[The R.M.C. 806 session was called to order at 1325, 29 April 2022.]

MJ [COL ACOSTA]: This closed commission session is called to order pursuant to my previous order earlier this week.

Government, all parties present as before?

TC [MR. MILLER]: No, Your Honor. The FBI personnel are no longer here, but otherwise, all same personnel.

MJ [COL ACOSTA]: Excellent. Defense?

LDC [MR. NATALE]: Your Honor, all the personnel could be here. Some may be going back and forth, but they're all the same individuals.

MJ [COL ACOSTA]: Okay. Nobody new?

LDC [MR. NATALE]: No, sir. Nobody new.

MJ [COL ACOSTA]: Okay. All right. This closed session -- this portion of the closed session will be taken up with regard to a 359/398. Government -- pardon me, Defense, you have -- or, pardon me. Is it the government's witness, the JDG commander?

ATC [MAJ ROMEO]: Yes, it is, Your Honor.

MJ [COL ACOSTA]: You may proceed.

ATC [MAJ ROMEO]: Thank you, Your Honor. I'd like to call Colonel William Rogers, Joint Detention Group Commander.

Okay, sir. Please stand and raise your right hand.

COLONEL WILLIAM ROGERS, JOINT DETENTION GROUP COMMANDER, U.S. Army, was called as a witness for the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the Assistant Trial Counsel [MAJ ROMEO]:

Q. Okay. Thank you. Please have a seat. Okay, sir. First of all, can you state and spell your full name for the court reporters.

MJ [COL ACOSTA]: You don't need to spell your name.

A. Okay.

ATC [MAJ ROMEO]: Yes, sir.

MJ [COL ACOSTA]: You never -- and just -- Counsel, stop asking them to spell their name. They don't have to do that. They've given the witness list to the court reporters. I expect you to give that to them there, so we can stop doing with the spelling, but thank you. Go ahead.

ATC [MAJ ROMEO]: Yes, sir.

Q. Okay. Colonel Rogers, what is your current billet with Joint Task Force Guantanamo Bay?

A. I'm the commander of the Joint Detention Group and the deputy commander of JTF-GTMO.

Q. Okay. Can you provide for the commission a brief summary of your military experience?

A. I've been in for just over 27 years. Started out three

years enlisted. Got commissioned through the Green to Gold Program. I'm active duty, have served all those years on active duty as a military police officer. Platoon leader time at Fort Hood; company commander in OIF 1 in Baghdad; followed by SGL or small group leader time at the MP school at Fort Leonard Wood; ILE, promotion to major.

From there I went to Fort Bragg where I deployed back to Afghanistan for -- I was the brigade operations officer for OIF 9-11, where I was the operations officer over the Bagram theater internment facility and the detention facility in Parwan. Excuse me.

Following Afghanistan I went back to Fort Bragg, did my brigade XO time. From there I went to, back to Fort Leonard Wood, did concepts, development for the maneuver school -- or the maneuver support school. From there I got selected for battalion command. Did my battalion command time at Fort Stewart, Georgia where served as the director of emergency services and the battalion commander.

From there I went to D.C. Did my joint staff time with the Office for Regular Warfare in the Pentagon. Selected for and attended the Eisenhower School for my senior service college on Fort McNair.

The last job I had before coming here was the -- I was the G-2 and G-3 or the intel officer and operations officer for the U.S. Army CID command in Quantico, Virginia.

Q. Do you have detention operations experience?

A. I do. I was -- as I said, I was the operations officer for the [redacted] in Bagram, Afghanistan, from July of 2009 until the end of July 2010. During that time we were the first MP brigade deployed to Afghanistan and we took over the detention mission.

So for the first four or five months we served that -- served as the headquarters in charge of all detention for the theater internment facility at Bagram Army Air Field.

From there, we constructed and moved that operation to what's now known as the detention facility in Parwan or the new prison on Bagram.

Q. Sir, so it's safe to say you have at least general knowledge of the detainee operations?

A. I do.

Q. Okay. How long have you been here at -- at the joint defense -- or Joint Detention Group?

A. I arrived here in June of 2020, took command in the first week of July 2020, and been here ever since. So just over 22 months.

Q. Okay. What are your roles and responsibilities as JDG commander and as deputy JTF commander?

A. As the JDG commander I provide command oversight to all the military police forces under the Joint Detention Group. When I first got here, it was [redacted] battalions with subordinate companies

underneath. [redacted] battalion was focused on high-value detention operations and security operations, so the Camp VII operation. [redacted] Battalion, which had at that time the mission for Camp V and VI for non-high-value detainees. Since I've been here, that has reduced [redacted] all of which I'm responsible for conducting both high-value detainee and non-high-value detainee detention operations.

As the -- so I run the day-to-day. I have oversight over that. The battalion commander does the hands-on tactical operations, but I have organizational and operational oversight of all detention operations within the JTF.

As the deputy JTF commander, my primary focus is on intelligence, kind of managing the oversight of some of the intelligence along with the JTF J-2, and then running the day-to-day operations for the operations of the entire JTF as well as maintaining my oversight over the detention operations.

Q. So do you have direct supervisory authority over all the various subordinate groups of the Joint Detention Group?

A. I do.

Q. Okay. So just shifting, sir. Are you familiar with the accused in this matter, Mr. Abd al Rahim Hussayn Muhammad Abu Al-Nashiri?

A. I am.

Q. How so?

A. I know him better as ISN 15 or 015. I know him more better -- or better by their ISN numbers than their actual names. I know he's an HVD. He's been here since, I think, approximately 2004, 2005, and is -- was a -- as an HVD he was in Camp VII from the time that that facility was -- he's been there until we transferred him approximately one year ago, Easter weekend. I think it was April 4th of last when we transferred him to Camp V.

Q. And is that where he's currently detained?

A. He's currently detained in Camp V, yes.

Q. Are you familiar with Mr. Al-Nashiri's motion sickness condition when he travels to attend commission proceedings to this courtroom?

A. I've been talked to -- or I've discussed that with the SMO. I mean, it's known. I think prior to my arrival a couple of years ago, one of the reasons that we went from the smaller kind [redacted] to the larger [redacted] vehicle, [redacted] was partly because of 15's motion sickness. So, yes, I'm aware of the motion sickness.

Q. Okay. And you've touched on it a little bit, but can you go into a little bit more detail regarding the transportation procedure from Camp V to where we are now, Courtroom 2.

A. Yeah. So typically what happens is Camp V, and I'm sure you're familiar with it, [redacted]

Q. [redacted]

A. [redacted]

Q. And how long does it typically take from -- for the actual transportation, you know, [redacted]

Q. Okay. Have you received any complaints from the accused about the effect of the ride on his health?

A. I have not received any complaints directly. I know that our medical team, the Joint Medical Group, offers 015 the opportunity to take motion sickness medicine prior to those trips. I'm not aware if he takes it for every trip. I know that he does accept to take that medicine for some trips.

Q. Okay. Now, I believe you said that -- that you have consulted the SMO regarding this transportation. Have you also consulted him with any -- regarding any other medical issues regarding Mr. Al-Nashiri?

A. No. We've primarily talked about, you know, the configuration of the [redacted] vehicle, how that -- you know, what we can do to combat or to -- to lessen the effects of riding in the back of the van.

Q. Okay. So -- so you've taken these different measures, is that what I'm understanding, to accommodate Mr. Nashiri? Is that -- my understanding correct?

A. It's my belief that in the past it was common practice for the Joint Detention Group [redacted]

Prior to my arriving here, I believe the previous Joint Detention Group commander ended that practice and we have not done

that practice since I've been here.

[redacted]

Q. Okay. Sir, are you familiar with Mr. Al-Nashiri's request to stay [redacted] at the ELC during commission proceedings?

A. Yes.

Q. Would there be any challenges if accommodations were made [redacted] him at the ELC during these proceedings?

A. [redacted] I believe the challenge is that as the Joint Detention Group Commander, charged with ensuring humane detention, [redacted]

There's other things that we provide the detainees, as I understand the DODI and I understand my -- the joint staff exhort that I'm supposed to provide that I'm unable to provide here if Mr. Nashiri [redacted]



Q. Okay. And why would you need medical, recreation, those type of facilities in a detention center?

A. I understand from, I think it's DODI 2310.01E, that I am directed by policy, U.S. government policy, to provide those things. I -- I must provide a recreation space. I must provide access to adequate medical care. I must provide those things in which -- in normal routine detention.

That DODI [redacted] it also directs me as the detention commander to only use those segregated or administrative areas for the time in which they're actually needed for whatever is occurring, whether that's an administrative hearing or any type of law enforcement questioning or medical care.

Q. And DODI, is that a -- what is that?

A. Department of Defense Instruction. I'm sorry.

Q. Sir, please describe the effect that meeting this accommodation -- in other words, having accommodations made for Mr. Nashiri [redacted] at the ELC, [redacted]

The other things -- and I think my -- my larger challenges [redacted] all of those things I think I would have to coordinate with WHS or OMC to provide as a joint effort.

Q. Have you had an opportunity to review the testimony of Colonel Steven Gabavics before this commission on 16 December 2016?

A. I did.

Q. And have you had an opportunity to review the testimony of Colonel Steven Yamashita on 11 January 2019 before the Hadi commission which the accused submitted before this commission in support of this request?

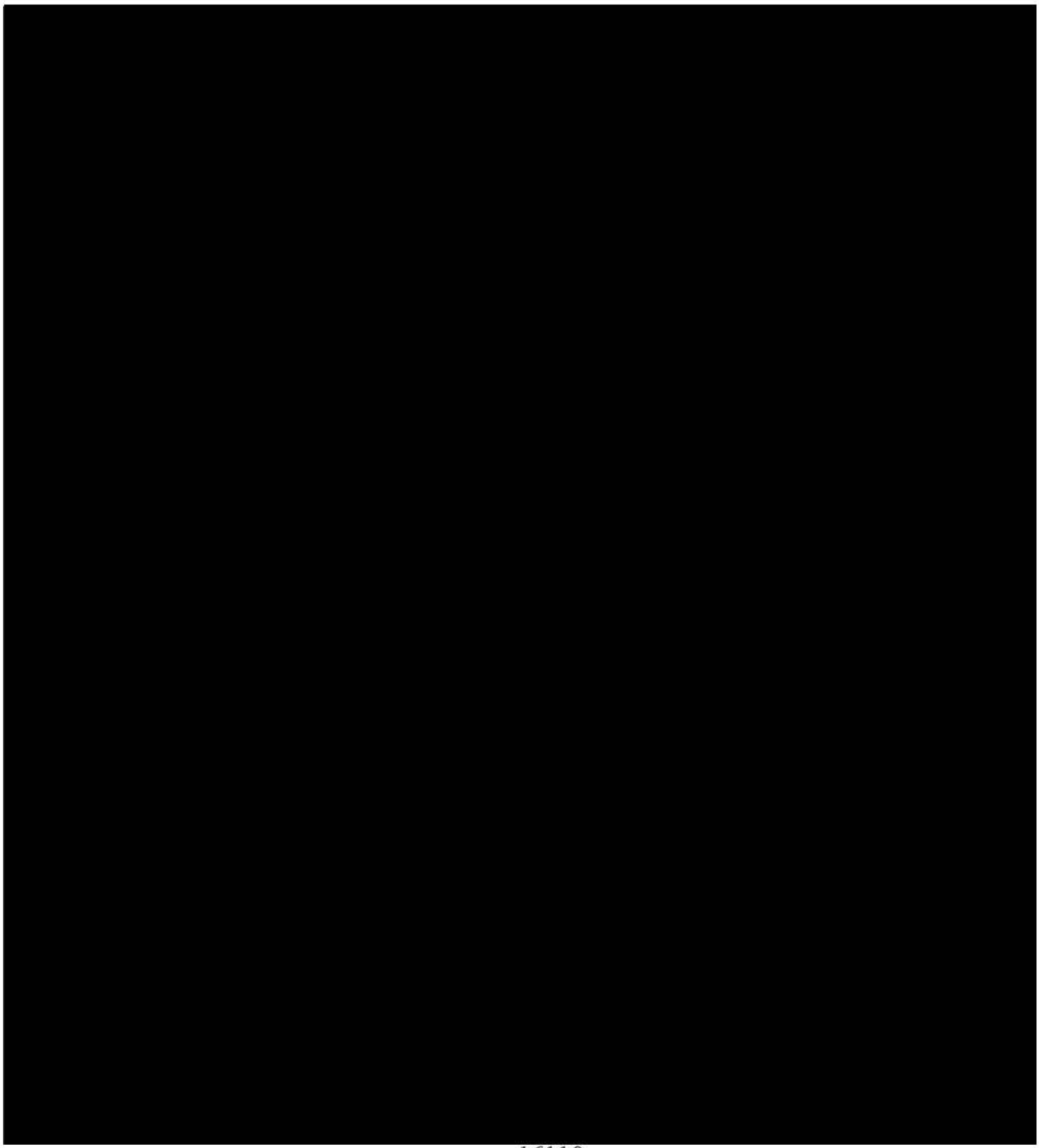
A. I did.

Q. Okay.

ATC [MAJ ROMEO]: And, Your Honor, for the record and for your reference, the Colonel Gabavics' testimony is located on pages 7734 through 7866 of the 17 -- or, excuse me, 16 December 2016 transcript. And Colonel Yamashita's testimony is Attachment B of the defense's filing of AE 359EE (Sup).

Q. Colonel Rogers, at the time that Colonel Gabavics and Colonel Yamashita provided testimony, did they hold the same position that you currently hold now?

A. They did. They were both Joint Detention Group commanders. They were not the deputy commander of the JTF.



[redacted]

In addition, since I have been here, [redacted]

[redacted]

Q. All right. Sir, I'd like to move to another topic. Can you please inform the commission where Mr. Nashiri and his attorneys currently meet for attorney-client meetings.

A. It's my understanding that the -- that Nashiri and his defense team [redacted] has met in Echo II, [redacted]

Q. Okay. What location do other attorneys for other detainees here at Guantanamo Bay meet their clients?

A. In the time I've been here, the attorneys have met in one of three spaces. The ELC -- and when I say the Expeditionary Legal Complex, I know that some meetings have taken place in the courtroom. Some have taken place in the holding cells that are adjacent to this building. Some have taken place at AV-34, [redacted] And then some take place at Echo II [redacted]

Q. Are you aware of Mr. Al-Nashiri's past history at Echo II?

A. Only in what I've been told or is passed down, you know, in historical documents. I don't know how accurate they are. I know that -- that 015 has been there [redacted] for meetings with other governmental agencies.

