL ACOSTA]: I'm telling you that I want you to tell me
8 where that individual, he or she is, just tell me where they are.
9 It's not hard.

10 People generally know where I am -- right? -- and you should
11 generally -- this person is requested in the medical office, if you
12 call -- like if you call the trial judiciary office they'll tell you
13 Colonel Acosta is here today or not here today. If you call that
14 medical office, I bet you they can tell you where they're at. Call
15 and find out where they are.

16 ATC [Capt DANIELCZYK]: Yes, Your Honor.

17 MJ [COL ACOSTA]: The -- so that's what I want to hear.

18 But next, what we'll do then is we will call -- we're going
19 to -- we're going to recess now for -- for lunch. We're going to
20 take it a little bit early. We're going to go until 1245, and then
21 we're going to come back in and we're going to take Dr. Crosby's
22 testimony because that's who you want to call, right?

23 LDC [MR. NATALE]: That's correct. As it relates to

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1 Dr. Crosby's testimony ----

2 MJ [COL ACOSTA]: Is it going to be open or closed?

3 LDC [MR. NATALE]: Your Honor ----

4 MJ [COL ACOSTA]: I can't imagine it could be -- I can't
5 imagine it has to be closed, but I'm wrong on that more than ----

6 LDC [MR. NATALE]: It's -- we believe that it's open and that
7 it should be open. As far as her testimony, it relates to two
8 motions. I am going to be bringing out her testimony on one of the
9 motions, and Lieutenant Commander Piette is going to be handling her
10 direct testimony on the other motion.

11 MJ [COL ACOSTA]: Okay. So which one are you talking about?

12 LDC [MR. NATALE]: Your Honor, it's 467.

13 MJ [COL ACOSTA]: You're doing 467?

14 LDC [MR. NATALE]: Yes.

15 MJ [COL ACOSTA]: And that, you anticipate, will be -- is
16 that -- you believe it's all open?

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

18 MJ [COL ACOSTA]: And you're going to do -- we're going to
19 start with 534. That's what I have her -- we'll start with
20 534 -- okay? -- and then we'll go into 467.

21 And I'll -- we should -- I will tell you if I'm going
22 to -- how I'm going to arrange that. I don't -- if the parties
23 prefer we can stop and do it -- you know, we can do it -- what we'll

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1 do is 534 direct, cross, redirect; and then we'll do 467 direct,
2 cross, redirect, okay? Just to keep it a hundred percent -- it's
3 much easier for my note-taking, for my own notes, to have it that
4 way.

5 If that -- I encourage you in the -- in the few minutes
6 before you all head out for lunch to confer with the government
7 counsel to discuss if any portion of that needs to be closed or if
8 you believe any portion -- if you believe that it can be taken up
9 in -- in open.

10 So that -- I'd prefer it to be open, obviously, but I don't
11 want -- I don't want to cross the line. I want to protect the
12 classified information to the extent necessary. If we can't, then we
13 will have to do a closed session and, if I have to, we'll just
14 arrange that portion for tomorrow for the closed portion.

15 Government, can you give me an update, then, on the Sonnen
16 discovery? Has it been fully provided and does the defense have it
17 so that we can take up Agent Sonnen's testimony tomorrow?

18 MATC [MR. WELLS]: Your Honor, I believe we provided, in an
19 unclassified format, 94 pages of the documents. One of the pages has
20 a redaction that has not been -- the underlying information has not
21 been revealed to the defense. We're working with the OCAs to
22 determine exactly what the basis is for that withholding.

23 I'm not certain it needs 505 protection at this point. If

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1 we can obtain a release of that information to cleared counsel for
2 whatever reason, if it's sensitive, unclassified, or if it's
3 classified, that's our objective. But I believe that they have the
4 basic unclassified information they need.

5 LDC [MR. NATALE]: Your Honor, I just -- there was that one
6 document ----

7 MJ [COL ACOSTA]: That's the one he was just talking about?

8 LDC [MR. NATALE]: No. I think -- are you talking about the
9 one ----

10 MJ [COL ACOSTA]: Don't talk to counsel. Hold on, Counsel.
11 He's not -- he's confused as to what you're talking about. Here's
12 what I'm going to tell you. We don't talk across tables with me.

13 So what you'll do is you'll talk -- as you're talking about
14 whether we're open and closed, we'll talk about the government
15 expediting a one-redaction clearance for you to get that released to
16 you in some form as cleared counsel with need to know for the
17 purposes of the -- of the hearing perhaps. Then we will go forward
18 and have Agent Sonnen tomorrow as well.

19 You've got enough -- because now that you have what she's
20 going to be talking about, that will give you enough time before
21 tomorrow. If you got it last night, you've got all day today.
22 Obviously you're all free today to look at that. But you'll have a
23 chance to look at that before you conduct the cross-examination for

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1 tomorrow. Because we only have the one day. That's why we're
2 pushing forward with that.

3 And we'll push that to the second part of the day, okay, so
4 that you've got even more time to look at it tomorrow, okay?

5 I'm not saying it's going to be in the afternoon. The
6 second part of today could be in the morning -- tomorrow could be the
7 morning. I don't know how long it's going to go, so -- understood?

8 LDC [MR. NATALE]: Understood, Your Honor.

9 MJ [COL ACOSTA]: All right.

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

11 MJ [COL ACOSTA]: And when we come back for -- when we come
12 back, right, it -- I'm not sure -- the government has said they were
13 willing to produce certain members of those if ordered to do so or
14 their ability. We'll take up 534 on -- I wanted to know where they
15 were.

16 If I don't have the ability to produce them for this, it was
17 just slowing me down. The -- my confirmation of where individuals
18 were was just if I order them, am I going to have any impact now or
19 am I going to be delaying what I intended to get done in April.

20 So, Counsel, be prepared after the testimony of Dr. Crosby
21 to argue for the production of the witnesses that -- the four
22 that the defense has requested in its latter two motions to produce
23 witnesses for 534. Understood? Okay.

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1 ATC [Capt DANIELCZYK]: Yes, Your Honor.

2 MJ [COL ACOSTA]: All right. The commission is in recess
3 until 1245.

4 LDC [MR. NATALE]: Your Honor ----

5 MJ [COL ACOSTA]: Hold on. Have a seat. The commission is
6 called to order. All parties present as before.

7 Yes, Mr. Natale.

8 LDC [MR. NATALE]: Your Honor, I apologize. As an
9 administrative matter, I've been informed that Mr. Nashiri wishes to
10 not be in the courtroom but in the place ----

11 MJ [COL ACOSTA]: Remain locally?

12 LDC [MR. NATALE]: Remain locally with the ability to hear
13 what is going on.

14 MJ [COL ACOSTA]: Okay. I -- again, we're having a break.
15 We're having a recess right now. To the extent that it's
16 possible -- I understand that's his option to do that. To the extent
17 it's possible, it's always more helpful for, you know, him to be
18 present. Perhaps he'll reconsider after the -- after the recess. I
19 ask that you -- I always ask that you encourage your client to be
20 present here.

21 But you can inform me of his decision after we've had our
22 lunch recess.

23 LDC [MR. NATALE]: Okay. Your Honor, I know that the

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1 technical people have set it up.

2 MJ [COL ACOSTA]: I understand. They'll arrange that.

3 LDC [MR. NATALE]: Yeah.

4 MJ [COL ACOSTA]: To the extent that it's possible, they -- to
5 the extent that they're -- it's always been available, is my
6 understanding. That should be made available.

7 But again, we'll discuss it when we come back from recess,
8 okay?

9 All right. The commission is in recess until 1245.

10 **[The R.M.C. 803 session recessed at 1133, 23 February 2023.]**

11 **[The R.M.C. 803 session was called to order at 1247,**

12 **23 February 2023.]**

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

14 Government, all parties present as before?

15 TC [MR. O'SULLIVAN]: A few changes, Your Honor. Ms. Joleen
16 Sanders has joined us, but also a representative from the JTF SJA's
17 office is here. And up north, Ms. Eisenreich is no longer in the
18 RHR. Also, Mr. Pascual Tavaréz will be joining us shortly.

19 MJ [COL ACOSTA]: Thank you.

20 Defense?

21 LDC [MR. NATALE]: Yes, Your Honor. Same people.

22 MJ [COL ACOSTA]: Absent the accused, Mr. Nashiri?

23 LDC [MR. NATALE]: Absent Mr. Nashiri, yes, Your Honor.

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1 MJ [COL ACOSTA]: And he's chosen, as you said before, to
2 remain in the back where he can listen and see?

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

4 MJ [COL ACOSTA]: All right. The commission finds that he
5 voluntarily absented himself from these proceedings. All right.

6 Let's take up AE -- the testimony that we can get done for
7 AE 534 with Dr. Crosby. Defense?

8 DDC [LCDR PIETTE]: Your Honor, the defense calls Dr. Crosby.

9 TC [MR. O'SULLIVAN]: Your Honor, because the witness is down
10 here, I'll swear her in, but Captain Danielczyk will be doing the
11 cross.

12 MJ [COL ACOSTA]: All right.

13 TC [MR. O'SULLIVAN]: Ma'am, could you please raise your right
14 hand.

15 **DR. SONDRAS CROSBY, civilian, was called as a witness for the defense,**
16 **was sworn, and testified as follows:**

17 TC [MR. O'SULLIVAN]: Thank you.

18 DDC [LCDR PIETTE]: Your Honor, real briefly, Dr. Crosby has
19 previously been recognized by this court as an expert in diagnosis
20 and treatment of torture victims, as well as the appropriate standard
21 of medical care for torture survivors, and we assume that she is
22 still recognized as an expert in that field.

23 MJ [COL ACOSTA]: She is. She is.

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1 DDC [LCDR PIETTE]: Thank you.

2 **DIRECT EXAMINATION**

3 **Questions by the Detailed Defense Counsel [LCDR PIETTE]:**

4 Q. All right. Dr. Crosby, you've already stated your name.
5 Can you tell this court what your current job is.

6 A. Certainly. I am employed at Boston University where I'm a
7 full professor in medicine and public health. I have a clinical
8 practice, which is primarily torture survivors, refugees, asylum
9 seekers. I teach students and residents about medical care of
10 survivors, refugees, and asylum seekers. And I also teach in the
11 School of Public Health.

12 Q. And how long have you been working with torture survivors
13 and teaching people how to work with torture survivors?

14 A. Since the late '90s.

15 Q. So at least 20 years?

16 A. At least 20 years.

17 Q. Okay. All right. Skipping ahead to this case, how long
18 have you been meeting with Mr. Abdul Rahim al Nashiri?

19 A. I first met Mr. Nashiri in 2013.

20 Q. So that's ten years you've been meeting with him?

21 A. Approximately ten years, yes.

22 Q. How long have you been reviewing Mr. al Nashiri's
23 Guantanamo Bay medical records?

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1 A. Probably for one to two years prior to when I first met
2 him.

3 Q. To be clear, what is your role? Why are you meeting with
4 Mr. al Nashiri and reviewing his medical records?

5 A. I am working with the defense -- for the defense as a
6 medical consultant, an expert on torture.

7 Q. And to be clear, you're not treating Mr. al Nashiri,
8 correct?

9 A. I'm not treating Mr. al Nashiri.

10 Q. Okay. Who, in your understanding, has the job or the role
11 of treating Mr. al Nashiri?

12 A. Mr. al Nashiri is under the care of the senior
13 medical officer, the medical people here at GTMO.

14 Q. And in your ten years of reviewing Mr. al Nashiri's
15 medical records, have you ever seen a medical history in those
16 medical records documenting his treatment during his time in CIA
17 custody?

18 A. So I think you're referring to a trauma history, what
19 happened to him. I have not seen a trauma history documented in his
20 medical record. But to be clear, I have not seen all the medical
21 records; particularly, I've not seen many of the mental health
22 records.

23 Q. Let's take that -- let's break that down a little bit.

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1 When you say trauma history, can you explain to those of us
2 who aren't doctors, to this court, what is a trauma history?

3 A. So a trauma history is really the central tenet of what we
4 do in torture treatment or any traumatized patient, and that is
5 obtaining a narrative of the person's traumatic events and how those
6 events have impacted the individual in different domains: medically,
7 psychologically, socially, et cetera.

8 Q. And is that something -- how would that be documented?

9 A. In a narrative -- in a medical record, in a written form.

10 Q. And to be clear, you haven't seen that? You have not seen
11 a trauma history in Mr. al Nashiri's Guantanamo Bay medical records?

12 A. I have not. And as I said, I have not seen all of his
13 records.

14 Q. In the records -- well, and why is that important when
15 dealing with people who have suffered past trauma? Why is a trauma
16 history important in their medical care?

17 A. So trauma history is critical to treating the
18 complications and sequelae of trauma. And again, when we develop
19 treatment plans and -- we, as clinicians who treat survivors, the
20 trauma history is the central piece of information that we need to
21 develop a treatment plan.

22 For example, what medical complications are there, what
23 trauma occurred causing medical complications, what psychological

1 complications are there from the trauma, what social complications
2 could the trauma be causing, and then developing a treatment plan
3 from that. But that is widely accepted standard of care when
4 treating torture survivors.

5 Q. Okay. And just real quick, can you define the word
6 "sequelae"?

7 A. Something that happens after the fact, a complication of.

8 Q. In your ten years of meeting with Mr. al Nashiri as an
9 expert consultant, has he ever complained to you about any ailments
10 or injuries he's suffered over those ten years?

11 A. He has.

12 Q. Can you give some examples of the types of complaints he's
13 made?

14 A. Certainly. I will give some examples, and the court has
15 actually heard some of these examples in my prior testimony.

16 He suffers from dizziness, or vertigo, that at least has
17 some genesis in prior ear trauma, head trauma, and mistreatment in a
18 shaking room, shaking box. He has gastrointestinal and rectal
19 complaints that at least have partial genesis in trauma that he
20 suffered in the CIA black sites. He has a litany of musculoskeletal
21 complaints that are in part derived from what happened to him in the
22 CIA black sites, as some examples. I'm sure there are others.

23 Q. Perfect. Let's just take one of those as an example.

1 Let's take vertigo. How would a trauma history -- a properly
2 documented trauma history be useful in your -- in treatment or
3 diagnosis regarding vertigo, or specifically Mr. al Nashiri's vertigo
4 complaints?

5 A. Sure. Well, knowing -- there are several -- there are
6 several domains to my answer. First in the physical domain, knowing
7 that he had physical trauma to the ear, it would definitely be
8 important to do further audiological testing and probably imaging to
9 determine if there's a fracture of the inner ear bone or some other
10 issue that needs repair.

11 There would also be a very important component of
12 psychological care that if we determined, as in Mr. al Nashiri's
13 case, he's triggered by going into the small van or some other
14 trigger, that would include, like, cognitive processing or cognitive
15 behavioral therapy to try to relieve some of those symptoms.

16 Q. Okay. And now I have a question about -- going back to
17 the trauma history, like documentation of a trauma history. Is
18 that -- I'm thinking of, like, the word "living document." Is this
19 something that gets written up once and then sits there, or is it
20 something that gets reviewed, re-evaluated? When you learn new
21 things about the patient it gets updated?

22 A. Are you talking about in my civilian world how that works?

23 Q. Yes.

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1 A. Yeah, okay.

2 Q. Trauma histories that you've seen or worked up yourself.

3 A. Yeah. I mean, a trauma history, it certainly -- it is not
4 uncommon for people to add to the trauma history over time, and
5 especially it's very common not to initially disclose things that
6 might be very sensitive or stigmatizing, like sexual trauma, and that
7 might be added later.

8 So to answer your question, could things be added to it?

9 Yes. The other point I want to make, though, is you don't want to
10 have repeated providers, like, re-traumatizing somebody and re-asking
11 them their trauma story, like, every -- every time. So you want to
12 have an integrated approach to care, where people are communicating.
13 If there's a trade -- if, you know, there's a transition in care,
14 there's a very good handoff.

15 Q. Well, let's talk about that briefly.

16 Do you mean -- so in Guantanamo Bay, I'm sure you're aware
17 that the senior medical officer changes or rotates out roughly once
18 every nine months. So you wouldn't recommend the new SMO taking a
19 new trauma history every nine months; is that correct?

20 A. As an expert in this field, I would not recommend that,
21 correct.

22 Q. Would a competently and thorough trauma history be useful
23 in an environment where there's constant turnover between medical

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1 providers?

2 A. Well, I think that's -- that presents challenges for sure,
3 but there are adaptations that can be made. People can have handoffs
4 and -- yeah, it's not impossible, but certainly presents challenges.

5 Q. And in your ten years in your role meeting with
6 Mr. Abdul -- excuse me, Mr. al Nashiri, have you ever tried to meet
7 with the SMO?

8 A. I have tried and made requests multiple times, I believe,
9 since I started on this case in 2013.

10 Q. And why? Why have you tried to meet with the SMO?

11 A. I absolutely think that it would be beneficial if I were
12 able to offer my resources, my experience in caring for trauma
13 survivors, and to share medical concerns that they may not know about
14 that Mr. al Nashiri has shared with me and tried to integrate care
15 and improve care.

16 Q. Is that uncommon in the medical field for doctors to
17 consult with each other, especially with experts in a field that they
18 might not be an expert in?

19 A. It's fairly common.

20 Q. Okay. And have you ever been allowed to or been able to
21 meet with the SMO in the past ten years?

22 A. Not in Mr. al Nashiri's case, no.

23 Q. All right. Are you still at this time willing to meet

1 with the SMO to assist them in providing care for -- or advise them
2 on providing care for Mr. al Nashiri?

3 A. Yes, I am.

4 DDC [LCDR PIETTE]: Thank you, Your Honor. I have nothing
5 further at this -- well, just one moment.

6 MJ [COL ACOSTA]: All right.

7 **[Counsel conferred.]**

8 MJ [COL ACOSTA]: Defense?

9 DDC [LCDR PIETTE]: Yes. Sorry, Your Honor. I do have a
10 little bit more here.

11 Q. In addition to meeting with the SMO, have you ever tried
12 to meet with the psychologist, the Guantanamo Bay psychologist that
13 sees Mr. al Nashiri?

14 A. I have made requests, yes.

15 Q. And have you ever gotten to meet with the psychiatrist?

16 A. No, I have not.

17 Q. I think I just said "psychologist," and then I said
18 "psychiatrist." Just mental health professional, to make it easier.

19 Now, let's back up. Have you yourself in your role as
20 expert consultant for the defense taken a trauma history of
21 Mr. al Nashiri?

22 A. I have, yes.

23 Q. And did he open up to you right away about that or did it

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1 take time?

2 A. It was a difficult process and took time, yes. Which is
3 what I would expect and is similar to my experience with trauma
4 survivors.

5 Q. And when we say it took time, how much time are we
6 talking? Is it, like, a week or months or years?

7 A. Definitely months, and there are things that -- that come
8 out after years, details.

9 Q. And did you have to take time to build rapport and trust
10 with him in order to get him to open up to you?

11 A. Yes. And that's a critical component of working with
12 survivors of torture because one of the things that happens is trust
13 is broken, and it's very difficult to regain that back.

14 Q. And it's fair to say, then, that in the ten years'
15 worth -- the time that you've been here and all the medical records
16 that you've reviewed, you haven't seen any of the trauma history that
17 you've documented in his official Guantanamo Bay medical records,
18 correct?

19 A. I have not.

20 Q. And again, when we talk about working with the SMO or
21 consulting with the SMO, would you be willing to share with them the
22 trauma history that you've documented?

23 A. Yes, and I've had Mr. al Nashiri's permission to do that.

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1 Q. Okay.

2 DDC [LCDR PIETTE]: All right. Thank you, Dr. Crosby. Your
3 Honor, at this time, I actually don't have any more questions.

4 MJ [COL ACOSTA]: All right. Give me a moment. All right.
5 Government, cross?

6 I believe that you're going to be able to see that
7 individual on the screen in front of you.

8 WIT: Okay. Thank you.

9 ATC [Capt DANIELCZYK]: Yes, Your Honor. Thank you.

10 **CROSS-EXAMINATION**

11 **Questions by the Assistant Trial Counsel [Capt DANIELCZYK]:**

12 Q. Good afternoon, Dr. Crosby.

13 A. Good afternoon.

14 Q. I am on the screen in front of you. I realize it's a
15 little bit awkward. So I'll be looking at you as we go through this.

16 So first I want to talk about this idea of retraumatization,
17 and I think in your discussion with the defense counsel, you
18 mentioned that it's not ideal to have kind of a change-out in
19 providers, but there are ways around that; is that correct?

20 A. Yes. And I think my point was you don't want to be
21 repeatedly asking a survivor their trauma story because it's
22 retraumatizing. This is something where -- you don't do right away
23 when you meet somebody. You spend time building rapport and trust

1 until it's -- the survivor is willing to do that. So it's not ideal
2 to be constantly changing out providers in an ideal world.

3 Q. Sure. Sure. And I think -- in your discussion earlier, I
4 think you said that if you do have to switch providers, you know,
5 it's ideal to have a handoff. So is it fair to say that, you know,
6 kind of a one-on-one or really, I guess, old provider, new provider,
7 and the patient having a sit-down, that's what you're talking about
8 ideally is kind of a way around that; is that correct?

9 A. That's part of it. The new or incoming provider would
10 need to have reviewed the trauma story, you know, before taking care.
11 So, yeah, that would be part of it, yes, having a sit-down, a
12 handoff, but also being familiar with what the trauma story is.

13 Q. Now, just generally speaking, you were not the accused's
14 treating provider, correct?

15 A. That is correct.

16 Q. And -- excuse me -- you haven't seen all of his medical
17 records as you testified earlier?

18 A. I have not seen all of his medical records.

19 Q. And I believe you said that includes the -- the
20 psychological or the behavioral health records; is that right?

21 A. That is correct. I've seen fewer of the mental health
22 records than the physical health records but certainly not a complete
23 set of any records.

1 Q. So then I guess this may be obvious, but there are
2 documents then that you haven't seen, whether that's in the medical
3 records or outside?

4 A. That is correct.

5 Q. And is it fair, then, to say that there may be information
6 about that trauma outside of the records in those records that you
7 haven't seen?

8 A. It is possible, yes.

9 Q. Now, just generally speaking -- excuse me -- your
10 education is in internal medicine; is that correct?

11 A. That is correct.

12 Q. And when you described your clinical setting, I believe
13 what you said was you treat and you see refugees, asylum seekers.
14 Can you elaborate on that a little bit more?

15 A. Absolutely. So I -- as you said, I'm a general internist
16 and I have actually worked with the Boston Center for Refugee Health
17 and Human Rights and later cofounded an immigrant and refugee program
18 within primary care. So I provide primary care to trauma survivors,
19 mostly asylum seekers and refugees, in Boston within an integrated
20 setting that also has mental health, case management, vocational
21 rehabilitation, et cetera. I also have a clinic with traumatized
22 HIV-infected refugees.

23 Q. Are those refugees, those patients, are they from all

1 around the world?

2 A. They are from various different countries around the
3 world, yes.

4 Q. When you're seeing them and providing care, do you consult
5 outside resources to get a better understanding of what those
6 experiences were?

7 A. Can you clarify that? What do you mean by outside
8 resources?

9 Q. Sure, sure. I'm thinking, you know, for an example, if a
10 patient comes in and says they experienced, you know, this trauma,
11 whether that's cultural, political, are they -- if they're from a
12 country that you may be unfamiliar, do you consult news articles,
13 peer-review articles, anything like that to get a better
14 understanding?

15 A. Yeah. So, well I've been doing this for quite a while
16 now, but, for instance, when I first saw patients from Cameroon, I
17 would -- years ago I would consult, like, the State Department
18 information on what's happening in Cameroon, like, what -- you know,
19 what do I need to know? So, yes, I have consulted outside sources
20 about country conditions and political conditions in the country,
21 also, Amnesty International, Human Rights Watch, other sources.

22 Q. And do you feel that that gives you kind of a background
23 knowledge that helps you give better care, then? Is that right?

1 A. It helps give me an understanding of the environment where
2 the person is coming from. So potentially that would be better care,
3 because I would have a better understanding of their social
4 background.

5 Q. And would you agree that it's also important to not only
6 listen to your patients and what they're telling you, but to verify
7 those -- verify what they're telling you with your own observations?

8 A. What do you mean by verify?

9 Q. Conduct your own evaluation to either confirm or -- or
10 come up with your objective, independent evaluation of their
11 experience or what they're telling you.

12 A. So yes. And depending on the circumstances or the purpose
13 of my evaluation, I could be evaluating a survivor who is applying
14 for political asylum, for example, or somebody who is alleging
15 torture in a prison.

16 In those kind of cases, I would not be the treating
17 physician. I would be conducting an evaluation based on the Istanbul
18 Protocol, which is a medical-legal standard for the investigation of
19 torture, cruel, inhuman, and degrading treatment. And I would use
20 guidance from that document in performing a physical or psychological
21 evaluation to either confirm or not confirm what the individual told
22 me happened.

23 So is there consistency between the allegations of what

1 someone said and what I'm seeing, or is there not consistency? So
2 I -- does that answer your question?

3 Q. It does, yes. Thank you.

4 A. Yeah. And that's different from seeing patients in my
5 clinic whom I'm solely providing clinical care to, perhaps treating
6 PTSD or musculoskeletal injuries or traumatic brain injuries or
7 others. That would be very different than actually providing
8 documentation and providing expert opinion on the allegations.

9 Q. Now in that clinic when you're seeing patients, typically
10 how long do you see them for? What duration is that? And what I'm
11 thinking is, kind of the timeline of care. Are they in for one time?
12 Are they seeing you for months or years?

13 A. For clinical care or for forensic documentation of torture
14 and ill treatment? Which?

15 Q. The latter. The forensic documentation.

16 A. Oh, you know, that depends on how complex the case is.
17 Typically, I would see them for a couple of hours and then maybe one
18 or two follow-up visits after that. But again, it varies depending
19 on the complexity of the case, if there are language barriers or
20 other issues.

21 Q. Approximately how many of those patients are involved in
22 legal proceedings?

23 A. Of the patients I see for forensic documentation?

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1 Q. Yes, ma'am.

2 A. Most of them are involved in some kind of legal
3 proceeding.

4 Q. And how many of those would you say, an approximation, are
5 involved in criminal legal proceedings?

6 A. That's -- that's hard to say. Probably a smaller
7 proportion, but certainly -- certainly a proportion.

8 Q. Do you know if any of those are subjects or suspects in
9 those criminal legal proceedings?

10 A. I have seen some people who were suspects in legal
11 proceedings, others who are alleging war crimes against
12 governments ----

13 Q. So ----

14 A. ---- or other torture against governments.

15 Q. Fair to say you've seen both sides, then?

16 A. Yes.

17 Q. Now, just generally speaking, you would agree that
18 somebody who's been accused of a crime, is facing conviction, you
19 know, possible jail time, loss of liberty, yes?

20 A. Yes.

21 Q. And, of course, people who aren't accused of crimes don't
22 face that, at least at that time, correct?

23 A. That's fair, yes.

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1 Q. Have you ever experienced patients that may be less than
2 transparent or aren't quite forthcoming when you meet them and when
3 you conduct your evaluation?

4 A. Are you asking about people that might be malingering or
5 making things up, or are you talking about people that are just so
6 traumatized that they can't -- they can't talk about their trauma at
7 that point in time? Those are two different things.

8 Q. Right. So I think you've talked about the latter in other
9 commissions hearings. But you mentioned folks that may be
10 malingering. Can you explain that a little bit?

11 A. Sure. Malingering is certainly a part of my medical
12 practice over the last, you know, 20-some years. And there are
13 patients who, in my experience, you know, have alleged or complained
14 of injuries that I can't confirm on my exam or outside of the trauma
15 realm.

16 You know, I'm a doctor. People malingering for narcotics, they
17 malingering for disability. So, yes, I'm very, very familiar with that.

18 Q. Understood.

19 Now, I want to get into a little bit more specific -- and
20 this is regarding the real substance of this motion, of AE 534, and
21 this conversation between the accused and the senior medical officer
22 on 17 August 2022.

23 Are you at least generally familiar with that?

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1 A. I'd have to ask you to refresh my memory. I -- yeah,
2 I ----

3 Q. So are you aware of a shoulder injury that the accused
4 had ----

5 A. Yes.

6 Q. ---- approached the senior medical officer regarding?

7 A. I am aware of a shoulder injury and treatment received for
8 that, yes.

9 Q. Now, just to be clear, were you there, were you present
10 for any conversation between the senior medical officer and the
11 accused on 17 August?

12 A. No, I was not.

13 Q. So you obviously don't know what was said during those
14 interactions?

15 A. I do not.

16 Q. Are you aware of the accused's workout routine at the
17 detention facility, exercise?

18 A. I am, yes. Probably not in detail, but yes.

19 Q. So are you aware that frequently it includes heavy bicep
20 curls using sandbags?

21 A. I am.

22 Q. Front shoulder raises?

23 A. I am, yes.

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1 Q. And what I -- can be described as other exercises that may
2 cause an impingement?

3 A. Yes. Yes, I am.

4 Q. Are you aware of the frequency with which he performs
5 those exercises?

6 A. I couldn't say with certainty for now. I mean, my
7 impression is fairly frequently, except for during hearings.

8 Q. Now, certainly if a patient of yours is conducting or
9 performing exercises that may exacerbate an injury, you would
10 recommend that either the weight be reduced or that be changed in
11 some way, correct?

12 A. I think that's fair, yes.

13 Q. Now, you weren't present for the actual injury to the
14 accused's shoulder, right? In other words, when that shoulder injury
15 occurred, you weren't there?

16 A. This is -- I just want to make sure I'm clear in what I
17 say. I know Mr. al Nashiri has had shoulder issues for a long time.
18 I know he did have an acute exacerbation I believe at the time you're
19 talking about, but, no, I wasn't -- I wasn't there, for sure.

20 Q. And my apologies. I'll be clear.

21 Whether it's the acute exacerbation or kind of the genesis
22 issue, you weren't present, correct?

23 A. I was not present.

1 Q. So there's no way of actually, at least medically, telling
2 when that injury occurred; is that right?

3 A. Can we talk about -- which injury are we talking about?

4 Q. The shoulder injury, the start of whatever injury path
5 that that has.

6 A. Okay. Again, I know Mr. al Nashiri has had longstanding
7 shoulder and arm issues from when I first met him. Again, I know
8 there was an acute exacerbation that I believe was correctly
9 diagnosed as biceps tendonitis. But I wasn't -- I did see him around
10 the time he was receiving treatment for that, but I wasn't there at
11 the time of the injury.

12 Usually, those kind of injuries happen over time, so if
13 someone had been, you know, doing lifting, I would categorize as a
14 kind of overuse injury. So it may not be just one specific time; it
15 might have occurred over time.

16 Q. Okay. Thank you for clarifying that.

17 Now, are you aware that the accused suffered physical
18 injuries prior to his detention and custody in the CIA?

19 A. Yes, I believe he had suffered some injuries.

20 Q. And I think you testified in December of 2021, and you
21 told the commission at the time that Mr. al Nashiri experienced a
22 number of incidents of trauma. Do you remember that?

23 A. I don't recollect my exact wording on my testimony at that

1 time, but we're talking events prior to his CIA time. Yes, yes, I do
2 know that he had suffered some injuries.

3 Q. And those injuries or those kind of incidents that you
4 described, did that include, to your recollection, bicycle accidents
5 and other things that may cause injury?

6 A. I do recall, yes, a bicycle accident, falling in a
7 hospital room.

8 Q. And so is it fair to say, then, that bicycle accidents and
9 other things, other incidents, can cause serious injuries to the
10 body?

11 A. It is possible.

12 Q. Things like concussions, broken bones, muscle tears, and
13 that -- those sorts of things?

14 A. It is possible.

15 ATC [Capt DANIELCZYK]: Your Honor, may I have a moment?

16 MJ [COL ACOSTA]: Yes.

17 **[Counsel conferred.]**

18 ATC [Capt DANIELCZYK]: Thank you, Your Honor.

19 Q. Dr. Crosby, just a quick follow-up here. Regarding those
20 records, I believe you said you haven't seen all of them.

21 You review the records that defense provides to you; is that
22 correct?

23 A. Yes, I do.

1 Q. And so presumably, those records are not -- let me start
2 over.

3 In other words, you don't get the entire tranche of medical
4 records. You receive what defense counsel provides?

5 A. That is correct.

6 Q. Now, are you aware that -- scratch that. Sorry. Let me
7 go a different way.

8 You said you provided a trauma history -- or you took a
9 trauma history of the accused; is that correct?

10 A. Yes, I have.

11 Q. Did you provide that to him to provide to his healthcare
12 providers?

13 A. I did not provide a copy in writing to him ever.

14 Q. And why did you not?

15 A. There would be -- I was never asked to, and I have not
16 provided it to him.

17 Q. If the ultimate ----

18 A. I ----

19 Q. ---- goal was to get it to his healthcare providers,
20 couldn't you just give it to him to provide to his senior
21 medical officer?