[redacted]

A. Only in what I've read in relations to the preparation for this testimony over.

Q. Okay. I'd like to show you [redacted] and ask that you identify them.

ATC [MAJ ROMEO]: Your Honor, may I ask for permission to use the ELMO?

MJ [COL ACOSTA]: [redacted]

ATC [MAJ ROMEO]: [redacted]

[redacted]

MJ [COL ACOSTA]: That's what I want to hear.

ATC [MAJ ROMEO]: Okay.

MJ [COL ACOSTA]: [redacted]

[redacted]

ATC [MAJ ROMEO]: Yes, they are, Your Honor.

MJ [COL ACOSTA]: Because if not, you're going to have ----

ATC [MAJ ROMEO]: Right.

MJ [COL ACOSTA]: ---- a fight with the court reporter and I don't want you to have to do that.

ATC [MAJ ROMEO]: Yes, sir.

MJ [COL ACOSTA]: All right. Keep going.

ATC [MAJ ROMEO]: Okay.

MJ [COL ACOSTA]: You can use the ELMO.

ATC [MAJ ROMEO]: Okay.

Q. [redacted]

A. I can.

Q. [redacted]

[redacted]

Q. [redacted]

A. [redacted]

Q. Okay.

DDC [MS. MORGAN]: Judge, I've been told that they can't see anything in the RHR on those screens.

MJ [COL ACOSTA]: All right. I need our IT folks here to make sure that it's being projected up to the RHR. Normally somebody pops out of that door and does something. I don't know.

Defense -- Defense, who's handling this for you?

DDC [MS. MORGAN]: I am, Your Honor.

MJ [COL ACOSTA]: Okay. I'm just making sure that I didn't need

to go back and show them [redacted] But if you were here, you saw them.

DDC [MS. MORGAN]: I actually would appreciate -- unfortunately lack some institutional knowledge, so I would actually appreciate if those can be reshown.

MJ [COL ACOSTA]: [redacted]

ATC [MAJ ROMEO]: No problem, sir.

MJ [COL ACOSTA]: [redacted]

ATC [MAJ ROMEO]: [redacted]

MJ [COL ACOSTA]: Okay. So it's -- just identify which attachment it is ----

ATC [MAJ ROMEO]: Oh, sure.

MJ [COL ACOSTA]: ---- for each one that you're showing as you're showing it, please, and that will clean up the record as we go as well. Go ahead.

ATC [MAJ ROMEO]: All right. No problem.

MJ [COL ACOSTA]: Because now you've got me in trouble with the court reporter, so go ahead.

ATC [MAJ ROMEO]: Sorry guys.

Q. [redacted]

MJ [COL ACOSTA]: Have they been able to -- have we been able to confirm that they can see it?

ATC [MAJ ROMEO]: I'll just put this down.

MJ [COL ACOSTA]: All right. I have confirmation they can see it, [redacted]

ATC [MAJ ROMEO]: Okay.

MJ [COL ACOSTA]: And which AE.

ATC [MAJ ROMEO]: [redacted]

MJ [COL ACOSTA]: Thank you.

ATC [MAJ ROMEO]: All right.

MJ [COL ACOSTA]: Go to the next one.

ATC [MAJ ROMEO]: [redacted]

MJ [COL ACOSTA]: Hold on.

ATC [MAJ ROMEO]: Okay.

MJ [COL ACOSTA]: Let them see it.

All right. Finally?

ATC [MAJ ROMEO]: [redacted]

MJ [COL ACOSTA]: All right.

ATC [MAJ ROMEO]: Okay.

MJ [COL ACOSTA]: Pick back up where you were.

ATC [MAJ ROMEO]: [redacted]

[redacted]

Q. And, sir, I'd like to see if you can identify this for the commission.

A. [redacted]

Q. Is that on the other side of that [redacted]

[redacted]

A. [redacted]

Q. Okay. And this is [redacted] of AE 398D [redacted] And, sir, can you identify this?

A. [redacted]

Q. Okay. So before I get to the next picture, just a question about the pictures we've reviewed already. What would be the purpose of that cell that we saw in the first group of photographs I showed you?

A. So my understanding is those -- that cell was used probably

in the -- and I'm not 100 percent sure on these dates -- probably in the 2006/2009 time frame. [redacted]

DDC [MS. MORGAN]: Your Honor, I'm just going to object to the extent that I'm not sure this applies to Mr. Al-Nashiri. And so I don't know there's any evidence that this witness has personal knowledge that Mr. Al-Nashiri was ever here.

ATC [MAJ ROMEO]: Well, Your Honor, the whole point of the government's motion -- I mean, the defense's motions are to determine whether Mr. Nashiri should go to Echo II or not, and we're -- because of evidently past things that happened to him. We're showing the interior of these areas, so ----

MJ [COL ACOSTA]: We've seen them. We've seen the rooms.

ATC [MAJ ROMEO]: Yeah.

MJ [COL ACOSTA]: Can ask him what they're used for and how it applies to Mr. Nashiri. Correct?

ATC [MAJ ROMEO]: Yes, sir.

MJ [COL ACOSTA]: Because now we're talking about just general historical stuff, correct? That's what he's talking about.

ATC [MAJ ROMEO]: Yes, sir.

MJ [COL ACOSTA]: Are you going to get to how Mr. Nashiri participated in that, or no?

ATC [MAJ ROMEO]: I am, sir, yes.

MJ [COL ACOSTA]: Then why don't we get to that part.

ATC [MAJ ROMEO]: Okay, sure.

Q. So let -- okay. So I'd like to move on to [redacted] of AE 098[redacted] Can you describe what this is, sir?

A. [redacted]

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

Q. Yeah.

[redacted]

[redacted]

Q. Okay. To your knowledge, has Mr. Al-Nashiri ever met the ICRC?

A. Yes.

Q. Has that occurred during the time that you've been JDG commander?

A. Yes.

MJ [COL ACOSTA]: Can you confirm where that -- the other piece of paper that you just ----

ATC [MAJ ROMEO]: Oh, I'm sorry.

MJ [COL ACOSTA]: ---- where is it from.

ATC [MAJ ROMEO]: That was [redacted] Your Honor, of AE 398D.

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

ATC [MAJ ROMEO]: Yes.

[redacted]

A. So during the -- during the quarterly meetings with the ICRC, [redacted]

Q. Okay. And has Mr. Al-Nashiri attended those?

A. Yes.

Q. Since you've been here?

A. Yes.

Q. Approximately how many times?

A. I think when we looked at how many times that Mr. Nashiri's attended here, it was 21 times, but I believe that was in the last 36 months. So I'd say the majority of those has been during my time that I've been here.

Q. [redacted]

A. [redacted]

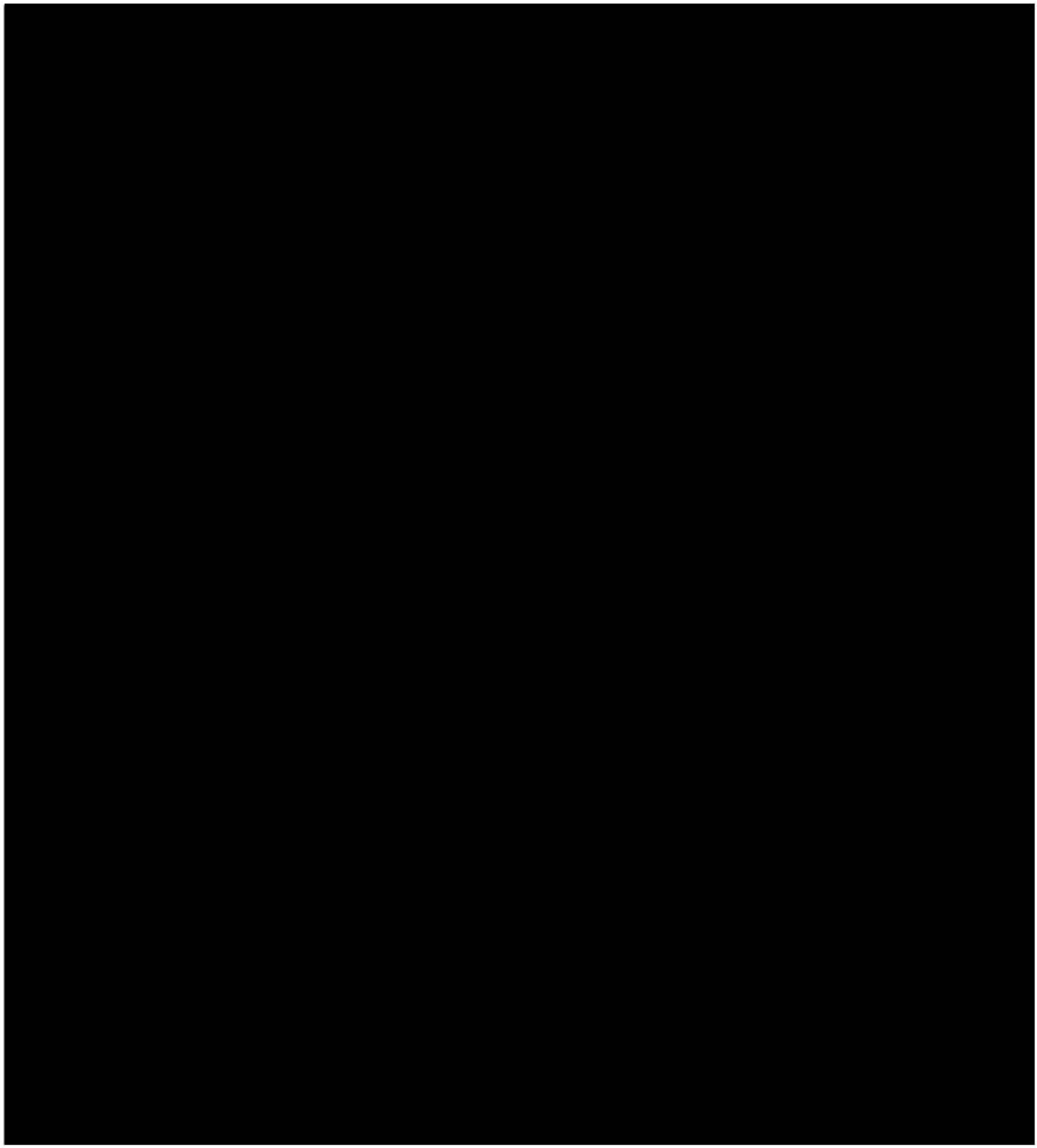
Q. Okay. And this is AE 398, [redacted] I just want to ask you, sir, [redacted]

A. Yes.

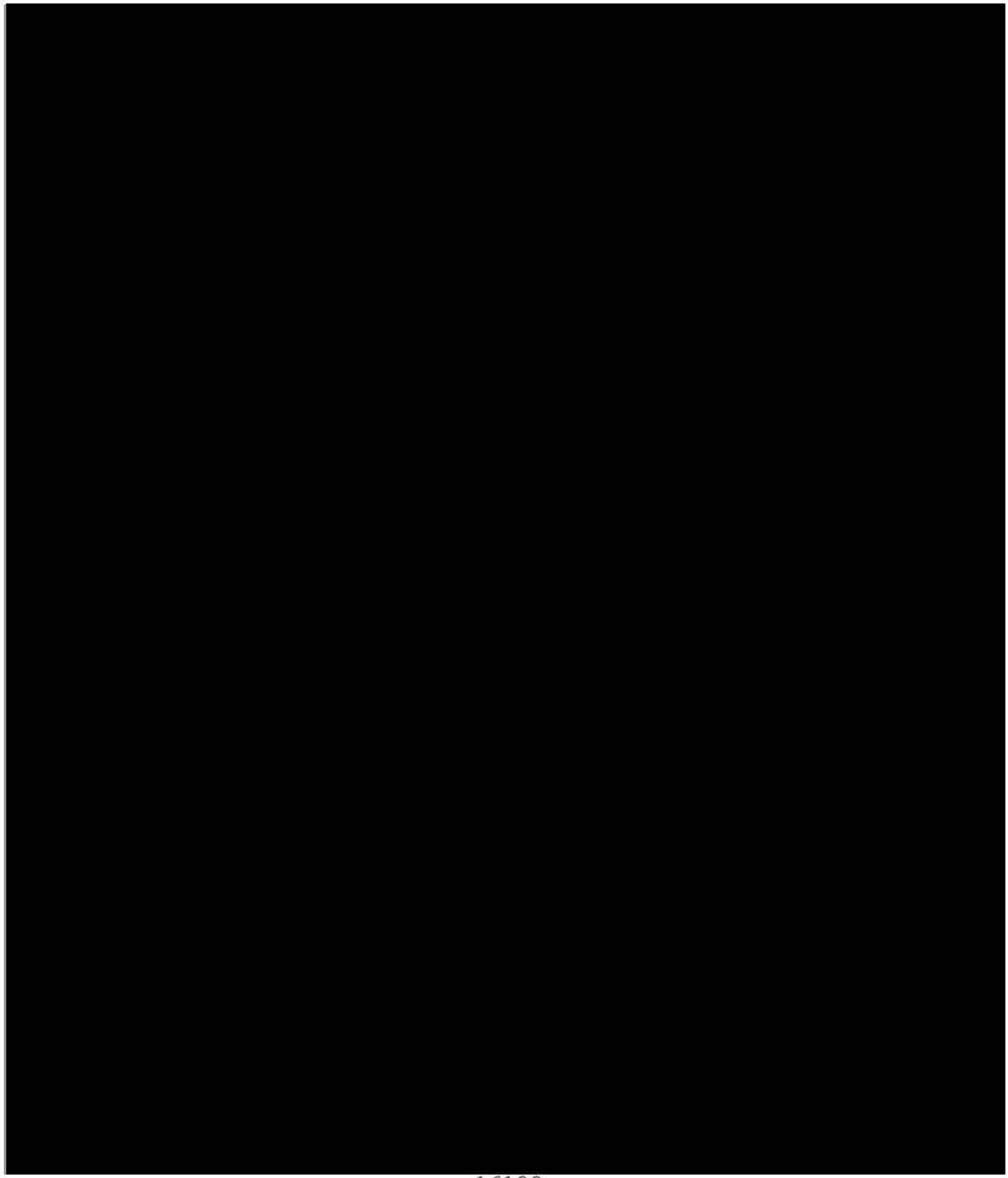
[redacted]