22 A. I don't think that would be the way I would prefer to do
23 things. I would prefer to meet with the senior medical officer and

1 discuss it and go over it. I just would not feel that it would be
2 professionally appropriate to have such a sensitive and confidential
3 document handed over and, you know, out of my control or out of
4 anybody's control. But I would certainly be willing to sit with the
5 senior medical officer and go over the trauma history.

6 Q. Now, certainly in your clinical practice, if patients come
7 and go, you don't sit down with every follow-on provider, right?

8 A. Can you explain what you mean?

9 Q. Sure. If you've seen, say, hundreds of torture victims in
10 your practice, they're not all staying local. They're not all under
11 your care for the duration of, you know, the rest of their lives
12 essentially. You don't sit down and meet with all of their follow-on
13 providers, whoever they go to.

14 A. No, I don't. And, you know, it's a very individual type
15 of situation. If I had a particular -- particularly vulnerable
16 patient, I would do a -- maybe not face-to-face, but a telephone
17 handoff. Other times it's not necessary. People are stabilized,
18 they're under treatment, and there would be less need for that. So,
19 no, I don't commonly do that.

20 ATC [Capt DANIELCZYK]: Your Honor, my apologies. May I have
21 a moment?

22 MJ [COL ACOSTA]: Briefly.

23 **[Counsel conferred.]**

1 ATC [Capt DANIELCZYK]: That's all I have, Your Honor, but I
2 will note I do have a very brief cross that will need to be conducted
3 in a closed hearing.

4 MJ [COL ACOSTA]: On this motion?

5 ATC [Capt DANIELCZYK]: Yes, sir.

6 MJ [COL ACOSTA]: Okay. We'll keep that in mind for tomorrow.
7 We'll have redirect on the open portion now, and then we'll address
8 the closed portion tomorrow, which if I wasn't clear previously, my
9 intent is not to do the closed portion today. It's tomorrow, not
10 today.

11 DDC [LCDR PIETTE]: Thank you, Your Honor. Is this thing on?

12 MJ [COL ACOSTA]: I don't know.

13 DDC [LCDR PIETTE]: There we go. All right.

14 **REDIRECT EXAMINATION**

15 **Questions by the Detailed Defense Counsel [LCDR PIETTE]:**

16 Q. Dr. Crosby, the prosecutor just stood up and brought up
17 some very good points that I think are going to help us illustrate
18 why taking a trauma history is so necessary.

19 As the prosecutor said, you were not there and you didn't
20 see when the agents of the United States Government shackled
21 Mr. al Nashiri, pulled his arms above his head and hung him from the
22 ceiling so that ----

23 MJ [COL ACOSTA]: Counsel, when you do that, you know what I

1 have to do. Okay.

2 Counsel took his hands, placed them above his head, and
3 raised them with his -- crossed at the -- at the wrist above his head
4 with his arms extended, not quite as high as he could reach, but
5 almost to his maximum length. Go ahead.

6 Q. And you weren't there to see Mr. al Nashiri's arms get
7 yanked up as high and higher than he could reach so that he was
8 dangling so just his toes touched the ground. You didn't see that
9 happen to him in CIA custody?

10 A. I did not see that happen to him.

11 Q. And you didn't stand there the multiple hours and days
12 that that happened to him while he was in United States custody?

13 A. That is correct.

14 Q. Okay. So in other words, you were not there when his
15 shoulder injury could have started, as the prosecutor said?

16 A. I was not there.

17 Q. Would taking a trauma history help to determine when that
18 shoulder injury started?

19 A. It would, and I did take a history when I met
20 Mr. al Nashiri and did a trauma history.

21 Q. And were you able to determine that his -- his injuries
22 and development of those injuries over time is related to him being
23 hung over, you know -- from the ceiling by his wrists so that just

1 his toes touched the ground for hours and days on end? Did you
2 determine that that has led to shoulder injuries and his shoulder
3 injuries getting worse over time?

4 A. He -- I do believe he did suffer shoulder injuries,
5 including nerve injuries, at the time, and that has -- that has
6 persisted. I guess I'll end that.

7 I think that's separate, though, than the biceps tendonitis
8 injury. I just want to be clear that I think there's more than one
9 type of upper-extremity injury that Mr. al Nashiri has.

10 Q. And would having a trauma history to refer back to, if you
11 were in a clinical setting, help when you were diagnosing biceps
12 tendonitis to know his prior history?

13 A. Yeah, I would say yes, it would be nice, but I don't think
14 that would change the nature of that -- that particular injury or the
15 treatment of it.

16 Q. Another thing the prosecutor asked you about was
17 malingering versus -- you know, some patients who are malingering
18 versus some who you said are so traumatized that they're unable to
19 discuss their trauma and it may take time to get that out of them.

20 Based on the ten years of experience that you've had with
21 Mr. al Nashiri, have you been able to determine whether he's
22 malingering or whether he was one of those who was so traumatized by
23 what happened to him in United States custody that he has trouble

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1 talking about it?

2 A. My opinion and conclusion is that Mr. al Nashiri is a very
3 traumatized individual, and I've found his allegations credible and
4 they were not only consistent with my evaluation but also with
5 collateral information that I was later able to see.

6 Q. Let's talk about that, because the prosecutor also brought
7 that up by talking about it's important to listen but also to verify.

8 Were you able to read the SSCI Report, otherwise known as
9 the Torture Report, that which is public?

10 A. I have read the executive summary of the SSCI Report, yes.

11 Q. And did that help you corroborate what Mr. al Nashiri told
12 you about his -- what he suffered in United States custody?

13 A. Yes, it did.

14 Q. As far as medical records go, do you agree that you have
15 access to everything that the defense has been given by the
16 government and can review it as much as possible?

17 A. As much as possible.

18 Q. Is there any limits on your ability to review it?

19 A. Just the fact that I'm not down here very often.

20 Q. So maybe, like, time?

21 A. Yeah.

22 Q. Another thing that the government brought up was, he
23 mentioned kind of an ideal scenario where you could -- the old

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1 provider -- so the outgoing provider could sit down with the incoming
2 provider and the patient and discuss the trauma history. Maybe if
3 the old provider had a rapport with the patient, was able to hand the
4 patient off to the new provider, that would be an ideal scenario.

5 Would keep -- would a trauma history also be useful in
6 having a successful and effective turnover to the new provider?

7 A. So I'm not sure if I'm answering your question, but let me
8 make sure I understand it. I don't think it would be appropriate for
9 every new provider coming in to take a trauma history.

10 Q. Right.

11 A. I think -- and this is a unique environment. Like, I
12 don't have all the answers to how it should work here, given
13 the -- the restraints. But there should be knowledge of the trauma
14 history to incoming providers as well as a handoff.

15 Q. And so in other words, should a -- or a trauma history is
16 kind of a vital tool for ensuring that the new provider understands
17 the patient's trauma history without having to retraumatize the
18 patient by getting a new trauma history; is that right?

19 A. Yes.

20 Q. And your role here on the defense is more along the lines
21 of forensic documentation -- your forensic documentation role rather
22 than the clinical role; is that right?

23 A. That's right, although I have been asked to comment and

1 give advice on medical records that I have reviewed in my capacity as
2 a board-certified internist. So that part of it is not -- not
3 forensic.

4 Q. Okay.

5 A. So I have been doing some clinical consultant work for the
6 defense as well.

7 Q. And finally, as a medical care provider, do you provide
8 the same treatment for people whether they are innocent of a crime,
9 being investigated for a crime, accused of a crime, or even guilty of
10 a crime? Does everybody get the same standard of care or
11 should -- or do guilty people or people who have been accused of
12 crimes get a lesser standard of care?

13 A. I believe all people are entitled to the right to health,
14 appropriate standard of care, you know, regardless of who they are.

15 DDC [LCDR PIETTE]: One moment, Your Honor.

16 **[Counsel conferred.]**

17 Q. One more thing. On that note, you had mentioned -- so you
18 were talking about the standard of care for all people, innocent,
19 guilty.

20 And when it relates to torture survivors, earlier you
21 mentioned the Istanbul Protocol. Can you briefly tell this court
22 what that is.

23 A. Yes. The Istanbul Protocol, initially published in 1999

1 by the United Nations High Commissioner for Human Rights, is a
2 medical-legal standard for the investigation of torture, cruel,
3 inhuman, and degrading treatment.

4 And it literally provides a guide for how to investigate
5 when somebody alleges trauma or abuse for -- from both the legal side
6 and from the medical side, it provides ethics guidance, how to
7 interview survivors. It really is the international standard.

8 This document was updated and republished in June of 2022,
9 just recently, and I was one of the authors on the chapter on
10 physical torture. So that is really the standard
11 for -- internationally for investigation.

12 Q. Okay.

13 DDC [LCDR PIETTE]: Thank you, Your Honor. I have no further
14 questions at this time.

15 MJ [COL ACOSTA]: All right.

16 ATC [Capt DANIELCZYK]: Your Honor, this is Captain Danielczyk
17 from the RHR. Defense brought up something. I'd like to be heard on
18 it but outside the presence of the witness, if possible.

19 MJ [COL ACOSTA]: Okay.

20 **EXAMINATION BY THE MILITARY COMMISSION**

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

22 Q. Dr. Crosby, you said two different things. I picked it up
23 as a slight contradiction. I don't know if I just missed it or not.

1 You said that you haven't reviewed all of his medical
2 records, including some of his psychological records. Have you
3 reviewed any of his psychological records?

4 A. I have reviewed a few psychological records. None
5 recently.

6 Q. None recently. Okay.

7 And then defense counsel asked you, though, have you
8 reviewed everything that's been provided to the defense. They
9 have -- so you haven't reviewed everything that's been provided to
10 them. You've reviewed everything they've provided to you?

11 A. I hope I've reviewed everything that's provided to them,
12 but I can't tell you a hundred percent because I don't know
13 everything that been provided to them.

14 Q. Okay.

15 A. I -- to the best of my knowledge, I've reviewed everything
16 that's been given to me.

17 Q. Okay.

18 A. Sorry for the misunderstanding.

19 Q. Okay. It sounds like they've given you -- based upon
20 defense counsel's question, I'll take it that they've provided
21 everything that they have been provided -- provided you with
22 everything they've been provided.

23 Again, you say you're not his treating physician, but you

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1 have provided some type of clinical consultation to the accused in
2 this case for his symptoms, et cetera?

3 A. That is correct.

4 Q. Okay.

5 MJ [COL ACOSTA]: All right. Any questions based upon mine,
6 Defense?

7 ATC [Capt DANIELCZYK]: No, Your Honor.

8 MJ [COL ACOSTA]: I'm not talking to you, Government.
9 Defense?

10 DDC [LCDR PIETTE]: No, Your Honor.

11 MJ [COL ACOSTA]: All right.

12 Government, you have nothing?

13 ATC [Capt DANIELCZYK]: Yes, sir.

14 MJ [COL ACOSTA]: Okay. Okay. For the purpose of this
15 motion, before I have her step down, for the purpose of this AE --

16 I'm just going to have you step down and step outside. I'm
17 going to have to have you step outside because I need to talk to them
18 about something else as well.

19 I advise you that you remain under oath. Don't discuss your
20 testimony or knowledge in this case with anyone other than counsel
21 for either side. Please go step outside the door. Thank you very
22 much.

23 WIT: Yes, Your Honor.

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1 **[The witness was warned and withdrew from the courtroom.]**

2 MJ [COL ACOSTA]: All right. Before the government tells me
3 whatever they want to tell me, we were going to get into 467. Did
4 the parties consult about what can be discussed in the open session
5 and what can be discussed in closed?

6 Defense, did you have a consultation with the government?
7 Did you -- the parties talk about the motion that you're going to be
8 directing on, Mr. Natale, about what can be heard in open versus
9 closed?

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

11 MJ [COL ACOSTA]: Okay. Is there any portion that can be done
12 in open?

13 LDC [MR. NATALE]: I think -- I think all of it. After
14 talking to the government I think all of it can be done in open
15 session.

16 MJ [COL ACOSTA]: Government, do you concur?

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

18 MJ [COL ACOSTA]: Okay. All right. That is good.

19 Now, Government, what is it that you needed to be heard on
20 this issue outside the presence of the witness?

21 ATC [Capt DANIELCZYK]: Yes, Your Honor. Defense talked to
22 Dr. Crosby and elicited testimony regarding corroboration of her
23 trauma history. The government's not in possession of that trauma

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1 history, and Dr. Crosby relied on that during her testimony, so the
2 government feels like we should have -- or we should be entitled to
3 that.

4 MJ [COL ACOSTA]: To his trauma history?

5 ATC [Capt DANIELCZYK]: Yes, sir. It's not privileged. She's
6 not a treating physician.

7 MJ [COL ACOSTA]: Defense, do you have a position that you
8 care to take now on that issue?

9 DDC [LCDR PIETTE]: Your Honor, we don't disagree. The
10 government should have access to that, so we'll turn it over. We ask
11 too that since we know that what they want to do is they want to try
12 to use and maybe spin it as a way to justify ----

13 MJ [COL ACOSTA]: Regardless of how they plan on using it ----

14 DDC [LCDR PIETTE]: Right.

15 MJ [COL ACOSTA]: ---- what do you want? Do you want a
16 protective order? What do you want?

17 DDC [LCDR PIETTE]: If there was some way for the court to
18 also order that perhaps we could turn it over from -- as well as to
19 the government from Dr. Crosby to the SMO, if there's a way to
20 facilitate that meeting so that not only could the government get it
21 in their attempts to execute Mr. al Nashiri but that it could
22 actually be used to -- as a treating tool for Mr. al Nashiri as well.

23 MJ [COL ACOSTA]: Again, what people do with his medical

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1 records in order to treat him, I'm not -- there's certain -- the
2 authority -- you're going to turn it over to the government is what
3 you just said? Good. That's all -- that is the extent -- then I
4 don't need to rule on anything, and I'm not ordering anybody to turn
5 anything over to anybody else. I am not in the treating or
6 incarcerating business of running those things.

7 If you can negotiate that out with the government to
8 say -- to do something, that's fine. But I'm not -- I'm -- I have
9 limits to what I am -- to what I have the authority to do, and if you
10 can cite something to me about where I have the authority to order
11 that, that would be great. But I'm not -- if you give me some
12 authority for that, I would, so ----

13 DDC [LCDR PIETTE]: Okay. Your Honor, then what we're going
14 to do is you can expect a filing for protective order, and until then
15 we are going to object to turning it over until we litigate the
16 protective order on the ----

17 MJ [COL ACOSTA]: Oh, I mean, you used it, right? You just
18 referenced it like -- she was referencing it and referring to it in
19 the middle of her testimony, that your expert consultant, who is your
20 expert witness for this matter, was using. Typically you turn over
21 the reports and documents upon which an expert relies upon their
22 testimony to the opposing side.

23 If you -- if you want a protective order saying it's only to

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1 the government, to the government's team, because it contains medical
2 record or some type of records that are protected, you can ask for
3 that. However, that seems to also then go against your asking them
4 to share it further with other medical providers.

5 So why don't you draft whatever you want for a protective
6 order for that record, but have it ready to be turned over -- I don't
7 normally have to do a protective order for that. That's something
8 that you just have to turn over. You've used it in court.

9 DDC [LCDR PIETTE]: Understood.

10 MJ [COL ACOSTA]: I'm not asking you to -- I don't even care
11 that you -- if you ask for the protective order. Turn it over to the
12 government.

13 Government, you know that there are certain things that
14 you -- that you can't do with a -- with a -- with medical records.

15 ATC [Capt DANIELCZYK]: Yes, Your Honor.

16 MJ [COL ACOSTA]: It will fall under the -- I believe there's
17 a protective order in place for certain things. I don't know if I
18 need an individual one on this one.

19 But you've got to turn this over, Defense, if you just used
20 it. She just relied upon it.

21 DDC [LCDR PIETTE]: Understood, Your Honor.

22 MJ [COL ACOSTA]: Turn it over. Thank you.

23 ATC [Capt DANIELCZYK]: Your Honor, in that vein, the

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1 government sees the psychological records grouped in with that as
2 well. She relied on those.

3 **[Counsel conferred.]**

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

5 MJ [COL ACOSTA]: Defense?

6 DDC [LCDR PIETTE]: I'm not clear on how she relied. She did
7 say she reviewed psychological and medical records, but in her
8 testimony up here she did not say that she relied on the medical
9 records -- or the psych records, excuse me, for her testimony.

10 And, in fact, as I'm thinking about it, I mean, this is a
11 fairly narrow motion that is just about the -- the underlying motion
12 is not about adequacy of medical care. We're not relitigating or
13 even litigating that issue. It's about ----

14 MJ [COL ACOSTA]: No, I understand.

15 DDC [LCDR PIETTE]: ---- the failure to properly document or
16 even take a trauma history.

17 So trauma history does seem relevant, since we have one.
18 Makes sense to turn that over. But the fact that throughout her ten
19 years she has seen some psych records in the past, she wasn't relying
20 on that today, it wasn't relevant to what she talked about today, so
21 at this point, no, we object to turning over any psych records.

22 MJ [COL ACOSTA]: Government, if you wish to make a motion,
23 you may.

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1 The trauma history, turn it over. Turn over the trauma
2 history.

3 DDC [LCDR PIETTE]: Yes, Your Honor.

4 MJ [COL ACOSTA]: Okay. And the others -- again, I understand
5 what the motion is about. I mean, the motion is about you're saying
6 that those certain things haven't been documented, that the
7 government -- that you say that you will -- that will essentially
8 prevent you from presenting it in an effective manner should
9 sentencing come to be, right?

10 DDC [LCDR PIETTE]: Yes, Your Honor.

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

12 DDC [LCDR PIETTE]: Thank you.

13 MJ [COL ACOSTA]: All right. Do the parties want a recess
14 before we take up 467?

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

16 TC [MR. O'SULLIVAN]: That's fine, Your Honor.

17 MJ [COL ACOSTA]: All right. We'll take a -- how long do you
18 think you've got, Mr. Natale? And I ask you to be ----

19 LDC [MR. NATALE]: Generous? Generous or conservative?

20 MJ [COL ACOSTA]: To be ----

21 LDC [MR. NATALE]: As accurate as ----

22 MJ [COL ACOSTA]: ---- realistic.

23 LDC [MR. NATALE]: I would say an hour at most.

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1 MJ [COL ACOSTA]: You think about an hour?

2 LDC [MR. NATALE]: I think it's going to be an hour at most.

3 MJ [COL ACOSTA]: Okay. And, Government, I -- I'll -- who is
4 taking the government for the cross?

5 ATC [LT SCHWARTZ]: Lieutenant Schwartz here at the RHR, sir,
6 and I will not take an hour. I would say 30 minutes.

7 MJ [COL ACOSTA]: Okay. I'm just trying to make sure that if
8 I start it, I want to finish it today, so everybody knows we're
9 either going long or we're not going long for today.

10 For -- if we're not doing closed session with Dr. Crosby,
11 then the only way that we would have to close tomorrow is if
12 Agent Sonnen's testimony is going to be closed. Is that going to be
13 closed or open?

14 ATC [LCDR SCHREIBER]: Your Honor, as I understand it, the
15 defense has an interest in having a closed session on that.

16 MJ [COL ACOSTA]: Is that correct, Defense, on Agent Sonnen?

17 LDC [MR. NATALE]: No, Your Honor. What we -- what I've been
18 discussing with the prosecution is that if there are certain areas
19 that I ask -- that I'm going to ask about, if that requires a closed
20 session, to let me know. What ----

21 MJ [COL ACOSTA]: Here's what -- right. Okay. If you can
22 give the general topics so that we can talk -- so we can talk about
23 it, I need to be able to provide the public notice of we're going to

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1 be closed tomorrow at X hour if we're going to do it. And you know
2 it takes a bit of logistics with our court reporters and stuff.

3 Talk about that tonight -- today in this -- in the -- in the
4 next 20-minute recess that we're going to take right here, so we're
5 going to come back at a quarter after the hour. And what
6 we'll -- that way, I can put out today that we're going to have a
7 closed session or not a closed session tomorrow because I think ----

8 LDC [MR. NATALE]: All right.

9 MJ [COL ACOSTA]: ---- that might be all we have tomorrow is
10 Agent Sonnen -- is left to do, okay? And if it's closed, we've got
11 all day. We can -- that gives us time to do the physical changes to
12 the courtroom setup necessary. Just work it out, let me know.

13 LDC [MR. NATALE]: I -- Your Honor, I understand. It's just
14 that sometimes I don't know what the answer to the question will be.

15 MJ [COL ACOSTA]: Understood. If you -- to the best that you
16 can, right? I understand that if something comes up tomorrow, we'll
17 adjust fire. But to the extent that I can give prior notice to
18 the -- to the court reporters and to the public, I need to be able to
19 do that.

20 LDC [MR. NATALE]: Very well.

21 MJ [COL ACOSTA]: All right. So ----

22 ATC [Capt DANIELCZYK]: Your Honor, this is Captain
23 Danielczyk. Apologies. Just a reminder, I do have a brief cross for

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1 Dr. Crosby in a closed session.

2 MJ [COL ACOSTA]: You do have that in closed. I apologize.

3 I -- I -- that slipped my mind.

4 We're going to have to be -- we will be in a closed
5 session -- then I'm able to say now we will be in a closed session
6 tomorrow. It will be the last portion of our day. So for the public
7 and for our court reporters, after we finish our open session
8 tomorrow, we will take whatever time is necessary, which is normally
9 about a 30-minute break to allow them to make their changes, to get
10 down here to physically take the -- with the stenographer in the
11 courtroom.

12 So whenever I close the open session tomorrow, you'll
13 have 30 -- it will be 30 minutes after that. But it will be at the
14 end of the day tomorrow. We will have at least one -- one
15 cross-examination -- some brief examination of Dr. Crosby in a closed
16 session and potentially to accommodate Agent Sonnen as well. Okay.

17 The commission is in recess.

18 **[The R.M.C. 803 session recessed at 1356, 23 February 2023.]**

19 **[The R.M.C. 803 session was called to order at 1417,**

20 **23 February 2023.]**

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

22 Government, all parties again present?

23 TC [MR. O'SULLIVAN]: Yes, Your Honor, except Mr. Tavarez who

1 will be along shortly.

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

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

4 MJ [COL ACOSTA]: All right.

5 TC [MR. O'SULLIVAN]: And our linguist is here also, sir.

6 MJ [COL ACOSTA]: All right. Defense, call your witness.

7 LDC [MR. NATALE]: Your Honor, the defense calls Dr. Sondra
8 Crosby.

9 MJ [COL ACOSTA]: She's already sworn but -- she remains sworn
10 for this. I did not excuse her.

11 LDC [MR. NATALE]: Okay.

12 **[The witness, Dr. Sondra Crosby, resumed the witness stand.]**

13 **DIRECT EXAMINATION CONTINUED**

14 **Questions by the Learned Defense Counsel [MR. NATALE]:**

15 Q. Dr. Crosby, I know this is going to seem a little sort of
16 artificial because we're breaking it up, but you are the same
17 Dr. Crosby who just testified before, correct?

18 A. Yes.

19 Q. I am not going to go through any -- over anything about
20 your background and your knowledge. I'd ask the court that what she
21 said before be incorporated here.

22 MJ [COL ACOSTA]: Her qualifications -- her qualifications as
23 an expert are incorporated.

1 LDC [MR. NATALE]: Okay.

2 MJ [COL ACOSTA]: As well as her experience.

3 LDC [MR. NATALE]: Exactly.

4 Q. Is there anything new that would be in your curriculum
5 vitae and in your publications, any new things in which you engaged,
6 which relate to your knowledge and expertise in the area of the
7 treatment -- the identification, diagnosis, and treatment of people
8 who have trauma?

9 A. Anything to recently update my CV? As I have already
10 mentioned, the updated new Istanbul Protocol was published in June of
11 2022; I was one of the authors on that. I have recently published a
12 paper on deprivation of light as a method of torture in the *Torture*
13 *Journal*. And I have been teaching U.S. asylum officers how to
14 interview asylum seekers that are traumatized coming across the
15 border.

16 Q. Thank you.

17 A. Probably the main things. Otherwise, my activities are
18 the same thing, my clinical practice, my teaching, et cetera.

19 Q. I don't recall you saying what courses you do teach and
20 who do you teach them to?

21 A. Well, I teach medical students and residents in internal
22 medicine, in care of refugees and immigrants. I teach two formal
23 courses in the School of Public Health, and one is Immigrant and

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1 Refugee Health; the other one is Health and Human Rights.

2 Q. Thank you.

3 Now, during the course of your interviews with Mr. Nashiri,
4 did he ever describe to you anal assault which occurred while he was
5 in CIA custody?

6 A. Yes, he did.

7 Q. Okay. What did he tell you?

8 A. There were several instances. I will start with what has
9 been reported as the rectal feeding or hydration incident.

10 Mr. al Nashiri described an incident to me where he was in
11 his cell and some men came in, roughed him up, took his clothes off,
12 took him somewhere else, bent him over a chair, shackled him,
13 inserted a tube into his anus, and administered liquid -- liquid
14 food.

15 Q. Did he describe or mention any other incident that you can
16 recall now specifically?

17 A. There was another incident where he was shackled naked,
18 arms extended above his head, feet shackled, where he was sodomized
19 with a broomstick.

20 Q. How long, approximately, was it that you had been meeting
21 Mr. Nashiri that he was able to share those things with you?

22 A. It was a process. I don't recall. These incidents were
23 clearly very, very distressing to him; shame, stigma, very, very

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1 painful. He experienced them as painful sexual assaults or rape, in
2 his words.

3 And in my experience of caring for male survivors of sexual
4 trauma, it's very difficult to talk about this. And, in fact, we
5 know from the literature that it often takes men 10, 15, even longer,
6 years if they ever report it at all. So we know this is a very
7 difficult subject to broach and to elicit a history about. And so
8 it -- I was able to get this history from Mr. Nashiri, but it was
9 painful and it took time.

10 Q. Would you share with the judge what was his demeanor as to
11 when he was telling you this? Was it just sort of like, hey, I
12 got -- what was his demeanor?

13 A. No, no, it was very, very difficult for him to talk about
14 this. As I said, it was painful for him. He was very, very
15 distressed. And initially, he couldn't really even find words. He
16 would use, like, hand gestures and, you know, eventually he was able
17 to talk a little more.

18 But, in fact, as I sit here today, I think this is probably
19 the most painful, the most traumatizing event that happened to him,
20 and, in fact, he's instructed me to never bring up the subject again.

21 Q. Now, after learning about this from Mr. Nashiri, did you,
22 from any other source, receive any confirmation of what he told you?

23 A. I did. And after I obtained this history from him, the

1 SSCI Report, the Senate report executive summary was published, I
2 believe, in December 2014, and his report was corroborated in that
3 summary.

4 Q. In addition to what was contained in that report, did you
5 have a chance to review any of the documents which provided further
6 detail and further corroboration of what he told you?

7 A. I did. I reviewed discovery documents ----

8 Q. And ----

9 A. ---- provided to me by the defense.

10 Q. At any time did we restrict you from viewing any documents
11 that we were provided by the government?

12 Did you ever ask us, hey, can I look at this, and we said,
13 oh, no, no, no, no, no, you can't look at that?

14 A. No.

15 Q. You are fully qualified and have all the necessary
16 clearances, correct?

17 A. That is correct.

18 Q. What experience -- explain to the judge the experience
19 that you've had in dealing with people who are involved in hunger
20 strikes.

21 A. All right. So I do have experience in dealing with hunger
22 strikes in places of incarceration, and I have published a
23 peer-reviewed article in The Journal of the American Medical

1 Association on management of hunger strikes.

2 I traveled to Bahrain at the invitation of the government
3 and consulted on a hunger strike they were having in their prison
4 approximately 2011, I believe, and wrote a report for them, and also
5 consulted with both hunger strikers and prison physicians in the
6 prison there.

7 I have been consulted ----

8 Q. I don't mean to interrupt you, but ----

9 A. I'm sorry.

10 Q. ---- did the actual physicians at those facilities talk to
11 you about the treatment and how to deal with people who were having a
12 hunger strike?

13 A. Yes. Yes. I provided some informal training to
14 physicians in those facilities.

15 Q. Did you ever get involved in anything relating to hunger
16 strikers as it relates to Guantanamo, JTF?

17 A. I have. I have been -- I've served as a consultant for
18 several habeas cases in Guantanamo and on one case, there was a
19 detainee who was a very complicated hunger striker, a long-term
20 complicated hunger striker.

21 And I served as a consultant, along with two military
22 doctors, a group of us, to evaluate this hunger striker and to make
23 recommendations to JTF about the management of this hunger striker.

1 And that consisted of multiple visits. Actually, I think multiple
2 reports over a period of one and a half to two years where we
3 met -- met the hunger striker and created a report that was
4 subsequently submitted to the JTF on the management of this hunger
5 striker.

6 Q. Did I hear you correctly that the other two physicians
7 were military physicians?

8 A. Yes, they were.

9 Q. Now, that report was submitted to, to your knowledge, who?

10 A. JTF, the detainee's lawyers, I presume.

11 Q. Now ----

12 A. The judge in the case. I -- yeah, I don't know who all it
13 went to.

14 Q. Now, based on your knowledge and experience, is there sort
15 of a protocol as far as information that someone should gather in
16 order to know if someone is actually on a hunger strike?

17 A. So there is international guidance on how to -- how to
18 manage a hunger strike, and that is contained in the World Medical
19 Association Declaration of Malta. That was first, I believe,
20 published in, like, the early '90s. It was recently updated in 2017.
21 And that's probably the best guidance for how to manage a hunger
22 strike. It provides guidance to physicians, to carceral facilities,
23 et cetera.

1 Q. Have you had a chance to familiarize yourself with that
2 document?

3 A. Yes, sir, I have ----

4 ATC [LT SCHWARTZ]: I'm going to object at this point. This
5 witness hasn't been qualified as an expert in hunger striking. She's
6 qualified, as I understand, as an expert in treating victims of
7 torture, so I just want to make sure we're staying in the realm of
8 this witness' expertise.

9 LDC [MR. NATALE]: We're going to qualify her as an expert in
10 hunger strikes. It's part and parcel of what she has been doing
11 here, Your Honor.

12 ATC [LT SCHWARTZ]: The government just was not aware of that,
13 so that is news to us, but understood.

14 MJ [COL ACOSTA]: On the hunger strikes, that she's an expert
15 in hunger strikes. That's what they're saying that they're unaware
16 of. Do you understand?

17 LDC [MR. NATALE]: I understand.

18 MJ [COL ACOSTA]: Did you provide notice that she was going to
19 be testifying as an expert in hunger strikes?

20 LDC [MR. NATALE]: Not specifically, but said that she was
21 going to be testifying to the -- quote, the anal feeding, the rectal
22 feeding, and whether that was appropriate. And so the only way that
23 she could make a decision as to whether it was appropriate would be

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1 for me to establish her credentials on that. And that's all I'm
2 trying to do. It goes to the weight of her testimony as to whether
3 or not she knows about this information.

4 ATC [LT SCHWARTZ]: And, Your Honor, I'm sorry. We just were
5 under the impression that as an internal medicine doctor, that was
6 how she was testifying, not as a hunger strike expert, which is
7 vastly different.

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

9 LDC [MR. NATALE]: It's part of, Your Honor ----

10 MJ [COL ACOSTA]: Hold on. Government Counsel, are you
11 conceding that as an internal -- as a doctor of internal medicine
12 that she may be qualified to discuss how to deal with hunger strikes?

13 ATC [LT SCHWARTZ]: No. At this point, we're understanding
14 she's been qualified for the session and this motion is she's
15 testifying as an expert of treating -- treating victims of torture.
16 So I don't see how this is going to fall under that because it sounds
17 like this is her testifying as a hunger strike expert, which we just
18 were not aware of.

19 LDC [MR. NATALE]: Judge, let me explain this. The
20 justification that the CIA has said for why they did these anal
21 feedings ----

22 MJ [COL ACOSTA]: Right.

23 LDC [MR. NATALE]: ---- is allegedly based on a medical

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1 decision and that what we are putting on Dr. Crosby is to refute any
2 allegation that that would, in fact, be a valid medical decision.

3 The only reason why I get into the hunger strike is because
4 it gets to why she would know as to when they say there was a medical
5 necessity, was there, in fact, a medical necessity. And that gets to
6 the very ----

7 MJ [COL ACOSTA]: I understand.

8 LDC [MR. NATALE]: ---- heart of ----

9 MJ [COL ACOSTA]: I get what you're trying to do. The
10 government also understands what you're trying to do as far as -- as
11 far as pointing out the lack of necessity with that.

12 Their concern is not with your -- the point of what your
13 examination is, it is the method of which -- is -- that you're doing
14 it with an expert that is -- that is recognized as an expert of
15 treating victims of torture who happens to also be an internal -- a
16 doctor of internal medicine and who now we've learned about the
17 hunger strike publications, which I'm not sure if that's -- or the
18 hunger strike experience, which I don't know if it's in her CV or
19 not.