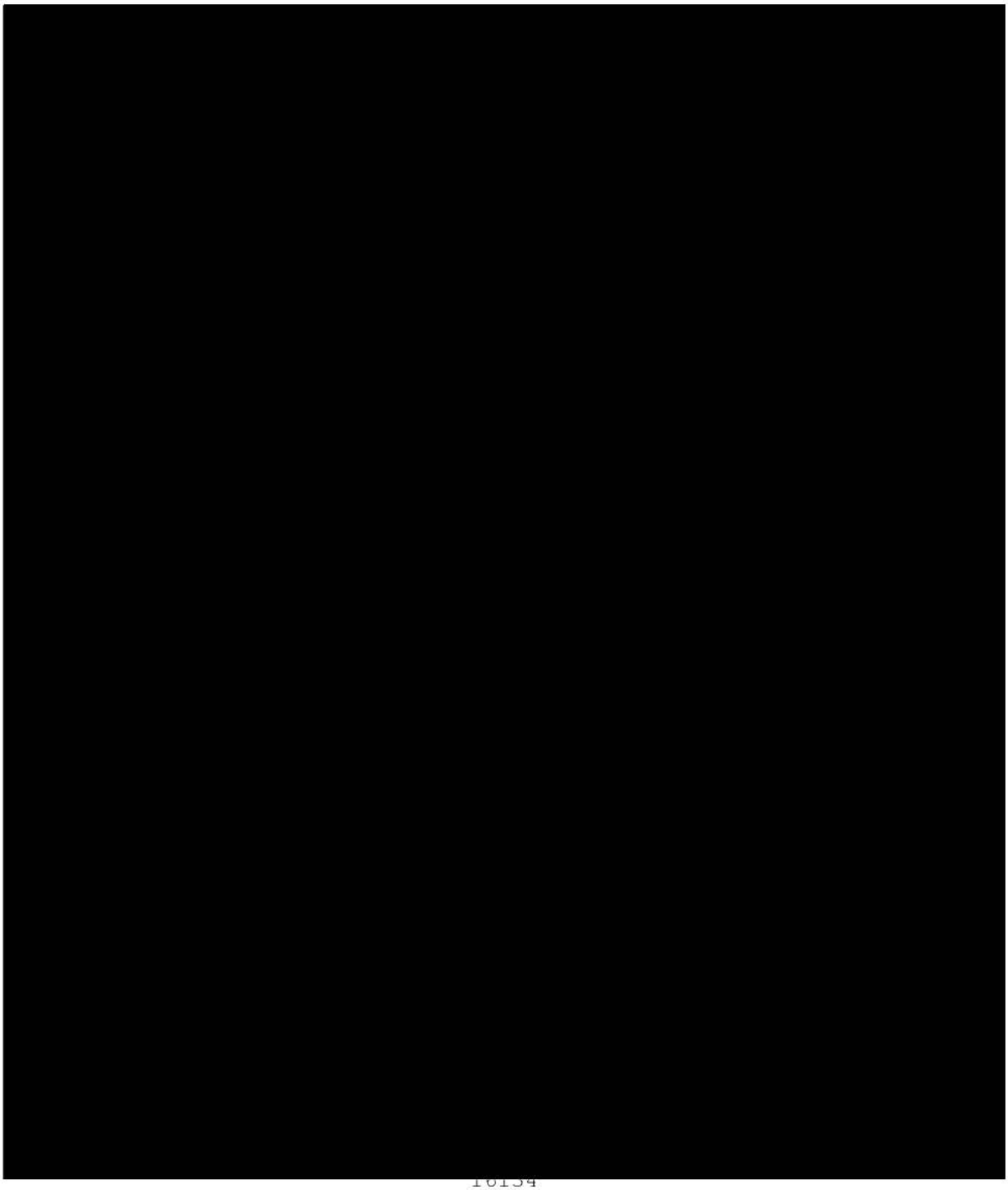
A. [redacted]

~~//TOP SECRET//ORCON//NOFORN//~~
//OFFICIAL/UNAUTHENTICATED//



//OFFICIAL/UNAUTHENTICATED//
~~//TOP SECRET//ORCON//NOFORN//~~







Q. Okay.

ATC [MAJ ROMEO]: Your Honor, I request permission to consult with the trial team.

MJ [COL ACOSTA]: You may.

ATC [MAJ ROMEO]: Okay, sir. I have no further questions at this time for you. I believe the defense may have some for you.

A. Thank you.

MJ [COL ACOSTA]: Defense, cross.

DDC [MS. MORGAN]: Your Honor, may I have just a very brief break to consult with the prosecutor?

MJ [COL ACOSTA]: You need a recess to consult with the prosecution?

DDC [MS. MORGAN]: Yeah, just five minutes.

MJ [COL ACOSTA]: Okay. We're going to take a brief recess. That means during this recess, since you're still on the stand, you're still on the stand essentially during the recess. That means don't talk about your testimony with either the government or the defense during the recess. Can you follow that instruction?

WIT: Yes, Your Honor.

MJ [COL ACOSTA]: All right. We're going to recess. You can step down after the recess the commission.

WIT: Thank you.

MJ [COL ACOSTA]: The commission is in recess for five minutes.

[The R.M.C. 806 session recessed at 1403, 29 April 2022.]

[The R.M.C. 806 session was called to order at 1411, 29 April 2022.]

MJ [COL ACOSTA]: This closed session of the commission is called to order. All parties present when the commission last recessed are again present. The witness is back on the stand.

I'd just remind you, Colonel, that you remain under oath.

Defense, you may proceed.

DDC [MS. MORGAN]: Thank you, Your Honor.

CROSS-EXAMINATION

Questions by the Detailed Defense Counsel [MS. MORGAN]:

Q. Colonel Rogers, I just want to spend a minute talking about what you've had a chance to review prior to your testimony. Talked a little bit about the fact that you had a chance to review the prior testimony of Colonel Gabavics and Colonel Yamashita. Am I pronouncing those names right?

A. Yeah. Gabavics and Yamashita.

Q. Great. Did you have a chance to speak with those two individuals about your testimony at all?

A. No.

Q. Did you have a chance to review anything else prior to testifying today?

A. I looked at the photos that the -- that the prosecution team put up on the screen a few minutes ago. Had a meeting with the prosecution to kind of go over what -- what would happen here today as far as the -- the flow of the events. I reviewed some of our SOPs, our Joint Detention Group standard operating procedures, to be prepared for the movement questions and things like that. Also reviewed -- as that DoD or the Department of Defense instruction I mentioned earlier has just recently been revised, I believe in March, I went back and reread that a couple of days ago.

Q. Understood. And as far as your SOPs relating to high-value

detainee movement, when were those most recently updated?

A. As I mentioned, so it's been a year since we moved from Camp VII to Camp V. We've been in a process of revising all of those SOPs since that time to kind of, since it's under [redacted] now, to get them more similar in nature and not as -- not as duplicative in some cases. I believe the SOP that has to do with HVDs and movement of HVDs was probably -- I've read it, I don't know if I've signed it yet, probably in the last 60 or 90 days.

Q. It's a work in progress?

A. It is a work in progress.

Q. Understood.

How often do you interact with Mr. Al-Nashiri?

A. Other than seeing him when I'm in Camp V, I cannot recall that I've ever had a face-to-face meeting with him or interaction with him.

Q. You testified to your military experience on direct. Is your only experience in detention ops prior to this position the year you spent in Bagram?

A. As a -- as a day-in-and-day-out job, yes. In preparation for this job, coming down, it was during the early stages of COVID. I did not get a chance -- I did get a chance to come down in January of 2020 for four or five days, meet with Colonel Yamashita, see the operation then in preparation for my assignment as the commander.

But, yes, the time in Afghanistan, my trip here in January 2020, was the only time that, other than point of capture in OIF 1 in Iraq, that I spent around detainees.

Q. And that was the -- Bagram is a short-term detention operation, correct?

A. At the time I was there, the average stay of the detainees was 18 months. So some were there for a short duration, some were there for a longer duration. During the time I was there we were partnering with the Afghan National Army to transition the facility to A and A control and government of Afghanistan control for the intention of it being more of a long-term government of Afghanistan facility.

Q. What, if any, training have you received in long-term detention operations?

A. I don't know that any training exists other than having the experience, reading the SOPs, which I did prior to assuming command when I was here in June. And just talking to previous Joint Detention Group commanders, talking to the existing staff that's here as part of the JTF and the JDG to understand some of the historical challenges and -- of the mission.

Q. Have you taken the opportunity to consult with any officials, say within the United States Bureau of Prisons, to understand long-term detention operations?

A. I don't think the Bureau of Prisons does detention operations. I believe they do corrections operations. But no, I have not.

Q. Understood. You discussed that you are aware that Echo II was a CIA black site, correct?

A. I've been told it was, yes.

Q. And that Mr. Al-Nashiri was detained in that CIA black site between late 2003 and early 2004, correct?

A. I don't know the dates he was there with the CIA. I know he transferred from CIA to DoD custody I believe in 2006.

Q. And you discussed the fact that at some point, Mr. Al Nashiri met his attorneys in Echo II, correct?

A. It's my understanding, yes.

Q. In fact, that is -- part of the motion we're here talking about is that Mr. Al-Nashiri's objecting to meeting his attorneys in that location, correct?

A. My -- since I've been here I don't believe he's met with his attorneys in that location [redacted]

Q. In Echo II. Are you aware that historically he has met his attorneys in Echo II and his attorneys are objecting to having to meet in that location at any point?

A. I know the attorneys are objecting to meeting there.

Q. And I am going to go ahead and show you a photograph that you've been shown -- you were shown on direct. I am historically really bad at ELMO, so I'm hoping I'll get this right. It is 398D [redacted]

A. Yes.

Q. And is that your -- is it your understanding this is where he historically had met his attorneys?

A. Again, I'm not sure that he met his attorneys there. I know in the past we've used it for other HVD attorney-client meetings.

Q. Are you aware that that pad was the exercise pen where Mr. Al-Nashiri was held during his stay in CIA custody when Guantanamo Bay was a black site?

A. No, I'm not aware of that.

Q. Retrieving the exhibit.

Were you aware that when Mr. Al-Nashiri -- are you aware of the fact that Mr. Al-Nashiri had historically met his attorneys [redacted]

A. I was not here during those meetings but I have been told and read in historical documents that he met with his attorneys [redacted] yes.

Q. Are you aware of the fact that he stopped meeting -- why he

stopped meeting his attorneys [redacted]

A. [redacted] I don't know if that's the same reason that he no longer meets there.

Q. Are you aware that he stopped meeting his attorneys [redacted]

A. I know that there were devices that were found, believed to be microphones, before I arrived here. But I don't know the outcome of that inquiry.

Q. And after that, Mr. Al-Nashiri began meeting his attorneys in Echo II?

A. I know that no legal meetings took place [redacted] we did move all legal meetings at that time to Echo II.

[redacted]

Q. Were you aware that Al-Nashiri's attorneys were not informed that that location had previously been a black site?

A. No.

[redacted]

Q. Colonel, I apologize. I asked you a different question and I don't think I was very clear, so let me ask you a more clear question.

A. Okay.

Q. I'm only asking a question in relation to Mr. Al-Nashiri. That's the only case that's before us right here. So I recognize you deal with a lot of detainees.

But if this military judge were to order that Mr. Al-Nashiri's attorney-client meetings, so not dealing with any of the other HVDs, but Mr. Al-Nashiri's attorney-client meetings were to happen [redacted]

Q. [redacted]

A. Yes.

Q. I want to talk a little bit about Mr. Al-Nashiri's request [redacted] You would agree that detainee medical needs necessitate some amount of flexibility in Guantanamo Bay's prison accommodations. Is that fair to say?

A. If -- I don't understand what you're asking by flexibility.

MJ [COL ACOSTA]: I'm sorry. Yeah, I didn't understand that either. Can you ask that question again.

DDC [MS. MORGAN]: That was a poor question.

MJ [COL ACOSTA]: That's okay.

Q. Let me just get into it. [redacted]

[redacted]

Q. Okay. So let me bring up two points just to kind of walk through that.

When Mr. Al-Nashiri comes for his commissions proceedings, he doesn't have access to a full suite, correct?

A. No. In that case if there was a medical emergency requiring medical care, he'd go to the nearest facility where that care is provided, and that would be the Naval Station Guantanamo Bay Hospital.

[redacted]

[redacted]

Q. And so if there's a medical emergency [redacted] what happens?

A. Initially, depending on the severity of the illness or injury, there is a triage process where the detainee can be taken [redacted] into a medical space [redacted] diagnosed and/or treated, and transported from there, if necessary, by ambulance to the Naval Station Guantanamo Bay Hospital.

Q. Now, are you aware of whether or not Mr. Al-Nashiri has any emergent medical conditions? And when I'm saying that, I'm talking about heart disease, diabetes, unmanaged blood pressure, things like that?

A. I'm not aware, but I'm not the SMO.

Q. Now, you do have other detainees in your facility that do have emergent health conditions, correct?

A. I do.

Q. [redacted]

A. You'd have to tell me which detainee you're referring to. As far as I know, I've made no arrangements for a detainee [redacted]

Q. Are you familiar with Mr. al-Iraqi?

A. I am.

Q. And Mr. al-Iraqi, in fact, the jumbo cell [redacted] was built to accommodate Mr. al-Iraqi's medical conditions, correct?

A. It was built to accommodate his mobility challenges that he has, his inability to sit for long periods of time, his inability to stand for long periods of time, his frequent use of a wheelchair or walker. [redacted]

Q. So when the government called Colonel Yamashita [redacted]

A. I know that it's been discussed in the past. I am not familiar with the conversation that was taking place with the government and the previous JDG commander, no.

Q. Okay. If you're not familiar, that's fine.

And then I want to talk recreation. [redacted]

A. Currently all the HVDs, [redacted] have access to the recreation yard [redacted]

Q. And are they required to participate or can they elect to participate?

A. They can elect to participate. [redacted] often doing communal prayers in the rec yard, hanging out outside. [redacted]

[redacted]

Q. Are you aware if Mr. Al-Nashiri prays?

A. I'm not aware of his prayer schedule. I know he does participate from time to time, but I don't know if he prays five times a day with the other detainees, no.