20 It has been a long -- I have not looked at it recently. I
21 know that it's in another pleading. Don't ask me the number. But I
22 know that it's there. Is that in her CV as well, the hunger strike
23 information, yes or no?

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1 LDC [MR. NATALE]: I don't know if all of that
2 information ----

3 MJ [COL ACOSTA]: Okay.

4 LDC [MR. NATALE]: ---- is in there.

5 MJ [COL ACOSTA]: So the issue will be -- the issue that the
6 government is having is that now she's testifying about something
7 that is more specific in the hunger strike treatment handling area
8 and the efficacy, or lack thereof, of using the words that are in the
9 reports and that Dr. Crosby has just said, of the rectal feeding or
10 hydration. And that's where you're going into an area where she
11 hasn't previously talked about.

12 If you could, could you ask, perhaps a way -- and I'm just
13 doing this as a way to be efficient, Government Counsel, is, the
14 victims of -- you know, in her treatment of victims of torture,
15 et cetera, that she has treated, whether or not that is something
16 that she has treated, dealt with, or handled in her practice
17 that -- in which she is qualified, whether or not the hunger striking
18 is a topic that is within her recognized field of expertise. That
19 might be the more effective way to go, or to at least tie those two
20 together. And I would suggest ----

21 LDC [MR. NATALE]: I will try to do it that way.

22 MJ [COL ACOSTA]: I will let you do it that way. I could do
23 it for you, but -- but she's your witness. I want you to be able to

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1 get the information you want out of her. But that's what I would
2 need to hear.

3 Q. Dr. Crosby, during the course of your practice and
4 expertise in dealing with survivors of torture and your experience in
5 the trauma that they suffer, have you come to be involved in
6 situations where there have been hunger strikers?

7 A. As I said, I have, yes, evaluated and provided
8 consultation to hunger strikers and to physicians in prisons managing
9 hunger strikers.

10 Q. Now, what do you understand to be the proper protocol,
11 based on what you do, in the situation if you're confronted with a
12 hunger striker? Is there a protocol you would follow?

13 A. Again, I would refer back to the Declaration of Malta.
14 And they go through a very detailed guidance on how to evaluate
15 hunger strikers. First of all, are they competent or ----

16 ATC [LT SCHWARTZ]: Your Honor, I'm sorry, I'm going to have
17 to renew my objection. We're -- they just said that she's here to
18 talk about the rectal rehydration, and that's what we're focused on,
19 not alternative methods that she believed or what she would see, what
20 they're trying to do in an expert opinion of what could have been
21 done.

22 So I'm just having a hard time seeing how this is related to
23 what we've been told ----

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1 MJ [COL ACOSTA]: Okay.

2 ATC [LT SCHWARTZ]: ---- and given.

3 MJ [COL ACOSTA]: I've got your -- your objection is noted.
4 Defense?

5 LDC [MR. NATALE]: Your Honor, if -- I am going to ask her her
6 medical opinion on what she reviewed and what she knows. If the
7 government wants to cross-examine her on that, to say that, you know,
8 she's making stuff up, she doesn't know what she's talking about,
9 then they are free to impeach her credibility, they are free to call
10 someone else to refute it.

11 But this is part of her treatment of people and knowledge as
12 an internal medicine person. She can ----

13 MJ [COL ACOSTA]: Well, she's not -- was she qualified as an
14 expert in internal medicine when she was qualified?

15 LDC [MR. NATALE]: Yes. And, Your Honor ----

16 MJ [COL ACOSTA]: I understand. Believe me, I'm asking you
17 questions because I'm trying to ----

18 LDC [MR. NATALE]: Yes.

19 MJ [COL ACOSTA]: I'm trying to get to a particular place here
20 perhaps where -- she's qualified as an expert in internal medicine,
21 she's qualified as an expert in treatment of torture survivors. In
22 the course of her treatment of torture survivors and in her work
23 as -- in dealing with that, she has dealt with hunger strikers, and

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1 she has consulted on those issues.

2 Government, are you questioning -- are you stating that you
3 do not believe that she is qualified to discuss -- to give an opinion
4 as to how to handle or deal with hunger strikers and -- as an
5 internal -- as an expert in internal medicine and in treating and
6 recognizing victims of torture?

7 ATC [LT SCHWARTZ]: I think ----

8 MJ [COL ACOSTA]: Is that what you're saying?

9 ATC [LT SCHWARTZ]: I think that there is a fine line between
10 the treatments that are administered and the hunger striking and
11 identifying things specific to -- outside of those procedures that
12 she's familiar with.

13 And again, Government just was not aware that she was going
14 to be testifying under -- on hunger striking. I had asked for
15 articles. Nothing was turned over to me that she had reviewed in
16 preparation of it. I just was not aware that we were going as her
17 testimony -- testifying to a pseudo-expert for hunger striking. The
18 procedure, I understand.

19 MJ [COL ACOSTA]: Okay. I understand your -- I'll call it a
20 pejorative use of the term pseudo-expert.

21 The -- your objection is overruled. I'm going to allow her
22 to testify as an expert in these -- in these fields. The commission
23 finds her to be qualified to testify as an expert on this topic, both

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1 because she is recognized as an expert in internal medicine and the
2 treatment of -- of victims of torture and inhumane conduct.

3 I will caveat that with, it appears from her answers, and
4 she can answer this question for me: Do you find -- well, that -- I
5 will not ask that question.

6 I recognize her as an expert in those fields. Continue with
7 your questions, please.

8 Q. Doctor, could you explain what would be the protocols, the
9 specific protocols that you know as it relates to hunger strikers?

10 A. Again, I would refer you to the Declaration of Malta,
11 where they go through the steps of evaluation of capacity to make the
12 decision to hunger strike, the reason for the hunger strike, doing a
13 medical evaluation that is comprehensive to determine if there are
14 any underlying risk factors that would make hunger striking more
15 dangerous.

16 Q. Let me interrupt you for a second. That last part, what
17 would that include actually doing? The ----

18 A. What -- what ----

19 Q. The medical -- you know, determining the medical
20 condition, what that -- what would that entail the doctors to do?

21 A. For example, if there was a potential hunger striker or a
22 hunger striker with diabetes, that is very dangerous. And I would
23 need to know that, evaluate them, and advise about the danger of

1 hunger striking in that instance. So it would be taking a complete
2 medical history ----

3 Q. What else?

4 A. ---- and evaluation.

5 Q. Vital signs?

6 A. So -- okay. You're jumping ahead, but that's fine.

7 So when somebody is refusing food -- and again, this is
8 arbitrary, but generally if a person refuses nine meals, like three
9 days' worth of refusing meals, they could be qualified -- or they
10 would be called a hunger striker. Anything less than that, you would
11 say food refuser.

12 So the things you would want to monitor for in an ongoing
13 hunger striker would be weight, input/output, laboratory values,
14 urinalysis; and particularly important is a mental status exam, you
15 know, are they confused, lethargic, and weight, of course.

16 So those would be the parameters that you would monitor in
17 people who were not eating.

18 Q. Did you have a chance to review the discovery in this
19 case?

20 A. I did review the discovery that was provided, yes.

21 Q. In reviewing the discovery that was provided, did you read
22 summaries or any documents that related to what the CIA referred to
23 as rectal feeding?

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1 A. I did.

2 Q. Was there anything in those documents which met the
3 criteria which you have said need to be met in order to decide if
4 someone truly is a hunger striker?

5 A. So I can summarize what I read in the document ----

6 Q. Uh-huh.

7 A. ---- and that was that Mr. al Nashiri had refused or not
8 taken five meals over three days, which sort of by definition would
9 not qualify him as a hunger striker. And I should also say the
10 reason he was refusing meals is reportedly that he thought there were
11 medications put into the food. He was paranoid about that.

12 Q. As it relates to that medication put -- have you ever
13 discovered anything else in any of the discovery or -- about that
14 sort of a concern?

15 A. I did read a document where it was authorized for medical
16 to put medications in food. I have not seen anything specific to
17 Mr. al Nashiri ----

18 ATC [LT SCHWARTZ]: Objection, Your Honor, relevance to this.

19 MJ [COL ACOSTA]: Defense?

20 LDC [MR. NATALE]: Your Honor, it would get to whether or not
21 this person was doing this for some frivolous political reason rather
22 than a concern -- because it relates to his. What his concern
23 was ----

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1 MJ [COL ACOSTA]: No, I -- that's enough. Overruled. I'll
2 allow it. Go ahead.

3 A. All right. So I'm continuing with my summary ----

4 MJ [COL ACOSTA]: Yes.

5 A. ---- of the discovery? Okay.

6 So the -- the medical had observed Mr. al Nashiri looking
7 volume depleted, or what you would say, dehydrated, and they base
8 that on a rapid heart rate. He was complaining of headache and
9 dizziness and poor skin turgor, which is skin elasticity, which is
10 a -- can be a sign of dehydration. And this is after he had missed,
11 as I said, five meals over three days. So not the nine meals over
12 three days. And he appeared to be volume depleted.

13 So the summary also indicates that, although he was at risk,
14 you know, for dehydration, he was drinking some -- and they didn't
15 say how much in the records that I looked at -- and that he was not
16 at risk for severe dehydration and did not need intravenous fluids.
17 So that ----

18 Q. Did they -- did the records that you reviewed from the
19 CIA, does it reflect that they took action because he needed to be
20 rehydrated?

21 A. No, they specifically said he was not at risk for
22 dehydration and did not need intravenous fluids at this time. But
23 they did go on to say that he needed nutrition, and there was no

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1 basis or rationale for that.

2 They had noticed that he had lost approximately 6.5 pounds
3 over the previous ten days, which at that time was about 5 percent of
4 his body weight, but that is not a trigger for administration of
5 nutrition.

6 So that was the rationale. That was all there was. It
7 didn't quite make any medical sense because, based on the data that
8 was -- the information contained in that discovery, there was no
9 credible reason that Mr. al Nashiri needed artificial administration
10 of nutrition at that time. He may have needed IV fluids. I would
11 give them that, yes. But no nutrition.

12 Q. But not -- when you say IV fluid, you're talking hydration
13 or nourishment?

14 A. Hydration. There's a difference between hydration and
15 nutrition. Hydration is fluids, like water or saline. Nutrition is
16 nutrients, like protein, carbohydrates, and fats.

17 Q. Based on their records, what they wrote, there was nothing
18 which would warrant artificial administration of nourishment; is that
19 correct?

20 A. That is correct.

21 Q. Now, you used that term. Is there a reason why you use
22 the term "artificial administration of nourishment" versus "forced
23 feeding" or "rectal nourishment" or anything like that?

1 A. I think what you're asking -- so artificial administration
2 of nutrition means anything besides just eating it by yourself ----

3 Q. Okay.

4 A. ---- okay? So that could be a nasogastric tube, which
5 goes in through the nasal passage and down into the stomach; an
6 orogastric tube, which goes through the mouth down the esophagus into
7 the stomach. It could be surgical placement of what's called a PEG
8 tube which is surgically placed through the abdominal wall into the
9 stomach where you administer food, or it could be intravenous
10 nutrition with a line placed into a deep vein. So those would all be
11 artificial administration of nutrition.

12 I think you also asked about force feeding.

13 Q. Yes.

14 A. So force feeding is feeding without informed voluntary
15 consent of a -- of a competent person who is able to make that
16 rational decision.

17 Q. Did you see anything in the records that indicated that
18 there was a request or consent by Mr. al Nashiri as to what happened?

19 A. No, not -- there was not.

20 Q. Now, the -- what I'd like you to do now is I'd like to
21 show you what has been marked as Appellate Exhibit 467U, page 1 and
22 2. This has been provided to the government and to the court.

23 LDC [MR. NATALE]: Your Honor, may I publish?

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1 MJ [COL ACOSTA]: If it's at the appropriate classification
2 level, yes.

3 LDC [MR. NATALE]: May we have the ELMO turned on?

4 MJ [COL ACOSTA]: It's on. I have it.

5 LDC [MR. NATALE]: It's not -- I don't have it on my screen,
6 sir.

7 MJ [COL ACOSTA]: I have it here and you can look at it there,
8 so ----

9 LDC [MR. NATALE]: Okay.

10 Q. Doctor, can you see this?

11 A. No. Oh, there we go. Yes, I see that.

12 Q. Do you recognize what that is?

13 A. That is the package that is labeled "endotracheal tube."

14 Q. And are there any specifications as to that tube?

15 ADC [MS. MORGAN]: Judge, I apologize. We can't see it.

16 MJ [COL ACOSTA]: Okay. If ----

17 LDC [MR. NATALE]: Can I make it larger?

18 MJ [COL ACOSTA]: Hold on. It's not the problem of -- she
19 says she can't see it at all. She didn't say it's not big enough.

20 LDC [MR. NATALE]: Oh.

21 MJ [COL ACOSTA]: So whoever is controlling that, if they can
22 make it to counsel table. It looks like it's published to counsel on
23 the screen that I'm looking at in here. There we go.

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1 Continue, please.

2 LDC [MR. NATALE]: Can she see it now?

3 MJ [COL ACOSTA]: Yes. She's just -- your co-counsel just
4 told me she can see it.

5 LDC [MR. NATALE]: Okay.

6 Q. Looking at Appellate Exhibit 467U, page 1 of 2, you said
7 that that was an endotracheal -- it says endotracheal tube. What is
8 an endotracheal tube?

9 A. An endotracheal tube is a tube that is put into the airway
10 to assist with breathing. So if someone isn't breathing, a tube is
11 put down, it's attached to a bag or a ventilator, to breathe for the
12 person.

13 Q. Does tracheal refer to the neck or does it refer to the
14 anus?

15 A. It refers to the trachea, which is in the neck.

16 Q. Now, looking at page 1 of this, does this specify the size
17 in millimeters of this endotracheal tube?

18 A. Yes, it's a 7.0, which just means 7 millimeters for the
19 diameter.

20 Q. In reviewing the discovery, what was the description of
21 the endotracheal tube that they utilized?

22 A. It was a similar endotracheal tube that was size 7.0.

23 Q. Okay. I'd like to have you now look at page 2 of

1 Appellate Exhibit U467 **[sic]**, page 2. Do you see that?

2 A. Yes, I do.

3 Q. Do you recognize what that is?

4 A. That is an endotracheal tube.

5 Q. Okay.

6 LDC [MR. NATALE]: Now, Your Honor, we would be asking that
7 these -- this exhibit be admitted into evidence.

8 MJ [COL ACOSTA]: It's already attached to the motion, yes?

9 LDC [MR. NATALE]: Yes, but, Your Honor, I now have the actual
10 instrument which I'd like to show to her so she can demonstrate to
11 the court. Substitute that for the picture. It's only what's
12 depicted in here.

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

14 MJ [COL ACOSTA]: My courtroom security officer is informing
15 me that visual displays that have not gone through a review -- you
16 see, your -- the ELMO doesn't project out there. No one else can
17 see -- no one can see what you've put up there ----

18 LDC [MR. NATALE]: Okay.

19 MJ [COL ACOSTA]: ---- even though it's an exhibit, an
20 unclassified exhibit to a motion, they can't see it. When you pick
21 it up and you walk it over to her and she's holding it up, they're
22 going to be able to see the thing that is there.

23 LDC [MR. NATALE]: It was my understanding that we sent this

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1 through all of the review that was necessary. That's what my
2 paralegals told me.

3 MJ [COL ACOSTA]: Well, I don't -- I don't review the things
4 that are coming through ----

5 LDC [MR. NATALE]: Right.

6 MJ [COL ACOSTA]: ---- Right? Okay. I don't get them
7 for -- for review ahead of time. Is there some ----

8 LDC [MR. NATALE]: Your Honor, then let me ----

9 MJ [COL ACOSTA]: Here's what you can do. I can see it
10 physically with my eyes in front of me. Is it your intent for her to
11 unpackage it and hold it up and show everybody what it looks like?

12 LDC [MR. NATALE]: Well ----

13 MJ [COL ACOSTA]: Show me what it looks like?

14 LDC [MR. NATALE]: Yes, and then to show how this was used
15 based on what was in the CIA documents.

16 MJ [COL ACOSTA]: Is there -- is there anybody that
17 is -- right. I've not gotten -- I don't know if this has been
18 approved for an in-court demonstration.

19 I don't know why, again, that this -- it would be absolutely
20 necessary to be done. It is described in detail. I ----

21 Government, any objection?

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

23 MJ [COL ACOSTA]: Proceed.

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1 LDC [MR. NATALE]: Thank you. Your Honor, may I approach the
2 witness?

3 MJ [COL ACOSTA]: You may.

4 Q. Doctor, Dr. Crosby, does that, what I handed you, appear
5 to be the actual item that is depicted in AE 467U, page 1 and 2?

6 A. Yes.

7 MJ [COL ACOSTA]: Did you want her to open it? Because she's
8 opening it.

9 LDC [MR. NATALE]: Yes, that's what I'm asking.

10 MJ [COL ACOSTA]: Okay.

11 Q. Would you open that, and when you're holding it up, I
12 would like you to then describe to the court what are the different
13 aspects of that device.

14 Now, you know what this device is, right?

15 A. This, as I said, is an endotracheal tube.

16 Q. Right.

17 A. It is inserted into the trachea with a stylet. Once it's
18 there the stylet is ----

19 MJ [COL ACOSTA]: Can you hold it up where I can see it?

20 WIT: I'm sorry.

21 MJ [COL ACOSTA]: Thank you.

22 LDC [MR. NATALE]: Can you stand up? That may help so the
23 judge can see.

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1 WIT: Okay.

2 MJ [COL ACOSTA]: He asked if you can stand.

3 WIT: Oh, okay.

4 MJ [COL ACOSTA]: The witness is standing. Just aim the
5 microphone up a little bit higher for yourself. Thank you.

6 A. Okay. This is, again, a common device, an endotracheal
7 tube. It's used to intubate patients in hospitals or in the field.
8 With a blade and a light, it's inserted into the trachea with a
9 stylet to help guide it. The stylet is then removed. There's a
10 little balloon on the end to help keep it in place. Air is inserted
11 into the balloon to inflate it, hold it in place. This end is then
12 attached to either an oxygen bag or a ventilator to help the person
13 breathe. And this tube delivers oxygen and takes out carbon dioxide.

14 MJ [COL ACOSTA]: For the record, the item that she is holding
15 is a tracheal tube. The stylet that she's referring to is the
16 metal -- I believe that is -- it is a metal -- don't -- stop.
17 Everything that you do I have to ----

18 WIT: Oh.

19 MJ [COL ACOSTA]: ---- describe with my mouth. So the more
20 that you keep doing, the more that I have to keep talking.

21 So what -- what she's done is held it up in front of her
22 body with a -- it -- and it is -- as described in the exhibit, in the
23 photograph.

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1 And she described placing the metal stylet, which is covered
2 with the -- which is inside of the rubber or plastic tube -- I don't
3 know that -- the technical term for what -- what it is, some form of
4 a medical-grade flexible hosing that would go down the throat, and
5 she just -- she -- of a -- or into the trachea of a person who is
6 being intubated. And then the stylet, the metal portion, could
7 be -- can be removed from it.

8 There is also a smaller, thinner, narrower-gauge plastic
9 tubing that comes off when she described the balloon. The balloon is
10 at the end to be inserted into the mouth, and the thinner-gauge
11 plastic tubing has a small bluer -- a blue tip at the end of that
12 that is used to inflate the balloon that goes into the trachea and
13 holds it in place.

14 If we can -- I've seen it; I've got it. The -- and it's
15 fine if she wants to do more ----

16 LDC [MR. NATALE]: Your Honor ----

17 MJ [COL ACOSTA]: ---- demonstrations, but ----

18 LDC [MR. NATALE]: Very well. Your Honor, if I may, I'd like
19 to be able to show to her what has been marked as Appellate Exhibit
20 512, page 3 and page 4.

21 This has been provided to the government and has been
22 attached, and I just would like to show it to her.

23 MJ [COL ACOSTA]: Okay. You may show it.

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1 Q. Dr. Crosby, can you see what I've posted?

2 A. Yes.

3 Q. Have you seen this before?

4 A. Yes, I have.

5 Q. Could you describe what you're seeing and why that is
6 something which you requested as a demonstrative aid?

7 A. So this is a mannequin who is bent over a chair. And this
8 is roughly the position that Mr. al Nashiri described that he was
9 placed in after his clothes were removed. He was taken from his
10 cell, roughed up, shackled by his ankles and shackled by his arms,
11 bent over a chair.

12 Q. I'd like you to now look at the next page, which is
13 page 4. Is that just another ----

14 A. It looks like the same picture.

15 MJ [COL ACOSTA]: It's not the same picture.

16 WIT: Oh, similar. Same. Different angle.

17 Q. Does it show a different angle?

18 A. Yeah.

19 Q. Is that photograph consistent with what you just described
20 was ----

21 A. Yeah. Yes, except there are no shackles here.

22 Q. Now, Dr. Crosby, is the colon -- the anus, the colon, the
23 rectum, is that anatomically made to take nourishment?

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1 A. No, it is not.

2 Q. Why?

3 A. I can explain that.

4 Q. Is there anything I could show you that would help you to
5 explain it, or do you think you can do it without ----

6 A. Yeah. So interestingly -- well, let me first explain how
7 digestion works.

8 You take some food into your mouth, a piece of pizza.
9 Saliva actually starts to break down carbohydrates. It goes down
10 into the -- food goes down into the stomach by muscular action. It
11 gets churned around with stomach acid, pepsin, breaks down proteins.
12 Then enters into the first portion of the small intestine, and from
13 there enzymes, bile salts from the liver, enzymes from the pancreas
14 enter the first part of the small intestine. It starts to digest
15 more fats and proteins, carbohydrates.

16 And the food in liquid form then goes all the way through
17 about 22 feet of small intestine, and 95 percent or more of all
18 digestion is performed in the small intestine.

19 So after that, food enters the colon, which is shorter, only
20 about five feet. And essentially from there what the colon does is
21 take all that liquid stool and make it into hard stool, which is what
22 is expelled. So it absorbs water, makes the stool hard.

23 And the stool ends up in the rectum, which is just like a

1 repository, until you expel it out into the toilet or wherever.

2 So for just a bit of background -- no. So food is not
3 absorbed from the rectum or from the large intestine, the colon.
4 And, in fact, it's not a two-way street. So you -- food goes down,
5 food cannot go -- or nutrients cannot go back up and reach the
6 intestine. That is an impossibility.

7 And, in fact, this was something that was done back in the
8 late 1800s quite -- quite commonly for people that couldn't eat for
9 whatever reason, surgical patients, they would try to feed them
10 rectally, and turned out it just didn't work.

11 Actual scientific studies were done, actually on medical
12 students, that showed absolutely absorption does not occur in the
13 colon or the rectum, and food cannot travel from the anus/rectum back
14 up.

15 So in medicine, nutrition delivered via the rectum has been
16 debunked essentially since 1930, and there's great literature to
17 support that. It is never used in medical practice, and there's no
18 medical benefit, ever, to administering any form of nutrition through
19 the rectum.

20 Q. Now, are you familiar with Ensure? It's a liquid.

21 A. I am. Can I finish the digestion part?

22 Q. I'm sorry. I apologize.

23 A. I want to just -- because we talked about the difference

1 between nutrition and fluids.

2 So fluids, such as saline or water, can actually be absorbed
3 through the rectum and, in fact, in the battlefield, rapid
4 administration of rectal fluids in people who are in shock, bleeding
5 out, has been used. And again, fluids can be rectally absorbed, but
6 not nutrients. So I just want to make that distinction.

7 We don't use it very much anymore because we have better
8 methods of administration of fluids, but it could be used and it
9 could be absorbed.

10 Q. In the situation that you described on the battlefield, is
11 that for nourishment purposes?

12 A. No, it's for rapid fluid replenishment for people in
13 shock.

14 Q. Okay. Now, let me ask you about Ensure. Do you know what
15 that is?

16 A. Yes, I do.

17 Q. What is it?

18 A. Ensure is a concentrated nutritional supplement that is
19 used commonly in people who need extra nourishment, aren't getting
20 enough calories. Contains -- it's very balanced, carbohydrates,
21 proteins, fats, and vitamins.

22 Q. Did you come to learn, after the tube was inserted into
23 Mr. Nashiri's anus, what, if anything, did they do with Ensure?

1 A. So according to the discovery that I read, the tube was
2 inserted into the anus. The actual balloon was inflated. And using
3 a 60-cc syringe, either 400 -- somewhere between 400 and 500 cc's of
4 Ensure Plus was administered to Mr. al Nashiri over 30 minutes.

5 Q. And after that, what happened, based on your
6 understanding?

7 A. Well, based on what I read, they then left the tube in for
8 an additional ten minutes -- and I hate to use air quotes, but to aid
9 in colonic absorption, because there's no such thing as that, but
10 that's what was reported.

11 Q. And do we know, when they removed the tube, did the Ensure
12 come out or did it remain there, based on your ----

13 A. Ensure would have acted just like an enema, and it would
14 have been expelled. It would have been just like an enema. And
15 there was no report in the discovery I read that said one way or the
16 other what actually happened to the Ensure.

17 LDC [MR. NATALE]: Your Honor, could I have a moment?

18 MJ [COL ACOSTA]: You may.

19 **[Counsel conferred.]**

20 MJ [COL ACOSTA]: You don't still have the exhibit, do you?
21 Do you still have the ----

22 WIT: Yes.

23 MJ [COL ACOSTA]: All right. Hang on one second.

1 I'm going to have your co-defense counsel -- Commander, if
2 you can get the -- retrieve the exhibit from the witness, please.
3 You're going to need to hand it to the court reporter, who is going
4 to photograph and insert -- and insert in the record a photographic
5 substitute for me in the record of that -- of the device outside of
6 the packaging, and then we're going to return the physical exhibit to
7 the defense.

8 Defense, I don't know if you heard, but I had the -- I had
9 your co-counsel retrieve the exhibit from the witness stand. I'm
10 going to have the court reporters make a -- take a photograph of the
11 item outside of the package for -- and to use that as a photographic
12 substitute for the record and return the exhibit -- the physical item
13 to you.

14 LDC [MR. NATALE]: I apologize, Your Honor, for ----

15 MJ [COL ACOSTA]: It's okay. That's okay. That's it. You
16 can take -- it gave me time to take care of the administrative matter
17 that I needed to.

18 Q. Dr. Crosby, what you have described was during the time
19 that Mr. Nashiri was in black sites; is that correct?

20 A. That is my understanding. The time frame, I believe, was
21 May 2004.

22 Q. Now, you mentioned the battlefield use, that it has been
23 used to hydrate, not to feed. Is that the best practice or is going

1 through the chest cavity the best practice? What is the best
2 practice now, even in the battlefield?

3 A. The best practice for what?

4 Q. For hydration.

5 A. For hydration, the best practice would be intravenous
6 hydration, if that's possible. We now use intraosseous, which is
7 into the bone, which are both better and more efficient methods in an
8 emergency situation. However, you can -- you can do it rectally if
9 that's all you got.

10 Q. Now, based on your conversations with Mr. Nashiri, what
11 has -- what was the result of what he has described to you in his
12 conduct, in his behavior, that you have observed?

13 A. As I said previously, this was a very, very distressing,
14 painful, shameful, stigmatizing event. Again, as I sit here,
15 probably the worst thing that has happened to him. He experienced it
16 as a violent rape, a sexual assault, and this is certainly one part
17 of what is causing his chronic post-traumatic stress disorder at this
18 time.

19 I've discussed in previous testimony, I know common physical
20 ailments that occur after male sexual assault or any sexual assault,
21 including post-traumatic stress disorder, anxiety, difficulty with
22 trust, with relationships with other people, sexual dysfunction, back
23 pain, abdominal pain, vague abdominal complaints, and

1 rectal -- rectal problems, including constipation, trouble with
2 defecation, sort of, you know, focused on those body functions.

3 Q. Are any of those things that you just listed things that
4 Mr. Nashiri has expressed during the times you've talked to him,
5 these sort of problems?

6 A. Well, yes. We -- I think we've established that he does
7 have chronic post-traumatic stress disorder. I think we also
8 discussed in my previous testimony that he has chronic abdominal
9 complaints related, I believe, to this. He's been diagnosed with
10 irritable bowel syndrome, which I agree with, which is something that
11 is commonly seen. These symptoms come and go. And he also has had
12 recurrent problems with defecation, going to the bathroom, pain.

13 Q. Are those symptoms consistent with the rectal feeding that
14 the CIA employed?

15 A. Those symptoms are consistent with sexual assault, yes.

16 Q. Okay.

17 A. And that would be consistent with the tube being inserted
18 into his anus and rectally infused with nutrition.

19 LDC [MR. NATALE]: I have no further questions.

20 MJ [COL ACOSTA]: Government?

21 ATC [LT SCHWARTZ]: Your Honor, if I could have just one
22 moment, please.

23 MJ [COL ACOSTA]: Yes.

1 **[Counsel conferred.]**

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

3 MJ [COL ACOSTA]: Government, are you prepared? Nope?

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

5 MJ [COL ACOSTA]: There you are. Go ahead.

6 **CROSS-EXAMINATION**

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

8 Q. Dr. Crosby, I'm Lieutenant Schwartz. I am -- apologies,
9 I'm over at the RHR. I'm a member of the prosecution. I just have a
10 few questions/clarifications.

11 Can you recall, when was it that Mr. Nashiri told you about
12 the rectal rehydration, if you can recall?

13 A. I do recall. It was prior to the Senate report executive
14 summary. It was sometime in 2013. I don't have the actual date.

15 Q. And whenever you spoke with him, did you take notes on
16 what he was telling you about that?

17 A. I did take notes.

18 Q. In your testimony, you said earlier, if I'm correct, that
19 those notes corroborated what you then heard in the report shortly
20 after; is that correct?

21 A. My evaluation, yes, my notes were corroborated by the
22 SSCI Report.

23 Q. I know you testified back in 2019 in December -- or, I'm

1 sorry, in 2021 in December. Do you recall that testimony, ma'am?

2 A. I do.

3 Q. And in that testimony, there was a colloquy between you
4 and another member of the prosecution about prior issues with
5 constipation that Mr. Nashiri suffered from. Do you recall that?

6 A. I don't recall the specifics.

7 Q. Are you aware, then, that he had issues -- or have you
8 seen in records that he had issues with constipation and bowel
9 movement prior to being in CIA custody?

10 A. That -- that is a possibility. But as he reported to me,
11 he did not have these same symptoms before he came into CIA custody.

12 Q. And you made a few comments about PTSD that you have
13 evaluated Mr. Nashiri for. You have been requested by defense to
14 consult with them on the -- and I'll make sure I'm getting it
15 correct -- giving advice and assistance to defense team regarding the
16 difficulties that arise in communicating with someone suffering from
17 symptoms associated with complex PTSD. Does that sound correct?

18 A. That sounds correct.

19 Q. And that was as reason for more hours in February of 2023,
20 so this month?

21 A. I'm sorry. Can you restate what -- I just want to make
22 sure I know what I'm agreeing to for this one.

23 Q. You're fine.

1 I'm asking: Are you currently acting as a consultant and a
2 witness for defense from what they said -- what I just read, about
3 someone suffering from symptoms associated with complex PTSD?

4 A. Yes.

5 Q. Okay. And as you said, you remembered testifying for the
6 commission in December of 2021. You do recall that, correct?

7 A. Yes.

8 Q. And in that testimony, do you recall testifying that:
9 Complex PTSD would be outside the realm of my expertise and
10 treatment, and the standard of care would be to refer to a
11 psychologist and psychiatrist who has expertise in that area? Do you
12 recall that?

13 A. That would be an accurate statement, yes.

14 Q. So are you acting as a consultant for complex PTSD, then,
15 to your knowledge, for defense? Or is that outside of the realm of
16 your qualifications?

17 A. Yeah, no, it's -- let me explain.

18 Q. Thank you.

19 A. So in my normal practice and what would be standard of
20 care in my clinic, if I diagnose somebody with complex PTSD, or any
21 other complex psychiatric disorder, I work in a group, and I would
22 work with a mental health specialist in consultation.

23 And essentially for people with complex PTSD and torture

1 survivors, you need -- you need to work in an integrated model with
2 different subspecialties. So I would not manage somebody by myself
3 with complex PTSD. I would advise.

4 Q. And then -- but defer treatment to a mental health
5 professional, if you will, whether a psychologist or a psychiatrist?

6 A. Yeah, or work with them, yeah. We end up in primary care
7 in our clinic doing a lot of mental health. But I would work in
8 conjunction with a mental health specialist.

9 Q. And to your knowledge, Mr. Nashiri has access to
10 mental health specialists and professionals at Guantanamo, correct?
11 Yes?