Q. Can an individual elect to abstain from recreation?

A. Yes.

[redacted]

Q. ---- correct?

You've also experienced a reduction in detainees, correct?

A. I have.

Q. You're down to about 37 detainees?

A. Yes.

[redacted]

[redacted]

Q. Recently the judge in the 9/11 case, so the five-defendant case -- actually, let me back up before I get into the judge's issue -- the judge's order.

[redacted]



Q. Recently the judge in the 9/11 case issued an order regarding the provision of attorney-client meetings, that there would be meetings every day for each defendant for the week preceding each hearing. You're aware of that, I assume?

A. Yes.

Q. And I assume that you intend to follow that judge's order?

A. Yes.

Q. And then similarly, there have been orders issued in al-Iraqi's case regarding the availability of the meeting with -- Mr. al-Iraqi's ability to meet with his counsel. Are you aware of that?

A. Yes.

Q. And you intend to follow that order?

A. Yes.

Q. And I assume after, I believe you said 27 years in the military, if you're issued an order, you follow it?

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

A. As long as it's -- as long as it's lawful, ethical, and moral, yes.

Q. Absolutely.

ATC [MAJ ROMEO]: Your Honor, I'd like to object.

MJ [COL ACOSTA]: Basis? Just your basis. I don't need your argument. I want your basis.

ATC [MAJ ROMEO]: Okay. Relevance.

MJ [COL ACOSTA]: Okay. That's a good try.

Go ahead. Defense?

DDC [MS. MORGAN]: Your Honor, the government's position is that this is difficult. They brought a lot out in Colonel Yamashita's testimony as far as what was possible. Colonel Yamashita's testimony is, while difficult, if I'm given an order, hooah, I do it. I'm going to ask this witness the same question.

MJ [COL ACOSTA]: Just -- he just gave it to you. He just gave you the answer, correct?

DDC [MS. MORGAN]: Yes.

MJ [COL ACOSTA]: Okay. I've got the answer. I -- like all of

us, if we're given a lawful order, we'll follow it. So I would expect no -- none -- nothing less from anybody that's sitting there.

Okay. Your objection is overruled.

Go ahead.

Q. And so that was a yes, sir?

A. Did you ask a question?

MJ [COL ACOSTA]: The question was -- you've answered it, whether or not you would follow -- if the commission were to order you to do a particular thing, would you follow it?

WIT: Yes, Your Honor.

MJ [COL ACOSTA]: All right.

DDC [MS. MORGAN]: If I can have one moment.

MJ [COL ACOSTA]: You may.

[The DDC conferred with co-counsel.]

DDC [MS. MORGAN]: I have nothing further.

MJ [COL ACOSTA]: All right. Government, redirect?

ATC [MAJ ROMEO]: Yes, Your Honor.

REDIRECT EXAMINATION CONTINUED

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

Q. Okay. Just a few questions for you, Colonel.

I would just like to put up this picture again. This was 398D [redacted] the one that we've -- both parties have shown.

MJ [COL ACOSTA]: Uh-huh.

Q. Do you know when this building was built?

A. No.

Q. Okay. [redacted]

[redacted]

Q. Okay. Thank you. You just answered my next question.

ATC [MAJ ROMEO]: If I could just consult, Your Honor.

MJ [COL ACOSTA]: You may.

ATC [MAJ ROMEO]: Okay. Okay. I have no further questions for you. Thank you very much.

WIT: Thank you.

EXAMINATION BY THE MILITARY COMMISSION

Questions by the Military Judge [COL ACOSTA]:

Q. Colonel, how many more detainees are eligible to move right now, to be released, that you're aware of, that are tracking, that are on the path for release of the 37 that you have?

[redacted]

Q. Okay.

A. [redacted]

Q. Okay. Now, my next question is: The -- the number that you take to stand up the -- this facility that we're in now, whenever we do a case here, the [redacted] you stated? That number you gave, correct?

A. It is. [redacted]

[redacted]

Q. All right. So the -- the meetings where the -- where the other detainees are meeting in -- in Echo II where -- where you're doing each detainee for a day a -- having an attorney-client meeting

every day for the week prior, is that all in Echo II as well?

A. That's all in Echo II. Yes.

Q. The -- if there were -- I know you say that your issue of concern was that it might be difficult to have the -- the accused in this case utilize [redacted] during other commission sessions. What makes that difficult?

A. Particularly, sir, in the Hadi commission, because the order that was mentioned by the defense, the judge's ruling that Hadi al-Iraqi would be afforded [redacted] when he's having attorney meetings or having commissions.

Q. So -- but there's other meeting rooms back there [redacted] correct?

A. There are. They're smaller in size and do not allow for Hadi al-Iraqi to have that freedom of mobility that I mentioned.

Q. Right. But even during the -- the 9/11 five cases, as you refer to it, the -- in that case, if that case were going on, are they all in -- they're all in the separate rooms, right? None of them use [redacted] correct?

A. They will often use [redacted] to meet with multiple clients at one time. The smaller rooms don't allow for that, or don't -- aren't -- aren't comfortable for that.

Q. So it may be difficult during those periods to have the accused meet there but not -- but not during any other proceeding, to

meet [redacted] in general, right?

A. Yes.

Q. Okay. But your guard force, for attorney-client meetings, can accommodate the accused meeting [redacted]

A. Yes, Your Honor.

Q. So there's -- there's other locations where he can be taken into attorney-client meetings that are not Echo II?

A. Yes.

Q. And they may not be the ELC -- they may not be the ELC in general. They could be AV-34, correct?

A. Yes. I know in the past we've used AV-34 for attorney-client meetings.

Q. Okay. All right. And again, if -- if a -- during regular -- I know you -- you said you didn't consult with the -- with the -- you're not familiar with the Bureau of Prisons, which you say -- which you, I'm sure correctly, distinguishing correctional, right, being a prison versus a jail where somebody is taken to -- to -- to wait during a -- a -- to wait during trial, correct?

A. Correct.

Q. And there are holding facilities, right, as an MP you know

that there are holding facilities in MP stations that are not for long-term, correct?

A. Correct.

Q. What's typically the limit for the length of stay for one of those facilities?

A. Depending on how that facility is rated and what it has, at [redacted]

A. It could be if they had the facilities to accommodate those things I mentioned, yes.

Q. What would [redacted] be rated at?

A. [redacted] the way I understand and interpret and -- and the joint staff order along with the Department of Defense instruction, it does not provide for any type of access to recreation area or medical ----

Q. Understood, but there are other holding cells and jails at facilities where people are held for trial that don't have those facilities either in other situations, correct?

A. I don't know of any other that are subject to -- and I'm not trying to be flippant.

Q. No, no, that's okay.

A. I don't know of any other that would do that that are subject to the DODI that I mentioned.

Q. Okay. If the -- if the accused in this case were to waive his right to recreation, would that alleviate the -- the duty to provide it for the limited purpose [redacted]

A. I would not consider that waiving me of the responsibility to provide it, no, sir.

Q. Okay. And there's no hospital over by your -- [redacted] correct?

A. No, sir.

[redacted]

[redacted]

Q. Okay. All right.

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

ATC [MAJ ROMEO]: No, Your Honor.

MJ [COL ACOSTA]: Defense?

RECROSS-EXAMINATION

Questions by the Detailed Defense Counsel [MS. MORGAN]:

Q. All right, Colonel. You're referencing the DODI. I respect you're doing your best to remember what it says. You do not know what level holding facility this is, correct?

A. I don't, no.

Q. Okay. You do not know what amount of time an individual can spend in the cell away from the confinement facility, correct? You're giving me a WAG. You're doing the best you can, right? But you don't know.

A. There is not a set time. [redacted]

Q. I respect that you have not done it, but you do not know

that it cannot be done? I respect you're doing the best you can here. But you don't know that it can't be done, correct?

A. I don't believe it can be done given the current DODI that I follow.

Q. I respect your opinion. You have not done it. You do not know that it cannot be done?

A. No, I do not know that it cannot be done.

DDC [MS. MORGAN]: Okay. I have no further questions.

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

Government, any redirect based upon that?

ATC [MAJ ROMEO]: No, Your Honor.

MJ [COL ACOSTA]: Permanent for the purposes of this hearing?

ATC [MAJ ROMEO]: Yes, Your Honor.

MJ [COL ACOSTA]: Defense, any objection to that?

DDC [MS. MORGAN]: No, Your Honor.

MJ [COL ACOSTA]: All right. Colonel, you're permanently excused for the purposes of this hearing. While the case is in session, don't discuss your testimony or your knowledge of this case with anyone other than counsel for either side. You can step down and return to your duties.

WIT: Thank you.

[The witness was warned, permanently excused, and withdrew from the courtroom.]

MJ [COL ACOSTA]: All right. Counsel, is there any other evidence on 359/398 from either side? Defense, it's your motion. Any other ----

DDC [MS. MORGAN]: Nothing from defense, Your Honor.

MJ [COL ACOSTA]: Government?

ATC [MAJ ROMEO]: No, Your Honor.

MJ [COL ACOSTA]: Are you prepared to argue now or do you want to argue in a closed session next week?

DDC [MS. MORGAN]: Your Honor, I think 359 can be open.

MJ [COL ACOSTA]: I think so too, but I'm just trying to make sure that I -- we seem to cross the streams a little bit when we're talking about these two motions and I -- I'd like it to be able to be open, but I -- I also want to prevent us being shut down if necessary. So can you make your argument on 359 in an open session?

DDC [MS. MORGAN]: Your Honor, if I could have 15 minutes to sit and think, I can give you a definitive answer.

MJ [COL ACOSTA]: Well, here's what we'll do. We won't go into argument on it yet because we have other issues that we need to take up today that I wanted to get to -- that I really wanted to get to today as well. And you all can let your cogent arguments germinate while we talk about the other issues that we need to have in the closed session.

Does any party require a short recess before we start with

3 -- before we pick up with 333?

DDC [MS. MORGAN]: If we can have a brief comfort break.

MJ [COL ACOSTA]: All right. We'll take a 15-minute recess. The commission is in recess.

[The R.M.C. 806 session recessed at 1448, 29 April 2022.]

[The R.M.C. 806 session was called to order at 1506, 29 April 2022.]

MJ [COL ACOSTA]: This closed session of the commission is called to order. All parties present when the court -- commission last recessed are again present. Correct, Government?

TC [MR. MILLER]: Yes, Your Honor.

MJ [COL ACOSTA]: Defense?

LDC [MR. NATALE]: Yes.

MJ [COL ACOSTA]: All right. Brought up bringing up 333 first in this closed session for argument. That's where we are on it, is just argument. Defense, is that you, Ms. Morgan?

DDC [MS. MORGAN]: It is, Judge.

And, Judge, this is a lot of paper in a motion, but I think it's a pretty straightforward argument. When my colleagues filed this back in 2016 they sought the nuclear options. They sought a motion to dismiss with prejudice and then they sought -- and I can give Your Honor a minute if ----

MJ [COL ACOSTA]: No, go ahead.

DDC [MS. MORGAN]: Okay. I didn't know if -- and they sought

JWICS access. And I am no way retreating from those two modes of relief or prayers for relief, but it is not where I intend to spend the bulk of my time.

This is a standard Brady motion. It is not often that you have the opportunity to argue a -- and I believe I -- I said '16 but it actually was filled in 2015.

MJ [COL ACOSTA]: '15, yeah.

DDC [MS. MORGAN]: Yeah. I apologize. It's not often you have an opportunity to argue a seven-year-old motion on a case that is not coming back for a retrial, so this is sort of an odd posture for a case. But the position I'm in really, Your Honor, is to sort of craft some new relief that I'm going to ask for. Bear with us, but I will -- I will walk through it slowly.

MJ [COL ACOSTA]: All right. New relief.

DDC [MS. MORGAN]: Yes. And what I am chiefly relying on when I am discussing this -- the case law hasn't changed. I am still going to heavily rely on United States v. Bowser, the Air Force court opinion 73 M.J. 889 that is cited in the original motion.

The relief I'm asking for was not an option in Bowser. We're going to ask to have death taken off the table. You know, the judge in Bowser didn't have that just because it wasn't a death case.

Also going to ask -- and I'm going to do this in a nuanced way. We are not asking for you to reconsider anything under

M.C.R.E. 505.

MJ [COL ACOSTA]: Okay.

DDC [MS. MORGAN]: However, what I am asking for is that you take my colleagues across the aisle up on their offer in their reply in AE 333A Footnote 2, and also in the trial record at page 786, where they say that you have the authority to sua sponte reconsider the M.C.R.E. 505 presentations. And I think that that is consistent also with Your Honor's ruling in AE 400N.

You have, because of Nashiri III's ruling -- excuse me -- had the opportunity to revisit a number of M.C.R.E. 5 -- I'm sorry. Yeah, M.C.R.E. 505 presentations.

MJ [COL ACOSTA]: So you're not requesting consideration. You're requesting that I request on my own reconsideration?

DDC [MS. MORGAN]: Sua sponte. Now, again, it is nuanced. But it is an invitation that came up on behalf -- by the government. Again, their Footnote 2 in their responsive pleading.

And so -- and I believe I said M.C.R.E. R.M.C. And so in 400N what this military commission acknowledged was that the 505 presentations that had occurred, the summaries that had been done, were lacking. And I'll ----

MJ [COL ACOSTA]: Is that your primary relief that you're requesting?

DDC [MS. MORGAN]: It is -- it is not.

MJ [COL ACOSTA]: Okay. So what's the primary relief? You said you wanted new relief and yet you ----

DDC [MS. MORGAN]: Well, I should say ----

MJ [COL ACOSTA]: Hold on. Talking stick time. The -- with the -- you said there's new relief. Tell me the relief that you want. And normally there's this; if not this, then that; or all. What's your request?

DDC [MS. MORGAN]: Death off the table.

MJ [COL ACOSTA]: Is first?

DDC [MS. MORGAN]: Dismissal is first. I'm not going to ----

MJ [COL ACOSTA]: You're not backing away from that. I gotcha.

DDC [MS. MORGAN]: I recognize the posturing with JWICS. Death off the table. Take the prosecution up on their footnote, and order the prosecution to tell us the universe of discovery that remains in security review. If we are going to prepare for trial in any meaningful way, we've got to know how far we have left to go.

And so the reason -- and I think Bowser really is the right way to frame this case. I think at this point we are probably all really familiar with the facts of Bowser. You're on the eve of trial and you've been -- in full candor, I was the trial defense counsel in Bowser. You're on the eve of trial and you get discovery of two witnesses who are telling an inapposite story to the complaining witness.

That is enough in that case for the military judge to lose confidence in the discovery obligations. And there were other facts there.

Here, we have been on the eve of trial time after time after time. And if you go through the record, it is replete with instances of the prosecution representing discovery is closed, we've given them everything, and representing that they are officers of the court. And if there was anything out there, they certainly would have turned it over.

And at some point you can no longer take those representations as fact. And so this comes up in 2015 because at that time my colleagues had access to JWICS and other systems where they were actually able to find several concrete examples of material, relevant, exculpatory information that the government had failed to turn over and come here and say, hey, court, look, they're not honest brokers. Or, if not honest brokers, they fundamentally seem to misunderstand what their discovery obligations were.

And that was -- that was the issue in Bowser. You had a prosecutor who, to quote the judge, it was first-year Brady stuff. Didn't get it. Didn't seem to realize that a witness who told an inapposite version of the complaining witness' story needed to be disclosed and not minimized.

And that's what you see in the cables that my colleagues had

attached in 333, where these cables are not just important for findings, not just important for sentencing, but actually go to a much more crucial fact. Whether or not jurisdiction even exists.

And you get some really -- Captain Mizer, then-Commander Mizer, actually argues this, I think, particularly well when the very first 505 hearing is argued where he talks about -- and he actually doesn't know everything. But he makes sort of this, like, prescient argument where he talks about the role that he thinks that the [redacted]

[redacted]

And the cables are dated 2000, but they seem to really give this indication that there's a bigger story out there. And we don't get it from the government, Judge. We attached some additional 505 -- or some additional information to our 505 notice for a reason, right? And it may have seemed a little bit odd, right? Why are be attaching discovery we actually did get from the government to a motion talking about Brady that we didn't get from the government?

We did it for a reason, Judge, and I think it's to point out

back in 2015 when Captain Mizer was arguing that motion, he was arguing in a hypothetical, that I think something is there. I think there's something there with this -- with this Colonel Al-Hilah. I think we're missing something. [redacted] Why are we not getting it and we're in the year 2015? And oh, by the way, we were supposed to have trial dates already.

Well, now we're in the year 2022. And in March of 2022 the government finally turned over a factual -- the motion that we have attached to our 505 notice, and it was marked as -- let me get this right -- AE 333E, I believe. E. And it's at page 27 of 46 of that exhibit.

[redacted]

And the government had those cables. So in 2015, when Captain Mizer is making this hypothetical argument to the commission about how important this is, particularly because this is a

jurisdictional issue that we may need to raise, and if it's not jurisdictional, then it sure as heck goes to the merits [redacted] And if it doesn't go to the merits, well then it sure as heck goes to the sentence because mitigating that even if our client is found guilty, well, it goes to his level of culpability.

The government knew this existed. They knew it was in their possession because it was dated the same as other cables and they didn't turn it over.

And it doesn't end there, Judge. And we know it doesn't end there, because the only thing in the defense's possession that in any way, shape, or form talks about [redacted]

But we now know that there's more evidence out there, and it hasn't been discovered to us. We know it because Mr. Wells stood up in front of the commission during the 505 hearing on this evidence and said, well, [redacted] and we sat at defense table and were shocked because we have no evidence of [redacted] And it should be out there, but we haven't gotten it yet.

So what we know is the same position that we were in in 2015 when we filed this motion where there's still discovery that is relevant, that is material, that is exculpatory; we still haven't received it. And at some point the government can't use the, well, it's caught up in security review.

The judge in Bowser had a really interesting sort of perspective on this. You know, and I don't know when it happens. The Air Force court in Bowser ultimately said, you know, there was no reason for delay. The facts in Bowser are not particularly complicated. Bowser was a case involving a 19-year-old allegation of sexual assault between a married couple. So it wasn't the simplest sex assault case that the Air Force runs into, but nonetheless, did not compare to the facts of the case we're dealing with.

However, at some point this commission is going to have to address when is long enough. And what the military judge found in Bowser was the government was still perfecting its case on the eve of trial. The failure to perfect its case in the previous, in that case ten months, was without good cause, and any delay would inure to the government's benefits. The court would not reward the party with unclean hands with that which was desperately needed.

And so, Judge, at some point we have to confront when is the government's failure to turn over this evidence too much. And the defense position is we're there. We've long been there. My

colleagues filed this in 2015 saying we were there then. But we can point to very concrete examples sitting here as recently as this week saying we know it's out there.

My colleagues may stand up and say, well, the defense has to ask us. I would submit to you that is not our obligation. The discovery obligation lies with the government. I merely am pointing this out because I believe that all of us sitting at counsel table were stunned by Mr. Wells' representation.

However, as much as the government -- as much as the record is replete with representations that the government has fulfilled its discovery obligation, the record is also littered with representations that the government is aware of its obligations and, at multiple points, the government has said it is not incumbent on the defense to ask.

Now, I'm aware it was a slightly different prosecution team at that point. But throughout the early history of this case the government has said it is not on the defense. They are aware it is their proactive responsibility.

And, Judge, I'm not just able to point to one example, and I'll give you another very concrete example here. There were a number of questions posed this week to Agent McFadden, Agent Emley, about the HVD PTF, the High-Value Detainee Prosecution Task Force. The defense to date has never received an item of discovery on that.

We are aware of it because we spend entirely too much time reading every other commission's record. The 9/11 team has received discovery on that.

Now, that is not our obligation to read other commissions' records. Similarly, we are not obligated to have read the Hadi al-Iraqi record to discover Colonel Yamashita's testimony, which was also not disclosed to us. But going back to the 9/11 case, that is just one instance we can point to most recently where we are aware of issues that are running parallel in other commissions where discovery is being provided on identical legal issues to other teams that is not being provided to us.

The government was long aware that Agent McFadden and that Agent Emley would be testifying. They were long aware that they were [redacted] They were long aware that they had access to the databases containing information from intelligence agencies about our client. And they were long aware that that was pertinent to the issues relating to Badawi. None of that was discovered.

Agent Emley testified that everything that existed within Al-Nashiri -- within Al-Nashiri's folder was also within Khallad's folder.

MJ [COL ACOSTA]: Was that a definite statement that it existed or that he assumed that it existed?

DDC [MS. MORGAN]: He believed all things existed. But

again ----

MJ [COL ACOSTA]: I'm just going off of my memory of the testimony.

DDC [MS. MORGAN]: ---- the existence of the database has never been disclosed to us. We're getting this from -- from 9/11. And so to the extent I misstate that, Judge, that's not my point.

MJ [COL ACOSTA]: Okay.

DDC [MS. MORGAN]: My point is we're not -- and if I can point to that many open source things, I can't even imagine the universe of things that are classified at every level -- or at any level. And so in very real, very concrete terms, Judge, what Bowser dealt with was very small indiscretions compared to the universe that we're dealing with here. What Bowser stands for, in terms of legal principles, is that the judge has the right, has the authority, to determine a remedy. And so ----

MJ [COL ACOSTA]: For discovery violations, right? That's what you're saying, that this is a discovery violation. Because you've asked for that remedy in another motion that we're going to talk about later today of the death off the table, correct?

DDC [MS. MORGAN]: Correct. And that is, I think, always -- we're going to -- the defense position is that is always within your purview of remedies that can be -- this always was within your -- it's always been in your tool belt. But ----

MJ [COL ACOSTA]: Because even if it's not Brady -- are you saying even if it's not Brady, right, because Brady would require potentially -- would go back to the, you know, your first -- which I know that you're not backing down from, which is the dismissal of the case, right, Brady violations. Even if it's not a Brady violation, you're saying that it's still within the -- within the -- the realm of a -- of a remedy for other discovery violations, or what you state are discovery violations. And I know -- because I'm just saying I know the government is going to stand up and say that there are no discovery violations. I'm just not -- just so that people don't believe that I'm assuming there's a discovery violation. But slower discovery than you're -- than -- whether it's just slow or just not happening or the -- or not there, then a remedy is to take the death penalty to -- essentially to dismiss the death -- the referral of the death penalty.

DDC [MS. MORGAN]: Yes. And, Judge, at some point, I mean, I -- look, the government line has been death -- or, I'm sorry, the government line has been discovery is ongoing and that has been -- I think in 2012 they said discovery was closed adamantly. Since then, the discovery -- the government line has been discovery is ongoing.

I do not want discovery to be closed because that only inures to the detriment of the defense, right? I mean, that's -- that's -- we need the information. But at some point we

need to be able to prepare a case. Particularly because we are now a newly constituted, you know, capital team, we need to know what we're working with.

And so that is sort of where my last remedy comes from, which is tell me whether the universe of what I'm waiting on is 50 documents or whether the universe of what I'm working on is 300,000. But in order to rely on that representation, I also have to know you know what the heck you're doing and are being an honest broker. And I just am not sure that I can after -- what's the phrase? Fool me once, shame on me. Fool me for ten years -- and I'm not trying to be a jerk when I say that. But what I -- I need -- I am hesitant to rely on a representation after this extended period of time that the government is aware of its discovery obligation and is complying with them, based on the number of violations that I can so readily point to.

And so we are asking for a remedy that is meaningful.

MJ [COL ACOSTA]: Do you have any case citations for a judge taking death off the table because of discovery violations?

DDC [MS. MORGAN]: If I can provide some ----

MJ [COL ACOSTA]: Any authority? Authority as -- or any time that that's been utilized? And obviously, it's going to be largely within the state courts that you're probably going to find that, but ----

DDC [MS. MORGAN]: If I can provide supplemental briefing on that, I will do so expeditiously. Off the top of my head, I do not have it. But if I can provide that to the court prior to the -- this hearing session ending.

MJ [COL ACOSTA]: I'll consider whether or not I'm going to ask you to do it or not. Okay.

DDC [MS. MORGAN]: And, Judge, I just would sort of make the final point. The ultimate sort of -- when you're thinking in terms of prejudice, because I do think discovery -- I don't think you're required to find a prejudice because you're not required to find bad faith, but we are forced and have been -- even just in this commission's proceeding, we have been forced to handle witnesses without all of the discovery. I mean, you point just most recently to the testimony of McFadden and the testimony of -- the testimony of McFadden, the testimony of Emley. I'm sorry.

And then what you're also seeing, and I think just as a measure in judicial economy, you've seen it most recently where a flurry of supplemental pleadings. To some extent there's a commissions interest in briefing in this commission being closed out. You saw it most recently in 354. When we have this late discovery, it is forcing us to go back and rebrief issues. That's not in -- frankly, the defense doesn't have the -- the manpower, the institutional knowledge, you know, anything -- but it's also just not

a measure in judicial economy to be forced to revisit issues that should be able to be closed so that we can sort of know what the posture of our case is moving forward.

And so pending any additional questions by the commission.

MJ [COL ACOSTA]: None now. Thank you. I'll allow you -- just be prepared, I'm going to give you a short amount of time perhaps for rebuttal in just a second after I hear from the government.

DDC [MS. MORGAN]: Copy.

MJ [COL ACOSTA]: Who is covering this for the government? Mr. Wells.

MATC [MR. WELLS]: All right, sir. Good afternoon.

MJ [COL ACOSTA]: You may proceed.

MATC [MR. WELLS]: In resolving 333, the government would stand on its brief that there's been no Brady violation, to the extent over time discovery has focused on different issues that both the commission and the defense and the prosecution have looked at as developed, as we've learned the case. I think we've been diligent to respond and provide needed discovery.

I will say, though, the two allegations that were made today, that the two witnesses who appeared today, the information was not disclosed to them, I would ask the defense to go back and review Mr. McFadden -- Special Agent McFadden's 2017 testimony in front of this commission and also Gaudin's testimony in 2017 where they

explain their process and how they had access to a common database for HVDs [redacted] and the FBI. That was brought out. So -- and Lieutenant Piette, I think, was present. Unfortunately, learned counsel and two other civilian counsel had left the case at the time.

But there was additional discovery on that point already provided. So I just would chalk that up to maybe the new constituted defense team not being fully familiar with the record or the discovery.

The other matter that they've raised to your attention is ----

MJ [COL ACOSTA]: Was the testimony of McFadden and Emley, is that who you said it was?

MATC [MR. WELLS]: Gaudin ----

MJ [COL ACOSTA]: Gaudin. I apologize.

MATC [MR. WELLS]: ---- in 2017. And if you'll give us an opportunity, we'd like to cite to those points. If the defense believes that they haven't received the information either by topic or something, I think we will take the step to show in the discovery where we've produced it.

I'm always marveled at our analyst, Ms. [redacted] and Mr. Parker Smith, how diligently they apply themselves to try to answer these questions for the sake of the case.

The thing that I am concerned about is this allegation of

Mr. Al-Hilah that -- [redacted] I think we're really litigating now AE 429, which is a motion to compel discovery about Al-Hilah. And at that time we provided a list of Bates-numbered documents, and I believe that was -- that information was in there.

If not, subsequent discovery, we have provided that information leading into the deposition, which you ordered in 451, and I have not heard anything from the counsel who's handling that case, Ms. Carmon, that we have failed to meet our discovery obligations as it relates to Al-Hilah.

MJ [COL ACOSTA]: So you're saying in the discovery that you provided regarding Al-Hilah, [redacted]

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

MJ [COL ACOSTA]: Wait a second.

MATC [MR. WELLS]: So ----

MJ [COL ACOSTA]: [redacted]

MATC [MR. WELLS]: Yes, sir. I'm sorry for my sarcasm.

MJ [COL ACOSTA]: Okay.

MATC [MR. WELLS]: [redacted] They have that discovery. That's not a Brady violation.

So what other specific questions, sir?

MJ [COL ACOSTA]: The questions are just largely Ms. Morgan's argument is it's surrounding 333 and their request was, like, hey, there's certain things that we're seeing. The government will concede that there has been a lot of discovery that has been turned over since I -- I'll just say this. You know, I've looked through every -- through the -- I've gone back and, and believe me, it's a -- it's a -- it's a long history of this case and we've recovered a lot of the ground that occurred before I came -- became the military judge in this case, necessarily, because some of the ----

MATC [MR. WELLS]: Yes.