12 A. To my knowledge, yes, he has access to a mental health
13 specialist.

14 Q. Okay. And he's able to talk to that individual at his
15 request, correct?

16 A. Mr. ----

17 Q. To your knowledge, if you know.

18 A. Yeah, Mr. al Nashiri has access to speak with
19 mental health specialists, yes.

20 ATC [LT SCHWARTZ]: Your Honor, I don't have any further
21 questions for this witness at this time. Thank you.

22 MJ [COL ACOSTA]: Defense?

23 **[END OF PAGE]**

1

REDIRECT EXAMINATION

2 **Questions by the Learned Defense Counsel [MR. NATALE]:**

3 Q. Addressing this last point, Dr. Crosby, where you would
4 employ the expertise of other people, is that one of the reasons why
5 you have been trying for approximately ten years to be able to talk
6 to the medical staff here?

7 A. I have been trying to talk to the medical staff, and
8 again, I think I've said this before. My understanding from
9 Mr. al Nashiri is that nobody's really talked to him about his
10 trauma. And my motivation, my goal, would be to talk to the
11 mental health staff and just see what he's -- you know, see -- see if
12 we can, you know, work together, make sure they understand what his
13 situation is.

14 Q. I guess what I'm asking you: Is what you're asking for an
15 unusual thing for doctors to do among and between each other?

16 A. No. No. It's very common. In fact, it's important for
17 traumatized people to work in collaborative teams, you know, primary
18 care, mental health, physical therapy, whatever those -- those teams
19 would be. So collaboration is very important.

20 Q. Do you feel that there are substantive things that you
21 would be able to, as doctor to doctor convey, that ----

22 MJ [COL ACOSTA]: Counsel ----

23 Q. ---- would ----

1 MJ [COL ACOSTA]: Counsel, this is 467, right?

2 LDC [MR. NATALE]: Yes.

3 MJ [COL ACOSTA]: Okay. What does this do -- what -- 467 is
4 not ----

5 LDC [MR. NATALE]: Your Honor, I think ----

6 MJ [COL ACOSTA]: ---- treatment. 467 is -- is ----

7 LDC [MR. NATALE]: The effect on ----

8 MJ [COL ACOSTA]: ---- is a motion to suppress.

9 LDC [MR. NATALE]: Uh-huh.

10 MJ [COL ACOSTA]: Right, so -- now we're talking about
11 prospective things to do. That is not what a motion to suppress is
12 about.

13 LDC [MR. NATALE]: I have no further questions.

14 MJ [COL ACOSTA]: Okay. Thank you. I take it we got that
15 testimony earlier. To the extent it's applicable, I will take it
16 under consideration. But I'm just trying to cut that off. Thank
17 you. All right.

18 **EXAMINATION BY THE MILITARY COMMISSION**

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

20 Q. You stated that you would not -- that your -- that complex
21 PTSD is outside of your area of expertise but it is still your -- is
22 it your diagnosis?

23 A. Oh, it is something I would diagnose. I would not treat.

1 That would be out of the ----

2 Q. Right.

3 A. ---- scope of my expertise.

4 Q. Understood.

5 And in your -- and you have diagnosed it in Mr. Nashiri?

6 A. In Mr. Nashiri and other patients.

7 Q. Absolutely. Absolutely, okay. Thank you.

8 MJ [COL ACOSTA]: All right. Any questions based upon mine?

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

10 MJ [COL ACOSTA]: Government?

11 ATC [LT SCHWARTZ]: No, Your Honor.

12 MJ [COL ACOSTA]: All right. Anything else from Dr. Crosby
13 this session?

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

15 MJ [COL ACOSTA]: Government?

16 ATC [LT SCHWARTZ]: Something we will take out -- up after she
17 exits, Your Honor.

18 MJ [COL ACOSTA]: Well, I know that she's going to testify in
19 a closed session tomorrow based on cross -- for -- a closed
20 cross-examination question from Captain Danielczyk, I believe.

21 So I'm going to temporarily excuse you. As usual, do not
22 discuss your testimony or your knowledge of the case with anyone
23 other than the counsel for either side. You're temporarily excused

1 until -- until about 30 minutes after I close the open session of
2 tomorrow, so please remain available. Thank you.

3 WIT: Thank you.

4 **[The witness was warned, was temporarily excused, and withdrew from**
5 **the courtroom.]**

6 MJ [COL ACOSTA]: All right. Government -- I'm sorry.
7 Lieutenant Schwartz, I believe it was you that wanted to speak?

8 ATC [LT SCHWARTZ]: Yes, Your Honor. To echo my co-counsel's
9 statements earlier, Dr. Crosby just said that she was corroborating
10 statements made between a report and notes that she had taken and
11 obviously relied on that today in testimony, so therefore the
12 government would request those notes that she said she took in 2013.

13 MJ [COL ACOSTA]: All right. Send your request to the
14 defense.

15 ATC [LT SCHWARTZ]: Copy that, Your Honor. Thank you.

16 MJ [COL ACOSTA]: All right. Okay. Now we take up the
17 defense motion to compel witnesses in 534.

18 Defense, do you want to argue for your four witnesses?

19 DDC [LCDR PIETTE]: Your Honor, I've been asked can we have a
20 quick, maybe ten-minute health and comfort break?

21 MJ [COL ACOSTA]: Yes. I will give you a -- I'll give you a
22 ten-minute recess, and then we'll come back and take that up.

23 The commission is in recess for ten minutes.

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1 [The R.M.C. 803 session recessed at 1526, 23 February 2023.]

2 [END OF PAGE]

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1 **[The R.M.C. 803 session was called to order at 1542,**
2 **23 February 2023.]**

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

4 Government, all parties present as before?

5 TC [MR. O'SULLIVAN]: Except for Mr. Tavaréz, yes, Your Honor.

6 MJ [COL ACOSTA]: Defense?

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

8 MJ [COL ACOSTA]: All right. Commander Piette, do you want to
9 argue for your four requested witnesses?

10 DDC [LCDR PIETTE]: Yes, Your Honor. First, I'd like to note,
11 maybe to clear up something on the record earlier, which I guess I
12 should have said earlier. I'd like to note that this motion series,
13 534, is not fully briefed. We still have our reply brief due
14 tomorrow.

15 Normally we would send out our 703 request after it's fully
16 briefed so, in fact, these witness requests are not -- are not late
17 but they're early because the government had invited us, since the
18 witnesses are going to be on the island, to put in our 703 request
19 early. We did, just to maximize efficiency. So to clear up the
20 record earlier, I'd start with that.

21 And now moving to the witnesses in question. So I included
22 the SMO on our motion to compel. The government did grant the SMO in
23 their motion -- I mean, in their ----

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1 MJ [COL ACOSTA]: Reply?

2 DDC [LCDR PIETTE]: ---- in their reply to us. But they said:
3 To the extent your request seeks testimony beyond the scope of the
4 declaration, your request is denied. The declaration refers to the
5 SMO declaration in their response, 534C, I believe.

6 I don't see that as really being an issue, that we're going
7 to go outside the scope of the declaration, except that if they're
8 granting the witness, the witness needs to be able to testify to the
9 scope of the -- what's relevant to the motion. The government
10 doesn't get to limit it by what declarations they have put into the
11 record.

12 MJ [COL ACOSTA]: All right.

13 DDC [LCDR PIETTE]: And if they believe we are going outside
14 the scope, they are obviously free to object and deal with that at
15 the time.

16 MJ [COL ACOSTA]: All right.

17 DDC [LCDR PIETTE]: The second is the chief medical officer,
18 and -- one second here.

19 The chief medical officer is relevant because the chief
20 medical officer has a position of overseeing the medical provision at
21 Guantanamo Bay and is particularly relevant ----

22 Let me grab -- I left something at ----

23 MJ [COL ACOSTA]: Please.

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1 DDC [LCDR PIETTE]: I believe it's Section 1046 of the NDAA
2 or -- excuse me, 1036. The chief medical officer is tasked by
3 Congress to provide a report to Congress regarding a number of
4 elements, but having to do with the assessment and quality of medical
5 care provided to individuals at Guantanamo Bay.

6 Sorry. I need to slow down.

7 Again, he's tasked, or she is tasked, with the -- by the
8 NDAA to provide Congress with a report on the conditions and
9 provision of medical care at Guantanamo Bay. Presumably this means
10 they have access to all the medical records, can review the medical
11 records, and the adequacy of medical records, any sort of trauma
12 history.

13 And so this person is going to have broad overview knowledge
14 of whether trauma histories are being conducted, where they're held,
15 any restrictions, perhaps, to taking those trauma histories that are
16 placed on the doctors by any outside forces, if such things exist.
17 That's the extent of what I would be questioning the chief medical
18 officer about, and they would be relevant to the motion in that
19 regard.

20 MJ [COL ACOSTA]: All right.

21 DDC [LCDR PIETTE]: The psychiatrist, you heard testimony from
22 Dr. Crosby about how she hasn't seen medical -- or psychiatric
23 records in a long time. That's because we don't have them. Haven't

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1 gotten them in a long time. For all we know, the psychiatrist has
2 taken a trauma history; we just don't have it. That's something we
3 would like to get onto the record, if the psychiatrist or the
4 medic -- I'm just going to say medical health provider has or has not
5 taken that history ----

6 MJ [COL ACOSTA]: All right.

7 DDC [LCDR PIETTE]: ---- is, again, relevant to the motion.

8 Then there is the Arabic-language interpreter. And that
9 one, as Your Honor noted earlier, Mr. al Nashiri brought up the
10 Arabic-language interpreter. The interpreter was in the room when
11 Mr. al Nashiri told the SMO about being hung from the ceiling and
12 maybe that being a contributing factor. At least that's what
13 Mr. al Nashiri claims.

14 The SMO, in the declaration mentioned before, claims that he
15 was not -- that Mr. al Nashiri didn't say that. The only person who
16 can resolve that dispute is the Arabic-language interpreter.

17 And that's relevant to the motion just because in the
18 declaration the SMO says that if he had deemed that information
19 medically relevant to diagnosis and treatment, he would have put it
20 into the record. And so it's important to know whether he did
21 receive that, or even perhaps whether the translator even translated
22 that and passed it on to the SMO, which, again, would be relevant and
23 perhaps explain why certain aspects of Mr. al Nashiri's trauma

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1 history, whether it's an actual worked-up trauma history or just
2 little pieces of it, have not been put into the medical records.

3 And pending your questions ----

4 MJ [COL ACOSTA]: None at this time. Thank you.

5 DDC [LCDR PIETTE]: Thank you.

6 MJ [COL ACOSTA]: Government?

7 ATC [Capt DANIELCZYK]: Thank you, Your Honor.

8 And I believe I owe you an update as to the CMO. The CMO is
9 on island, Your Honor.

10 MJ [COL ACOSTA]: Okay.

11 ATC [Capt DANIELCZYK]: So first and foremost, 534 is an
12 underlying issue. It's not ripe for consideration at this time. The
13 complaints within the motion and the remedies requested, they all
14 pertain to sentencing.

15 And we're in this state of talking about putting on four
16 additional witnesses and additional litigation, and we're talking
17 about using the time that we should be using to get to trial on the
18 merits. So the number one, not ripe for consideration.

19 Additionally, Your Honor has enough information and does not
20 need a evidentiary hearing. You know, the issue again, as defense
21 said, will be fully briefed, I believe by tomorrow. And really, the
22 focus that we're talking about here in 534 is this meeting between
23 the SMO and the accused, and there's some more broad language about

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1 the adequacy of those medical records.

2 Now, defense is really in this case -- seems like they're
3 trying to relitigate issues that have already been heard and settled
4 by this commission, and I'm talking about AE 205, 367, and 371. 534
5 is a repackaging and, really, a different angle of attack on these
6 issues that have already been settled.

7 And moreover, Your Honor, defense has what it seeks. AE
8 534, their whole issue, they're saying that they don't have the
9 evidence to present to a panel on sentencing. But that's just not
10 true.

11 They have thousands of pages of discovery in the AE 120
12 series, including the classified record of medical care while the
13 accused was in CIA custody. They have the SSCI Report that I know we
14 talked about today, and the treatment of the accused is documented
15 within that.

16 And they have the medical records that they themselves
17 attached to the underlying motion; that's Attachment D to AE 534.
18 It's an encounter from -- or encounter with the SMO and the accused
19 on a separate occasion. And in that, talking about the shoulder
20 injury, the SMO writes that it's likely chronic bicipital tendonitis
21 by history, cannot exclude other pathology.

22 And we see that again in what's Attachment F to the
23 government's response in AE 534C, and that's the radiology report.

1 And that, again, notes the shoulder irregularity, and it states that
2 it may be secondary to prior trauma. That's in the medical record
3 right now.

4 And this idea -- and defense relies on Skipper v. South
5 Carolina in their filing, and this idea that a disinterested witness
6 is more impactful, which it's a valid point. But what defense seeks,
7 and that's a doctor saying that this injury was caused by X, doesn't
8 exist. No doctor can definitively say that the accused's injuries
9 were caused by this or that. At this point, there's just -- that's
10 not going to happen.

11 And in the same vain, a doctor writing in the record the
12 accused told me this, that this was caused by trauma or torture or
13 whatever you want to call it, that's not disinterested either.
14 That's still from the accused's mouth.

15 So either way, the truly disinterested evidence is already
16 in defense's possession. That's the AE 120 series discovery and
17 litigation, SSCI Report, and the existing medical records.

18 Now, turning specifically to the witnesses requested,
19 defense still has to satisfy their burden. And the 703 burden is not
20 only relevance, that we heard from defense counsel, but it's also
21 necessity. And part of necessity is that those -- testimony from
22 those witnesses is going to contribute to their case in a positive
23 way. And that's really what was lacking in defense's production

1 request.

2 We covered the SMO. Government, as defense stated, granted
3 within the scope of the declaration. And, Your Honor, it shouldn't
4 be an open door, and that's why there wasn't a limit there.

5 Some of the language defense used in that request suggested
6 that it was going to be an open door. They talked about the SMO
7 could testify to specific injuries of the accused, but they didn't
8 list what specific injuries. They didn't list a time frame. Were
9 these injuries in U.S. custody? Were they not? So that's why there
10 was at least an attempt to put a scope on the SMO's testimony.

11 Now, Your Honor, given the CMO, the CMO's not necessary in
12 this case either. It's a purely administrative role. The CMO is not
13 included in the development, in drafting of medical records, which
14 is, again, the substance of defense's underlying motion.

15 There's no proffer of exactly what the CMO will testify to.
16 Defense purely says they can testify to this. It really -- it reads
17 more like a job description of CMO's responsible for this, but
18 there's never that connection, the CMO will testify, and that's what
19 moves our case in a positive direction, that's what contributes to
20 the motion in a positive way.

21 Now, moving to the psychiatrist, again, psychiatrist here
22 isn't relevant and necessary either. AE 534 is all about medical
23 records. But in the same breath, defense says that they don't want

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1 to talk about medical records with the psychiatrist. So if defense
2 calls the psychiatrist -- and we've kind of gotten into this a little
3 bit today. If the defense calls the psychiatrist, the implication is
4 that the medical records are insufficient in some way. But those are
5 medical records the government doesn't have access to, and we should
6 be provided those to review prior to that psych's testimony.

7 But at the same time, again, like I said, they're talking
8 out of both sides of their mouth, they're not making the connection,
9 they are not saying the psychiatrist will say this, and this moves
10 our motion in a positive direction.

11 Finally, Your Honor, the interpreter. Now, again, we're
12 talking about the necessary standard of R.M.C. 703. Now, Your Honor
13 gave an analogy earlier this week of the red light versus green
14 light, and granted that was in a -- I believe it was a cumulateness
15 analogy, but it's true in this as well.

16 And in this case the SMO says light is red, the accused says
17 the light is green, and the interpreter, defense says, can break the
18 tie. But they never make the connection to say that the
19 accused -- or, excuse me, the interpreter agrees with the accused
20 that the light was green. That would be moving their case in a
21 positive direction.

22 We shouldn't be producing these witnesses just to ask them a
23 litany of questions about their job. That's more appropriate for

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1 discovery. That is not relevant and necessary.

2 Now, Your Honor, there is also some level of concern about
3 placing the interpreter in that position. As Dr. Crosby talked about
4 today, these detainees have a special relationship, and they build
5 trust with people who work with them closely. And putting the
6 interpreter in this position to potentially contradict one of
7 them ----

8 MJ [COL ACOSTA]: One of who?

9 ATC [Capt DANIELCZYK]: ---- undermines that trust ----

10 MJ [COL ACOSTA]: One of who? A detainee or a doctor?

11 ATC [Capt DANIELCZYK]: The accused. Putting that interpreter
12 in the position to contradict the accused would undermine the trust
13 already built and potentially undermine operations and -- just
14 further operations in the detention center.

15 Now, just wrapping up, Your Honor, you don't need to take
16 more testimony to settle 534. You have everything you need. I ask
17 you to look and to read the attachments in the motions already
18 submitted. Accordingly, the government asks you to deny the motion
19 to compel and deny the underlying AE 534.