MJ [COL ACOSTA]: ---- two years or so went away right when I came on the case. So we've had to replow that ground. But there has been a significant amount of discovery, new discovery even, that has been turned over even since I've been on the case, and that's been since, you know -- I think I've been on it since 2019, but I'm ----

MATC [MR. WELLS]: Well ----

MJ [COL ACOSTA]: I've been on it for three years now.

MATC [MR. WELLS]: Right.

MJ [COL ACOSTA]: So what I'm saying is there's been new -- there's been substantial new discovery from 2019 on, correct?

MATC [MR. WELLS]: Well ----

MJ [COL ACOSTA]: And this is after -- and her point is the government has in previous statements said we're done, we're done, we're done with discovery, we're done with discovery or we'll -- we'll -- we'll continue -- you know, the courts are always going to remind the prosecution, hey, you always have a continuing discovery obligation because we know that not everything may be known in a case that's, say, you know, 6 to 12 months from flash to bang, from, you know, detention to trial, but we're -- we're epically longer than that right now, right?

MATC [MR. WELLS]: Well, sir, two questions. Yes to this immediate answer. Yes, we're epically long. But you also said there's been new discovery since 2019. I would ask in the commission's mind what are the topics that you have in your mind that is new that we had not produced or that ----

MJ [COL ACOSTA]: No, I'm saying you've turned over things when you've discovered, as you found them, right? Has there been -- this is the question. I don't see all the discovery. Remember ----

MATC [MR. WELLS]: Yes, sir.

MJ [COL ACOSTA]: ---- I only see the things that come through the 505 process ----

MATC [MR. WELLS]: Based on ----

MJ [COL ACOSTA]: ---- right?

MATC [MR. WELLS]: ---- the defense's request, we respond to those requests. We evaluate if they're relevant and material and we seek the information that may equip them and be helpful to a defense, a justification of the action or provide something that might impeach a witness or lead to additional discoverable information.

In the topics since 2019, I'm not certain we've had new discovery. There have been questions about Mr. Gaudin's transition from the FBI, his Giglio, Jencks type material, and that's ongoing. I'm not certain that's new, but it's new developing.

There's also an issue about the CIA/FBI relationship and which FBI agents were detailed to the CIA to participate in the RDI program. None of our agents were detailed to that program and we've provided that information to the defense.

[redacted] And we provided that information to them. And so there are distinction and information that the defense has requested we responded to.

[redacted]

[redacted] We've provided that information to them because the defense has turned to that and wants to explore it further, on the angle that Al-Hilah was working a program to deport foreign jihadist terrorists, and that was a longstanding program from the '90s.

So that is the information that we have. And to the extent that some COLE actors, facilitators were foreign terrorists/jihadists that Al-Hilah facilitated travel outside of Yemen, that information has been provided and we're set up to do a deposition. So ----

MJ [COL ACOSTA]: So when was that provided? The information about Mr. Al-Hilah's providing of transportation for individuals.

MATC [MR. WELLS]: Well, I think in 429 we listed out everything that we had provided previously and I think that was covered in the Ali Soufan ----

MJ [COL ACOSTA]: I'm just asking the -- the question that I

just asked you.

MATC [MR. WELLS]: Yes.

MJ [COL ACOSTA]: Don't point to something. Answer if you can tell me, when did you provide the information about Mr. Al-Hilah doing that?

MATC [MR. WELLS]: I would like to provide you the exact date and the production number that -- on that.

MJ [COL ACOSTA]: Right. That's what -- that's what I'm kind of asking for. You seem to have a good command of it, and that's why I was assuming you had it.

MATC [MR. WELLS]: I don't have the ----

MJ [COL ACOSTA]: Okay.

MATC [MR. WELLS]: ---- information, but in 429 we tried to answer that. But this opened up a door and the commission rightly said let's have more exploration on this, because you've received their theory of the case. And it looks like it's developed now. An alternate perpetrator theory is always a legitimate approach maybe for the defense, but it may not pan out because it doesn't have great weight with a panel or the jury, but it's at least allowed to be discovered and pursued.

So since 429 we've opened the aperture. We went and got everything that was in the habeas case. You granted some relief to the defense, you denied some of the relief there. Everything that

was in the habeas case, we have produced it, just as Judge Lamberth in the district court approved the summaries to the defense, and we're prepared to have that deposition.

But I think the basic facts still remain. Al-Hilah was a peripheral figure. To the extent he knew Nashiri through the '90s and his activities in Yemen, that's to be explored with Mr. Al-Hilah if he'll answer the questions. But we also have interviews that have been provided to him. So they have additional evidence they can use in lieu of his testimony.

It's difficult to respond with particularity -- particularity and precision to each allegation of a claim of a failure in discovery unless we're given time to get a good sight picture and then provide accurate information to you.

And I see in the filings that we provided in 333, in Footnote 2 and 3, we did offer that to the commission. If there was any particular matter that the commission had concern, we would provide additional information. The production number, the underlying discovery if it was classified, how it was redacted, withheld, substitute and summary was provided. And much of this has already passed through the commission's hands, and so it is available there.

MJ [COL ACOSTA]: Well, either through my hands or the commission before we, correct?

MATC [MR. WELLS]: Previous judges. Yes, sir.

MJ [COL ACOSTA]: And you've gone back and even looked at some of the ones that were previous, and you're doing that again, correct?

MATC [MR. WELLS]: Correct, sir.

MJ [COL ACOSTA]: On some certain pleadings.

MATC [MR. WELLS]: And so they had A through S, and we've gone through each one of these and tried to map out where we provided the information. It's classified. Either the exact information is available and has been previously or it's not the precise cable but there was a summary cable that wrapped it all up and that was provided instead or in lieu of, but it contains the same cumulative information.

And there might be some deviations. [redacted]

But just this week, Mr. McFadden answered the question that Badawi was defiant and it was difficult to get the information from him. [redacted] but the FBI agent who actually conducted the interview, the defense was able to ask him how difficult was it to get information from Badawi. He was defiant. I think we've met our discovery obligation on that.

So to resolve 333, I would say no Brady violation. Certainly, there is a continuing duty of the government. We're

obligated, if we find additional information, to notify the commission and the defense to provide it. And I -- I think you can resolve that motion with that finding.

If you are concerned about a particular tab or topic of information, if the defense cites something ----

MJ [COL ACOSTA]: I ----

MATC [MR. WELLS]: ---- we're willing to answer it.

MJ [COL ACOSTA]: I think that's kind of where we're getting -- we're losing a little bit of what the defense argument is. They're not talking about a particular tab. Each particular tab might be -- a particular tab might be resolved, and I understand that the details matter and that each bit of discovery does matter.

But a larger crux of her argument was how long is too long that you can have a -- is there a time period at which -- beyond which, you know, a death penalty case can be litigated with discovery continuing to go -- continuing to -- to occur?

Now, granted some of it's -- the defense is asking for some requests. Sometimes they ask for things that are -- that they -- that they need more information on, and that's their right to do so.

But is there a -- is that a consideration that the -- that the commission should take in mind that it's been, you know, you know, a certain number of years since the -- you know, we're

at -- we're at 22 years since the offense. We're at, you know, a dozen years -- or ten years since, you know, before referral.

MATC [MR. WELLS]: Well, instead of a vague concern or sense, the defense probably has the burden to say this particular information we are missing. 701C, we requested, it's not there, it isn't there. Then you make a determination. Is it relevant? Logically connected? And also, is it material? And we would like the opportunity to respond to that.

But I don't have the specific information in front of me. I can answer A through S here and give explanations that way. How long should discovery go on? It's up to the government and the trial counsel and the prosecution's decisions are final, to our peril, on that. To the extent that the commission wants assurance that discovery has been done, we need the commission's help.

MJ [COL ACOSTA]: Right, and that's part of the issue, right, is can I be sure it's done? If the defense is pointing out, hey, we just got something new that's super relevant that we haven't had before.

MATC [MR. WELLS]: Are they really pointing it out, though, when they haven't presented it to you or -- I've been here all week and they haven't told me that I've withheld. [redacted]

I think the commission should put the defense to the task.

Show me the particular topic or information that you claim that you are missing. Government, what's your response? To have confidence.

MJ [COL ACOSTA]: Are you asking me to invite them to -- to brief on this issue?

MATC [MR. WELLS]: Well, I'm ----

MJ [COL ACOSTA]: I mean, that -- that's a perfectly acceptable ----

MATC [MR. WELLS]: Sir, I ----

MJ [COL ACOSTA]: ---- thing is that's what you'd like. And again, I know you're not ----

MATC [MR. WELLS]: Yes, sir.

MJ [COL ACOSTA]: ---- you're not asking to have another motion filed or another AE series done on discovery issues that we're covering in probably four other AE series. But I'm trying to, to the best of anybody's ability, connect all these threads because they all -- they all touch each other, right? All of our -- all of these AEs have -- you know, they touch each other through relevance or impact on other AEs. Like, you know, as you just brought up, hey, we're really talking -- we might really be talking about this other AE here.

So that's what I'm trying to figure out is if you're asking me to ask them to be more specific in a supplemental briefing to 333.

MATC [MR. WELLS]: Sir, that might help. But the two that have

been brought up here at the lectern, it's the first I've heard of -- I'll try to respond to those matters.

MJ [COL ACOSTA]: I understand. And again, I ask for -- I understand.

MATC [MR. WELLS]: Okay, sir.

MJ [COL ACOSTA]: Do you have anything else?

MATC [MR. WELLS]: No, sir.

MJ [COL ACOSTA]: All right.

Ms. Morgan?

DDC [MS. MORGAN]: Judge, I feel like we have this ----

MJ [COL ACOSTA]: Can you hang on for one second?

DDC [MS. MORGAN]: Oh, I sure can, Judge.

MJ [COL ACOSTA]: All right.

DDC [MS. MORGAN]: You know, Judge, I feel like we have this conversation, whether it's medical records, whether we're dealing -- like, it seems like the same conversation over and over, and if -- this is where the loss of confidence in the government's ability to understand its discovery obligations comes from. Because if you go to the record, the same conversation happened in 2014 -- 2015, excuse me. The same conversation happened in 2016, and we are in 2022 and we're having the same conversation.

We can't ask for something that we don't know exists. That's part of what makes this commission process particularly

difficult. [redacted]

MJ [COL ACOSTA]: But he says that he did give it to you.

DDC [MS. MORGAN]: And -- and, Judge, I'm going to steal a prosecution line. Officer of the court. But I will invite Mr. Wells, please, please provide evidence of that production and when it was provided, because the defense will submit to this court -- or commission -- [redacted] I don't know if it's in security review. Don't know if it just didn't get sent over. But we do not have that.

As far as the [redacted] is concerned, we have not heard of that. Neither Gaudin nor McFadden testified to that name in this commission prior. They did not confirm that in -- in 2017 testimony. [redacted]

And then the 9/11 record goes even further. [redacted] That's all in the 9/11 record. We have no discovery on that. So for Mr. Wells to be able to stand up here and say, well, if you just read your record -- no. That is not true.

Additionally, in December when we were down here we had a similar back-and-forth over discovery. [redacted] And the prosecution stood up and told this court, or commission, that they had absolutely provided those documents to defense. And Ms. Carmon stood up and said we do not have them. The prosecution stood up and said we have absolutely provided those documents to defense.

And after we left session, the prosecution went back and they sent the defense an e-mail that said, our bad. Sorry. We didn't provide them. We're sending them to security review. And to this day we do not have them.

Now, I may be a little old school, but where I come from, when you make a mistake like that, you come back on the record and you say, my bad. I actually got that wrong. But to this day, we don't have that.

Now, Mr. Wells said that they have started providing this information because we turned to an alternate perpetrator theory. Now, he doesn't know if that's going to be bought by the jury, but

it's our idea right now. And again, I would turn your attention to 2015. And I think it goes a little further back than that. But as I said in the beginning of my argument, Captain Mizer was prescient when he was arguing about these cables and why they were significant. And specifically what he argued in that 505 hearing why these were important, why they were relevant, was because they went directly to jurisdiction, they went to guilt or innocence, and they went to mitigation.

So this is not new. The government has been on notice for -- I think this is -- seven years as to why this information is relevant and material to the defense. And for seven years, it was not turned over.

As far as A through S, the attachments to -- A through S, the attachments to 333 and Mr. Wells' representation that they have reviewed each one of those and bumped them up to what they were provided to the defense ----

MJ [COL ACOSTA]: Which are those? Which are these?

DDC [MS. MORGAN]: The attachments to 333.

MJ [COL ACOSTA]: Oh, the A through S?

DDC [MS. MORGAN]: Yes. And I believe Mr. Wells had said that they had bumped each one of these cables up and that these cables had been provided to the defense more or less in some other form, but the underlying material had been provided.

And I would just go back to this commission's ruling in I believe it was 400N, AE 400N, where this commission had found that the prosecution's use of the summary process was, at best minimizing and, at worst, self-serving. And that the way in which the prosecution had been handling the summary process -- and that was dealing with the cables that the George Washington University -- I'm blanking on the name, but had gotten through the FOIA process and why those were, in fact, more intact than what had been provided to the defense through the discovery process. I don't think this is any different.

Pending any questions from the commission, I think that concludes my presentation. Just wrapping up to say, at some point we've got to call this. We can't stand here in 2025 and have the same argument we were having in 2015. We've got to know what exists in this universe. We've got to -- we've got to know that the discovery process has integrity, we're getting the information that is material and relevant to our case. Otherwise, we are in the position of Bowser where we have lost faith completely in the prosecutors and any continued delay just inures to the benefit of those with unclean hands.

MJ [COL ACOSTA]: All right. Thank you. Don't do any supplemental briefing until or unless -- I don't know if I'm supposed to say unless in front of until or not, but you know what I mean.

Unless I ask for it, don't send me anything extra on 333.

DDC [MS. MORGAN]: Copy all.

MJ [COL ACOSTA]: And that's for both sides. If you guys want to talk and work things out, you can always to that. And I know that I can tend to be a catalyst, but I can't hold the hands all the time, so we'll -- we can go on to the next issue. I know we're getting a little -- the day is getting a little long in the tooth here, but I want to keep going along with those things that I can take up in closed session.

And we will move now to the 454 argument that the government wished to -- wished to present.

TC [MR. MILLER]: Thank you, Your Honor. 354.

MJ [COL ACOSTA]: Pardon me. 354. See, I wrote it down and I told myself back -- this is for myself. I looked at it, I said I wrote 454. I'm going to end up saying 454, and I said it, and it's wrong still. So I apologize.

TC [MR. MILLER]: My own argument is fairly straightforward and I will try to make it brief.

In 354 and 354C the defendant plainly asks that the commission order the abatement of the proceedings in this case pursuant to R.M.C. 703(f)(2).

MJ [COL ACOSTA]: Uh-huh.

TC [MR. MILLER]: And he cites destroyed evidence, and

specifically the destroyed evidence here are the tapes, the 92 tapes in CIA custody.

Ignoring momentarily the merits of their request, because that I believe the court is going to take it up at another time, a critical issue jumps out is what evidence. And this is -- we sort of talked about this before and that's the only -- or the single issue that the government wants to address, is what specific evidence was lost or destroyed.

Now, there are two principles here, Your Honor. The first is 703(f)(1), which mandates that each party is entitled to the production of evidence which is relevant, necessary, and noncumulative.

MJ [COL ACOSTA]: Uh-huh.

TC [MR. MILLER]: 703(a) provides the defense shall have a reasonable opportunity to present witnesses. Obviously, the witness must be specifically relevant and necessary to an interlocutory question. And it's required that the defense give a fulsome sort of summary of what the individual witnesses -- what the witnesses are going to say.

Now, R.M.C. 703(f)(2) is the destroyed evidence or lost evidence provisions and it provides for varying relief for lost or destroyed evidence. There's a substantial amount of discretion to Your Honor as to what you should do in the event that you find that

something has been lost or destroyed.

Now, the crux of this. The 92 tapes contained only two identified as Nashiri tapes. We know that it was the practice of the individuals at the sites where Nashiri was held, who were interrogating and debriefing him, is to tape the EIT sessions and the interrogation sessions, but to reuse the tapes and tape over them after they had been reviewed.

As it stands now, no one, absolutely no one knows what, if anything, was on those two tapes. [redacted]

[redacted]

MJ [COL ACOSTA]: When did the EITs stop with the accused?

TC [MR. MILLER]: They would have stopped in early to mid-2000 -- November of 2002.

MJ [COL ACOSTA]: Your pleading says that they stopped in January of 2003. I'm not making that up. I'm sure it says it.

TC [MR. MILLER]: And I may be wrong, Judge. I'll check it out. The -- I'm sorry. The location where the tapes were made stopped in mid-November 2002. The EITs stopped in January of 2003.

MJ [COL ACOSTA]: The location where the tapes -- you see,

that's a -- I don't understand that. That's unclear language to me.

TC [MR. MILLER]: He was moved.

MJ [COL ACOSTA]: Oh, I understand. But were they taping them at the other location? Were they taping them?

TC [MR. MILLER]: Not that -- we have -- I have no information that that was occurring or that they have any tapes. The only tapes I know about, the only tapes that -- that -- that have been referenced are the 92 tapes [redacted]

MJ [COL ACOSTA]: [redacted]

TC [MR. MILLER]: [redacted]

MJ [COL ACOSTA]: [redacted]

TC [MR. MILLER]: Two Nashiri.

MJ [COL ACOSTA]: Two Nashiri tapes.

TC [MR. MILLER]: And that's what we're talking about here.

MJ [COL ACOSTA]: And they moved him in -- they moved Nashiri from ----

TC [MR. MILLER]: They moved Nashiri in ----

MJ [COL ACOSTA]: ---- from that location in December.

TC [MR. MILLER]: ---- in December.

MJ [COL ACOSTA]: Okay.

TC [MR. MILLER]: So there are 92 tapes taken at that particular site. [redacted]

MJ [COL ACOSTA]: And I'm going to interrupt you one more time,

and I apologize, Mr. Miller. [redacted]

[redacted]

TC [MR. MILLER]: [redacted]

MJ [COL ACOSTA]: [redacted]

TC [MR. MILLER]: Yeah, I believe -- I believe the attachment may have the exact date, Your Honor. The government's attachments to the -- let's see if I can -- give me just a second here.

[redacted]

MJ [COL ACOSTA]: Right. And that was in -- say that date. Did you have a date?

TC [MR. MILLER]: [redacted]

MJ [COL ACOSTA]: [redacted]

TC [MR. MILLER]: We know that he left in December of 2002.

MJ [COL ACOSTA]: Okay. So, I mean, I'm just wondering if there's an overlap there, if he was still there. Because we know the EITs kept going until January when he went to the next location. So were they still going on and being taped when they arrived? Because remember, this is pretty early on that they were concerned about the videotapes and what was on them and what they should do.

TC [MR. MILLER]: Right.

MJ [COL ACOSTA]: [redacted]

TC [MR. MILLER]: Correct.

MJ [COL ACOSTA]: [redacted]

TC [MR. MILLER]: Right.

MJ [COL ACOSTA]: ---- sworn testimony ----

TC [MR. MILLER]: Right.

MJ [COL ACOSTA]: ---- right? That's what you're looking at.

TC [MR. MILLER]: The only tapes of which I am aware that were stored are these 92 tapes.

MJ [COL ACOSTA]: Right. [redacted]

TC [MR. MILLER]: [redacted]

MJ [COL ACOSTA]: [redacted]

[redacted]

TC [MR. MILLER]: No. I don't ----

MJ [COL ACOSTA]: Yep. Yes. [redacted] and you can turn around and talk to your analyst if you need to, but I'm pretty sure that that's correct.

TC [MR. MILLER]: I think the question here is what happened ----

MJ [COL ACOSTA]: Well, I understand.

TC [MR. MILLER]: ---- [redacted]

MJ [COL ACOSTA]: Yeah, but you can't answer the question of whether or not that he was still there getting ----

TC [MR. MILLER]: Right.

MJ [COL ACOSTA]: ---- under the EITs being videotaped [redacted]

TC [MR. MILLER]: I can -- but it doesn't -- [redacted] The tapes were destroyed in 2005. There's nothing -- nobody can say what was on those tapes. We can talk all day about where Nashiri was, where this fellow was, where that fellow was.

MJ [COL ACOSTA]: I understand, but you are -- hold on a second. You are relying upon the fact that an individual says that they -- and I don't mean to point. I apologize.

TC [MR. MILLER]: Point.

MJ [COL ACOSTA]: [redacted]

[redacted]

MJ [COL ACOSTA]: [redacted] However -- or December 2002. But I don't know that there weren't -- that the tape wasn't used again, you know, on -- you know, to do the other EITs as they continued to go, because I don't have a match-up of the dates.

TC [MR. MILLER]: That's a matter of proof. Then the defense would have to show that something happened or somebody did something.

[redacted]

MJ [COL ACOSTA]: [redacted]

[redacted]

MJ [COL ACOSTA]: Okay.

TC [MR. MILLER]: Yeah.

MJ [COL ACOSTA]: [redacted]

[redacted]

TC [MR. MILLER]: Correct. And that's -- that's a whole different issue. They're relying on the destruction of those tapes, but they can't tell you that anything was destroyed. What was destroyed? The only -- the only evidence is is that they were blank.

The court can't guess that there was something on it or say what if. That's not evidence.

MJ [COL ACOSTA]: No, I'm not. I'm not.

TC [MR. MILLER]: That's a guess.

MJ [COL ACOSTA]: I'm not.

TC [MR. MILLER]: Okay. But the point is, is if we can't prove -- we can't show that there was anything on those tapes, then every -- then all these witnesses that they want to call are irrelevant. That they might want to -- that they destroyed the tapes is irrelevant. Because right now, the only thing, at best the evidence is, is that they destroyed nothing. They destroyed blank tapes.

MJ [COL ACOSTA]: Do they have the opportunity to call witnesses to say that there was something on the tapes?

TC [MR. MILLER]: If they ----

MJ [COL ACOSTA]: [redacted] Because they weren't destroyed until several years later, right?

TC [MR. MILLER]: Right.

MJ [COL ACOSTA]: It was three years later ----

TC [MR. MILLER]: Right.

MJ [COL ACOSTA]: ---- that they destroyed the tapes.

TC [MR. MILLER]: Right.

MJ [COL ACOSTA]: And we'll talk about some of that and the reasons. And while they don't go -- and while it may not go towards bad faith, right? It may go towards the issue of is it evidence, right? Because that's part of what your determination is, is it evidence.

TC [MR. MILLER]: I agree.

MJ [COL ACOSTA]: [redacted]

TC [MR. MILLER]: Right.

MJ [COL ACOSTA]: [redacted]

TC [MR. MILLER]: Right.

MJ [COL ACOSTA]: [redacted]

TC [MR. MILLER]: Right.

MJ [COL ACOSTA]: [redacted]

TC [MR. MILLER]: Correct.

MJ [COL ACOSTA]: ---- he was also either both -- he was both present and removed from that location where EITs continued to occur, and then they continued to occur in 2013 -- into January 2013. Granted, that's not when the tapes were allegedly ----

TC [MR. MILLER]: 2003.

MJ [COL ACOSTA]: 2013. 2003. The -- so then is there an individual -- can they call an individual -- I'm sorry.

TC [MR. MILLER]: No, I want to make sure I'm giving you correct information.

MJ [COL ACOSTA]: Yes.

TC [MR. MILLER]: I'm not trying to be rude.

MJ [COL ACOSTA]: No, no, you're not. You're not.

Here's the question for you: Do they not have the right then to make an evidentiary show or attempt to prove that [redacted]

TC [MR. MILLER]: They have nobody, I am sure. And maybe Captain Mizer can get up and say I know somebody who can say they looked at those two tapes and that was what was on them. I saw them on these dates, those two tapes, and that was on those two tapes. I don't think they can do it. And that's -- that's the point.

MJ [COL ACOSTA]: All right. Well, you know ----

TC [MR. MILLER]: All the evidence they have is that there was some taping done at sometime ----

MJ [COL ACOSTA]: Sounds like you're doing the guessing now about what they can do.

TC [MR. MILLER]: No. Well, I am ----

MJ [COL ACOSTA]: You're saying ----

TC [MR. MILLER]: I'm just saying -- I'm not guessing. I'm just saying I'm looking at what they're offering. They're not offering anybody who can tell you what was on those tapes. They can say -- they can say there was taping done at a certain time and there were videotapes used. They can't tell you that those -- anything was ever on those two tapes and, if there was, what it was.

MJ [COL ACOSTA]: Okay.

TC [MR. MILLER]: So that I think makes the inquiry something different. Then you've got to go back to whether or not the practice of taping, okay ----

MJ [COL ACOSTA]: Oh, I got your argument, that that's not destruction. That's just reuse.

TC [MR. MILLER]: That's correct.

MJ [COL ACOSTA]: The Seven-11 store runs the videotape and they're doing surveillance and it keeps taping over itself, right?

TC [MR. MILLER]: I guess my point and I'll sit down, Judge, is simply this. Absent the ability for them to provide the court with evidence -- evidence that somebody looked at those two tapes and saw a discrete incident which they can describe, the rest of this stuff becomes irrelevant. And if the court is of a -- of a mind to say, okay, I'm going to let them do it anyway, I would ask that they be

required to put those witnesses on first ----

MJ [COL ACOSTA]: Right.

TC [MR. MILLER]: ---- so that we don't waste time bringing in what would be ----

MJ [COL ACOSTA]: Okay.

TC [MR. MILLER]: ---- thought to be irrelevant evidence.

MJ [COL ACOSTA]: Here's a couple of questions for you that I've got. Based upon everything, and especially based upon -- because remember, this was the discussion that you provided me with that [redacted] And you can imply that it -- we all know something's out there, but until you make it an exhibit, it's not before me, so the -- so now it's there.

[redacted]

TC [MR. MILLER]: Yeah.

MJ [COL ACOSTA]: [redacted] The question is why would you destroy blank tapes?

TC [MR. MILLER]: Because ----

MJ [COL ACOSTA]: If there's nothing on it, why are you feeding it to the shredding machine ----

TC [MR. MILLER]: Right.

MJ [COL ACOSTA]: ---- or to whatever -- or to whatever they did. I don't know if they did a [redacted]

TC [MR. MILLER]: My guess is they assumed that there was something on them. [redacted] A number of them actually were also blank.

MJ [COL ACOSTA]: So we don't know why we destroyed the blank -- they were blank but they were destroyed nonetheless.

TC [MR. MILLER]: I think out of an abundance of caution, they destroyed all of them.

MJ [COL ACOSTA]: Okay.

TC [MR. MILLER]: But I don't think, again, I don't think we even get to why they destroyed them until we prove that there was something on them at the time that they were destroyed.

MJ [COL ACOSTA]: Well, it is a -- it is a -- a question that could go towards the fact of what's on them if somebody was destroying something that doesn't have evidence on it, right? I mean ----

TC [MR. MILLER]: I'm not sure ----

MJ [COL ACOSTA]: Well, the question is why -- it goes back to the destroy the blank tape.

TC [MR. MILLER]: Right. If they destroyed a blank tape, so what? I mean, what -- what -- that has no relevance to anything in this particular case.

MJ [COL ACOSTA]: And wasn't the concern, and we're talking about evidence, and I know a large part of your argument previously and has been is that it -- you know, this is the CIA. They are not a law enforcement agency. They're not concerned with prosecution of offenses, right?

TC [MR. MILLER]: Uh-huh.

MJ [COL ACOSTA]: [redacted]

TC [MR. MILLER]: Uh-huh.

MJ [COL ACOSTA]: ---- and their existence as it related to ongoing prosecutions in Moussaoui, if I'm correct and probably ----

TC [MR. MILLER]: Uh-huh.

MJ [COL ACOSTA]: Moussaoui -- and in other ----

TC [MR. MILLER]: Right.

MJ [COL ACOSTA]: ---- [redacted]

[redacted]

TC [MR. MILLER]: Right.

MJ [COL ACOSTA]: So if it's not -- does that undermine the -- is it evidence? I know your main argument is there's no evidence because there's nothing on it, but even if there -- you know, if there were something on the tapes, because previously, and this is why I asked you to confirm it, because I think in your original motion, it -- there was, like, hey, we don't -- we don't contest that there's something on the tapes and then your last time we argued it you stood up and said, Hey, we don't even think there was anything on it and here's why this guy's stuff; that's why I asked you for the supplemental briefing of tell me yes or no. Is it your argument that there's something on the tape or not?