20 MJ [COL ACOSTA]: I'm not taking argument on the motion
21 in -- itself right now because that's -- remember, it's not briefed.

22 ATC [Capt DANIELCZYK]: Yes, Your Honor. I understand.

23 MJ [COL ACOSTA]: Go ahead.

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1 ATC [Capt DANIELCZYK]: That's all I have. Thank you.

2 MJ [COL ACOSTA]: Thank you.

3 Defense?

4 DDC [LCDR PIETTE]: Yes, Your Honor. I'm not sure how much of
5 that to respond to since it seemed like the first, in fact, bulk of
6 that was arguing the underlying motion about ripeness.

7 MJ [COL ACOSTA]: Well, the bulk of the argument against the
8 witnesses is you don't -- either you say we'd like to ask this person
9 this question, which has the -- rhymes with taking discovery from
10 somebody as opposed to saying, hey, we're going to call somebody and
11 they're going to tell you we want to present this evidence of the
12 following, that this witness is going to testify, based upon
13 our -- you know, I know the limitations that the defense has in this
14 case that is different from other cases in that you don't generally
15 have access to all of these personnel to ask them what they're going
16 to say, which the government does not address.

17 And the -- and the fact that it -- did you seek answers to
18 any of these questions prior to putting them on your list or did you
19 ask -- you know, in your ability to ask questions of individuals, did
20 you ask the government: Can we please interview this interpreter and
21 ask him what he was told? I'm assuming it's a he. I don't know if
22 it's a he or a she.

23 DDC [LCDR PIETTE]: We have now, but to be ----

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1 MJ [COL ACOSTA]: You have now?

2 DDC [LCDR PIETTE]: Yes. To be frank ----

3 MJ [COL ACOSTA]: What is -- define "now." I know -- now is
4 right now.

5 DDC [LCDR PIETTE]: Yes, sir.

6 MJ [COL ACOSTA]: When did you do it?

7 DDC [LCDR PIETTE]: After we submitted the witness request.
8 In fact, I think it was just ----

9 MJ [COL ACOSTA]: I got the witness -- I got the witness
10 request yesterday, so you did it since yesterday?

11 DDC [LCDR PIETTE]: It was either -- it was as late as
12 yesterday, as early as two days before today.

13 MJ [COL ACOSTA]: Okay. And have you spoken to that
14 interpreter?

15 DDC [LCDR PIETTE]: No.

16 MJ [COL ACOSTA]: Okay.

17 DDC [LCDR PIETTE]: No. We got a response from the government
18 that they are going to forward our requests on.

19 MJ [COL ACOSTA]: Okay.

20 DDC [LCDR PIETTE]: And so what that means ----

21 MJ [COL ACOSTA]: For any of these individuals, have
22 you -- were -- did you seek to speak to all of them?

23 DDC [LCDR PIETTE]: Yes.

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1 MJ [COL ACOSTA]: Okay. And were you denied all of them as
2 well or not yet answered?

3 DDC [LCDR PIETTE]: Not yet answered. The government
4 responded that they are putting out the requests to the SMO, CMO,
5 psych, and interpreter. Well, actually, my understanding is that
6 they ----

7 MJ [COL ACOSTA]: You have a declaration ----

8 DDC [LCDR PIETTE]: ----- put out a declaration to the
9 SMO ----

10 MJ [COL ACOSTA]: You have a declaration from the SMO,
11 right ----

12 DDC [LCDR PIETTE]: Yes.

13 MJ [COL ACOSTA]: ---- from the government, right?

14 DDC [LCDR PIETTE]: Yes, but we haven't spoken to the SMO ----

15 MJ [COL ACOSTA]: Right.

16 DDC [LCDR PIETTE]: ---- just the government. And so I think
17 that they have probably put out the request -- you'd have to ask
18 them -- but to the SMO and then are waiting until your ruling on this
19 to forward my request to speak to the witness until after it's
20 granted.

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

22 Government, is that correct? They're not allowed to talk to
23 them until -- you've told them that you're not going to forward their

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1 request to speak with these potential witnesses based upon my
2 ruling -- pending my ruling? Is that accurate, Captain Danielczyk?

3 ATC [Capt DANIELCZYK]: Your Honor, I don't recall saying
4 that. I believe what I told defense counsel ----

5 MJ [COL ACOSTA]: Whether or not you said it, is that what
6 you're doing?

7 ATC [Capt DANIELCZYK]: No, Your Honor. That was passed
8 along.

9 MJ [COL ACOSTA]: You passed on the requests?

10 ATC [Capt DANIELCZYK]: I did, to our helping partners down on
11 the island.

12 MJ [COL ACOSTA]: Okay.

13 DDC [LCDR PIETTE]: Okay. Understood. Yep. That was my
14 interpretation of it as I was standing up here. I initially
15 understood it to mean he was forwarding it to everyone but then I
16 thought maybe it's only to the SMO ----

17 MJ [COL ACOSTA]: Okay.

18 DDC [LCDR PIETTE]: ---- so thanks for the clarification. I
19 did not know, and I did not mean to ----

20 MJ [COL ACOSTA]: It's all right. We're good.

21 DDC [LCDR PIETTE]: ---- assert that the government is doing
22 something that they weren't doing.

23 And so what that means, because we haven't talked to them

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1 yet, I can't put in what they are going to say. I don't think that
2 advancing our case in a positive manner necessarily means a favorable
3 manner. It might be that the interpreter says no, Mr. al Nashiri
4 said nothing of the sort, you know. That is still relevant and is
5 necessary. It advances our case. It moves it forward, meaning it's
6 moved in a positive direction, as opposed to moving backwards, is how
7 I interpret that.

8 And for the government to argue that these are not relevant,
9 we heard them before in their cross-examinations attacking ----

10 MJ [COL ACOSTA]: Let me clear that up. And I apologize for
11 interrupting.

12 DDC [LCDR PIETTE]: Yes.

13 MJ [COL ACOSTA]: They said that it's relevant, but it's
14 relevant for sentencing, perhaps, right? It's relevant for if you
15 get to the point to where you're trying to present it and you already
16 have the material. So that's their argument, and it's really getting
17 to the merits.

18 So I don't -- you know, would it be relevant, if I'm going
19 to take this motion, to what these people are going to say about
20 whether or not items got into the medical record? That's the
21 question that you need to answer. Don't worry about answering the
22 general relevance to the case issue. On this issue, are they
23 relevant and necessary on this issue?

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1 DDC [LCDR PIETTE]: To the medical records?

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

3 DDC [LCDR PIETTE]: Absolutely.

4 MJ [COL ACOSTA]: ---- of this motion.

5 DDC [LCDR PIETTE]: Yes. The SMO is able to talk about
6 whether or not he has seen a trauma history documented in the medical
7 records and been able to apply it in his treatment and diagnosis of
8 Mr. al Nashiri's ailments, to include the shoulder.

9 The shoulder is just an example. And, in fact, I worry that
10 we are getting too caught up in the shoulder. That's just an example
11 of the systemic kind of underlying issue that these -- that there
12 is -- there was no trauma history taken and there's no pass-down from
13 SMO to SMO about that trauma history and treatment plan regarding
14 that trauma history. The SMO can talk directly to that ----

15 MJ [COL ACOSTA]: Right.

16 DDC [LCDR PIETTE]: ---- and the government has granted that.

17 MJ [COL ACOSTA]: That gets to the overall point of your
18 motion, right? Are these people relevant and necessary to -- not
19 about the shoulder ----

20 DDC [LCDR PIETTE]: Yes.

21 MJ [COL ACOSTA]: ---- but about the issue of are the medical
22 records so deficient and so spotty or inadequate that, if your client
23 is convicted, you cannot put on an appropriate sentencing case?

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1 That's what -- that's what -- that's the issue, right?

2 DDC [LCDR PIETTE]: Yes.

3 MJ [COL ACOSTA]: Okay.

4 DDC [LCDR PIETTE]: I think the SMO is pretty clear. I think
5 the government even ----

6 MJ [COL ACOSTA]: We started scattering here.

7 DDC [LCDR PIETTE]: Right.

8 MJ [COL ACOSTA]: Let's come back to the point.

9 DDC [LCDR PIETTE]: Understood.

10 MJ [COL ACOSTA]: The issue is: Are these people relevant for
11 that purpose? The government's point is no, they're not, because why
12 are we talking about this now? That's for later down the line.

13 And your case that you cite is about an individual who was
14 not allowed to present evidence -- or could not present evidence of a
15 particular individual who -- or eyewitnesses about their character to
16 a certain extent and to only have -- or third-party witnesses, and
17 only had to have their spouse or themselves take the witness -- and
18 they -- the Supreme Court said, well, that's going to be seen as
19 purely self-serving.

20 DDC [LCDR PIETTE]: Yes.

21 MJ [COL ACOSTA]: The government's point is, right -- well,
22 you know, that's getting back to the merits. Follow my own
23 instruction. The issue is that's not where we are right now ----

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1 DDC [LCDR PIETTE]: Right.

2 MJ [COL ACOSTA]: ---- and that I should just deny it or delay
3 it until such time as we get to this -- this point in time.

4 DDC [LCDR PIETTE]: Well, we're ----

5 MJ [COL ACOSTA]: Or are you saying that -- why can't I defer
6 this ruling on these witnesses and this motion until such time ----

7 DDC [LCDR PIETTE]: Understood.

8 MJ [COL ACOSTA]: ---- as it becomes necessary ----

9 DDC [LCDR PIETTE]: Yes. Well ----

10 MJ [COL ACOSTA]: ---- so that we can do the other things I
11 need to do?

12 DDC [LCDR PIETTE]: As we've said before, and I'm going to say
13 plenty more times, death is different. This is not a courts-martial
14 where we can put off until sentencing ----

15 MJ [COL ACOSTA]: Putting together the sentencing case.

16 DDC [LCDR PIETTE]: Correct. So that needs to be happening
17 now. It needs to be happening ten years ago.

18 This is -- and these medical records, that's kind of the
19 issue, is that they are not being built. I mean, they haven't been
20 being built for ten years. The government has been denying that for
21 ten years. It's not going to change in between now and sentencing.

22 One moment.

23 **[Counsel conferred.]**

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1 DDC [LCDR PIETTE]: And it's not something that can go back
2 and get reconstructed anyway. So it's ripe right now because it's
3 broken right now. The records are inadequate right now. And they
4 will ----

5 MJ [COL ACOSTA]: Right.

6 DDC [LCDR PIETTE]: Those records -- even if they
7 start -- even if they -- tomorrow or next week when we're done here,
8 the SMO comes in and starts building the rapport and takes a trauma
9 history, that doesn't undo the ten-plus years that -- well, longer
10 than that -- 15, almost 20 years that he's been here without
11 adequate -- without a trauma history or medical records documenting
12 how his torture has affected him.

13 And that's the main thing is we don't want to confuse this
14 with the run-of-the-mill ----

15 MJ [COL ACOSTA]: I'm not.

16 DDC [LCDR PIETTE]: ---- BAH fraud case.

17 MJ [COL ACOSTA]: I'm not.

18 DDC [LCDR PIETTE]: I understand, but I am concerned the
19 government is, and that affects their decisions on who to grant and
20 what to give us in discovery. And so the issue is ripe. It will
21 stay ripe.

22 And the second aspect of that -- and again, I don't want to
23 get too much into this because I suspect I'll be arguing it later

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1 when I argue the motion on the merits, but that's also terribly
2 inefficient.

3 Are we going to -- I mean, we're in year 13 of preliminary
4 hearings right now. Are we going to, after the verdict, if there is
5 a guilty verdict, have another how many years of ----

6 MJ [COL ACOSTA]: Of rehashing litigation?

7 DDC [LCDR PIETTE]: Yes. Absolutely.

8 MJ [COL ACOSTA]: Understood. All right. I've heard enough.

9 DDC [LCDR PIETTE]: Thank you.

10 MJ [COL ACOSTA]: I'll take it under consideration as far
11 as -- I'll take the motion to compel witnesses under consideration.
12 I expect to see your reply tomorrow. Is that when it's due? Today
13 is the 23rd, right?

14 DDC [LCDR PIETTE]: Yes, Your Honor.

15 MJ [COL ACOSTA]: Tomorrow. No penalties for filing early, so
16 if you -- if you have that. I'm sure Mr. Natale wants to look at it
17 one more time, and then I'll see it from there. Okay.

18 That leaves us with tomorrow going into an open session with
19 Agent Sonnem -- Sonnem -- Sonnen. I ----

20 TC [MR. O'SULLIVAN]: Sonnen.

21 ATC [LCDR SCHREIBER]: Sonnen, sir.

22 MJ [COL ACOSTA]: I apologize. Agent Sonnen. Have we
23 resolved that one-line page redaction, Government?

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1 MATC [MR. WELLS]: Sir, I do not know yet.

2 MJ [COL ACOSTA]: Okay. All right. I'll give you broad
3 leeway on the cross on -- or, pardon me, on the cross to go into what
4 you need to, Defense, but let's hear from ----

5 LDC [MR. NATALE]: I understand that, Judge. I think that, in
6 talking to the prosecution, we have a much better understanding ----

7 MJ [COL ACOSTA]: Of what the issue is.

8 LDC [MR. NATALE]: ---- now as to what it will be, versus, you
9 know, in a vacuum.

10 MJ [COL ACOSTA]: Understood. And then I expect counsel are
11 continuing to work their way through the 444 disclosures that
12 have -- or discovery that are -- or production that's been made,
13 continue to do that.

14 But after Agent Sonnen tomorrow, then we will take up the
15 closed -- the brief -- according to Captain Danielczyk, the brief
16 closed session of cross of Dr. Crosby and any redirect in closed that
17 needs to occur off of that.

18 If you'd give me a moment.

19 And I think that that will be the extent of our day
20 tomorrow, which sounds like it could be short, but I'm not making any
21 promises, depending on how long Agent Sonnen -- how long is
22 Agent Sonnen talking for? What is your estimate, just so we can plan
23 on when to tell the court reporters to make a shift?

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1 ATC [LCDR SCHREIBER]: Your Honor, I'm going -- I'm doing some
2 more prep with her tonight, but I'm going to guess an hour for
3 direct.

4 MJ [COL ACOSTA]: Hour for direct?

5 ATC [LCDR SCHREIBER]: Maybe, maybe -- yeah. That's my best
6 guess.

7 MJ [COL ACOSTA]: Okay. If we can wrap that -- my plan will
8 be to start at 0900, wrap Agent Sonnen up, if we can, you know, at
9 lunch, allow everybody -- I will give the court reporters enough time
10 during lunch to move the equipment down here to take up and do the
11 closed session in the early afternoon and go from there.

12 So closed session will begin at -- after the lunch break
13 tomorrow, again, or 30 minutes after Agent Sonnen, whichever comes
14 closer. Okay.

15 Any questions on how we're going to proceed? Government?

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

17 MJ [COL ACOSTA]: Defense?

18 LDC [MR. NATALE]: Your Honor, there are people who are going
19 to need to check in in order to be able to be ----

20 MJ [COL ACOSTA]: Oh, to travel.

21 LDC [MR. NATALE]: ---- in the RHR in order to conduct their
22 business up there. So I don't -- I think if it's the normal -- what
23 is it, 11:30 that we can get there, 11:00 or whatever ----

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1 MJ [COL ACOSTA]: Right. Government?

2 MATC [MR. WELLS]: Your Honor, it's open until 1700 tomorrow,
3 so I think we'll have plenty of time to adjust and make that
4 tomorrow.

5 MJ [COL ACOSTA]: Right. You should have time after, and I'll
6 make -- if time has not appeared, I will give -- I will make a time
7 appear during the lunch break to give you more time to get over
8 there.

9 LDC [MR. NATALE]: Thank you for that consideration.

10 MJ [COL ACOSTA]: Yeah. Wherever we fit it in, right -- if we
11 finish with Agent Sonnen in the morning and that extended lunch
12 period and time for the court reporters to come down, I will -- you
13 can use that, obviously, to get your check-in done.

14 And to the extent that my word on that means anything, tell
15 them to please make all of our travelers from both sides who are
16 going the priority to go. I'm not going anywhere, so we're not going
17 to be in line. Go over there, get -- get in line and make -- counsel
18 for both sides need to be priority to get out -- to get back over
19 here.

20 LDC [MR. NATALE]: Thank you, Your Honor.

21 MJ [COL ACOSTA]: Okay. All right. If there's nothing else,
22 the commission is in recess until 0900 tomorrow.

23 **[The R.M.C. 803 session recessed at 1614, 23 February 2023.]**

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