If we went back to your original reply and said, okay,

there's something on it, your argument then was, yeah, but they're not law enforcement. They're not the prosecution. What they do with -- with items has nothing to do with -- that's why it's not evidence because they're not us.

TC [MR. MILLER]: Right.

MJ [COL ACOSTA]: Does it change that? [redacted]

[redacted]

TC [MR. MILLER]: My position is is the Rule 703(f)(2). And 703, this lost or destroyed, which is sort of a peculiar provision, deals with -- is aimed, I think, at police misconduct and police loss.

MJ [COL ACOSTA]: Right, right. And that's ----

TC [MR. MILLER]: I don't think it -- I don't think it applies to agencies that are non-law enforcement. I don't think it applies to private citizens. And I certainly don't think it does -- applies to the routine sort of what occurred in the ----

MJ [COL ACOSTA]: Right. And the cases you cite are the -- some of the -- the -- you know, Security and Exchange Commission had evidence and they lost it. One of them you cited where something was

lost or destroyed and it was destroyed before the crime was committed. Not helpful because, obviously.

TC [MR. MILLER]: Right.

MJ [COL ACOSTA]: And then a -- for that. And then the other one was it was destroyed my Mexico and also not helpful because it was still the United States. But when it's another agency, right, that's when it gets a little bit closer.

And I understand that even in those cases where it was the SEC, or I want to say there was some other different agency that had some type of evidence that -- or some type of tapings or recordings or something that was destroyed, where they said, hey, look, it's not the same. That might have been the one where it was before the crime was committed.

But this is a little bit closer to the bone, isn't it, when it's we're thinking about destroying it ----

TC [MR. MILLER]: Uh-huh.

MJ [COL ACOSTA]: ---- [redacted]

TC [MR. MILLER]: Sure.

MJ [COL ACOSTA]: [redacted] Does that make it a little bit closer for that organization to be destroying it?

TC [MR. MILLER]: I don't think so.

MJ [COL ACOSTA]: Okay.

TC [MR. MILLER]: I don't think so. I mean, it would be no different if I -- if you gave a -- a judge gave an order to someone, got a grand jury subpoena to turn over your tax returns. Those tax returns, you know, destroyed. Another defendant says, hey, they would have helped me. You're not going to punish the government because of the destruction because of the court order.

I just don't think -- I don't think, unless the destruction is done by members of the prosecution team or persons closely aligned with the prosecution and I -- that the -- there's any sort of penalty that should go.

MJ [COL ACOSTA]: Okay.

TC [MR. MILLER]: Again, I go back to the -- it should be applied. I go back to the -- the notion, again, is there's no ----

MJ [COL ACOSTA]: So you don't even get to the point to where I need to consider ----

TC [MR. MILLER]: No.

MJ [COL ACOSTA]: ---- adequate substitute?

TC [MR. MILLER]: No.

MJ [COL ACOSTA]: You say it's no evidence so that I don't even get to adequate substitute ----

TC [MR. MILLER]: No, right.

MJ [COL ACOSTA]: ---- rationale?

TC [MR. MILLER]: Right.

MJ [COL ACOSTA]: Okay.

TC [MR. MILLER]: I think I may have an answer to your initial question.

MJ [COL ACOSTA]: Okay.

TC [MR. MILLER]: Your Honor, here is the timeline. We -- we -- based on the holdings we have.

MJ [COL ACOSTA]: Uh-huh.

TC [MR. MILLER]: [redacted]

MJ [COL ACOSTA]: Okay.

TC [MR. MILLER]: ---- regarding Mr. Nashiri.

MJ [COL ACOSTA]: All right. I appreciate you giving me your -- your best range on the date.

TC [MR. MILLER]: This is -- Mr. Wells was talking about Parker Smith. I can't tell you how much we depend on the guy.

MJ [COL ACOSTA]: Yeah, I saw him close his eyes and think of dates a minute ago on ----

TC [MR. MILLER]: Thank you, Your Honor. Unless there's any other question.

MJ [COL ACOSTA]: All right. I don't have any.

Defense, who's got this one? Captain Mizer.

DDC [CAPT MIZER]: Good afternoon, Judge. Can you hear me?

MJ [COL ACOSTA]: Yes, I can. Please go ahead.

DDC [CAPT MIZER]: Judge, I want to talk briefly about the law, because I think that learned counsel for the government has us both struggling with a straw man to some extent here. And it's this concept that the defense has an obligation to prove what was on those tapes. And, Judge, I'm going to submit to you that we can prove what was on those tapes but that we don't have to.

With respect to legal issues, this is probably one of the simpler ones that you're going to deal with, because you really need to read one case, the Simmermacher case, one rule, 703(f)(2). And if you remember the facts of HM3 -- and for the record, that's hospital corpsman third class -- HM3 Simmermacher's case, she tests positive for cocaine. And before she's charged, the Navy drug lab sends a letter to the command and says, hey, we're going to keep this for a year and if you don't get back to us, we're going to destroy it.

There's no criminal case. They don't send that letter. The

urine sample gets destroyed. And then when it comes time for trial, her defense attorney says I wanted to test that urine sample to prove that there was cocaine metabolite in it.

And that is -- that is the 703(f)(2) violation. Not a substantive proof of what was in that urine, Judge; it's the opportunity.

And that's what happens to the defense in this case in 2005 when the CIA [redacted] allegedly blank tapes. And I'm going to quarrel with -- with that account. [redacted]

MJ [COL ACOSTA]: Which witness -- which witness do you have that can show what was on the tape and when?

DDC [CAPT MIZER]: [redacted]



And, Judge, as I said, you have done 112A cases. And you can imagine HM3 Simmermacher, the likelihood that they were going to test that urine and find that there wasn't anything but cocaine metabolite in that urine sample. And here case is abated not because

there was something of value to the defense in there, but because the defense lost the opportunity. And that is Simmermacher. That is the holding of Simmermacher. It is 703(f)(2).

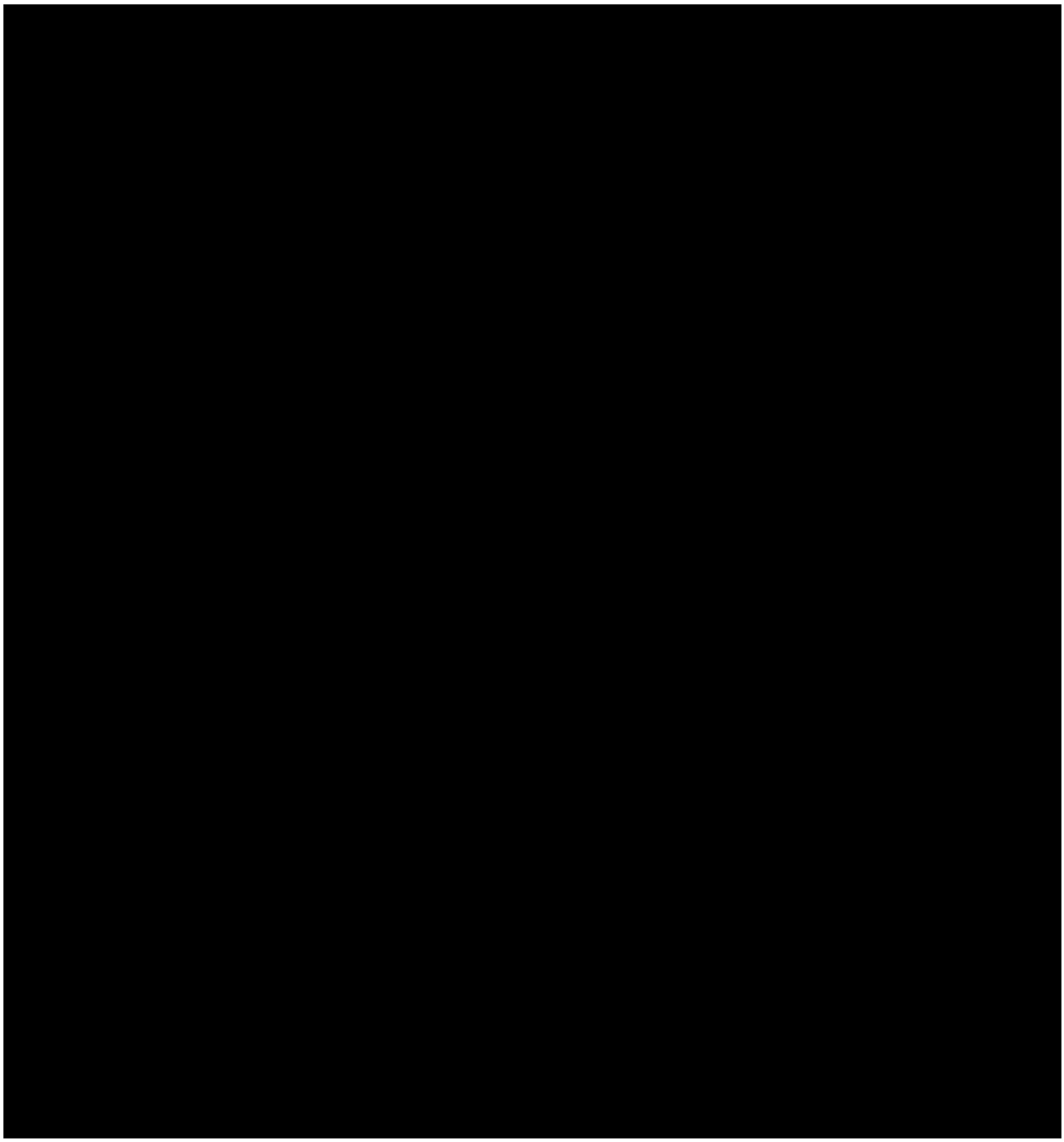
And, in fact, what learned counsel for the government is quoting is actually the second holding -- it was the appellate government's argument and the actual holding of the Navy-Marine Corp Court of Criminal Appeals. If you look at page 198 and 199 of Simmermacher, you will see this quote: Simmermacher was unable to prove the destroyed sample was materially exculpatory. The CAAF rejects that very argument, Judge.

And so with great force, Mr. Miller says that we have to prove that there was something on those tapes. That is not the case. That is not the case law. It is not the rule.

We had an opportunity to examine that. And, Judge, I don't know what a forensic analyst could do with a -- with a VHS tape. But, like Simmermacher, we are certainly entitled to find that out and to have that evidence. And that deals with the -- with the Nashiri piece, Judge, these allegedly two tapes.

And ultimately, Judge, it doesn't matter whether they tape over them, whether they erased them with magnets, which we've also given you notes of apparently some congressional hearing that happened where Congressman Darrell Issa is like I don't believe this essentially. Do you know how tapes get erased? They get erased with

magnets.



[redacted]

And, Judge, I -- I think you can read that testimony and give it the weight that it deserves. But I certainly don't think, even under Simmermacher, that this is dispositive. All of it violates 703, Judge.

The drug lab dumping urine samples on a routine basis on a -- on a yearly basis is no different than [redacted] It was no mystery to the government writ large, and you heard it. I mean, Mr. Miller eloquently had agents discuss 302s from Abu Jandal and Jamal Badawi dating from the year 2000 and early 2001 targeting Mr. Al-Nashiri. There's certainly no mystery that there is potentially criminal liability.

And again, that's a second argument that has no basis whatsoever in the case law. Because remember, Simmermacher was not facing charges until after the urine was destroyed. This idea that there has to be an ongoing criminal case, not so. Not borne out by the cases. The idea that these prosecutors have to -- have to have destroyed it, the idea that NCIS had to do it, none of that is borne out in the case law, Judge.

And so we would submit that, again, this is a -- a relatively straightforward issue with Simmermacher. Judge, it's not

just the two tapes. Whether it's 92 or Mr. Rizzo says in his book it's 96 tapes. [redacted] It's the same people there employing the same techniques in the same [redacted] facility that Mr. Nashiri is held.

Judge, I -- we have looked at the discovery as best as I can tell, and -- and you're right. Dates matter, don't they? Best I can tell from photographs that we have been given, we've got two photographs of Mr. Nashiri in 2002. They're both of his person. We've got nothing from that site.

And so we do have photographs of other sites. The government obviously knows that those are relevant. They've given them to us. But they destroyed evidence of what that site looked like. The people, the techniques, the conditions of confinement that were there, Judge. And so the other 90 tapes are absolutely relevant in this case.

Judge, the other thing, and I think you keyed in on some of this with respect to [redacted]



MJ [COL ACOSTA]: That's what you're making for the adequate substitute argument?

DDC [CAPT MIZER]: That's exactly right, Judge.

MJ [COL ACOSTA]: All right.

DDC [CAPT MIZER]: And it's the argument that I made to you when we were last here in -- in December, which is, you know, if -- if the story in the Derek Chauvin case is man dies of medical incident after interaction with police, Derek Chauvin is probably walking a beat in Minneapolis right now. And that video changed a lot of things. We are entitled to that same exact evidence ultimately ----

TC [MR. MILLER]: Judge, can I interrupt here for a second? I thought we were just simply talking whether or not we're going be able to prove the tapes ----

MJ [COL ACOSTA]: I understand.

DDC [CAPT MIZER]: I'll get to that, Judge.

MJ [COL ACOSTA]: Hold on. So this is -- this is about Mr. Miller's question on whether or not we need to have witnesses regarding the tapes, not about the adequate substitute.

But my question that I had, you know, when I was talking about it is you don't just have the cables, though, correct? You've got eyewitnesses that are going to be -- that are available to call to talk about all of the applications of the issues, all of the applications of the treatment that were applied to -- to -- to Mr. Nashiri, correct?

DDC [CAPT MIZER]: Yes. That's absolutely right, Judge. And that I think is one of the last main points that I want to make, to give you some sense of what we're up against. We do have live

witnesses, and we've got live witnesses like, for instance, Damien Corsetti who will talk about monstering and then the government is -- is going to come in and say, isn't -- is -- there's no real difference between that and Army PT, right?

And with respect to Dr. Mitchell, who is going to testify next week, if you've read any of his testimony from the 9/11 Commission, he talks about some of his interrogations being fireside chats.

And what we're entitled to do in this case, Judge, is play a video, even if it's of Abu Zubaydah, and ask him, with the timestamp, is this an example of a fireside chat, Dr. Mitchell?

And so ultimately -- and that's all I'm going to say with respect to the merits. Is -- I think we get to the merits. To the extent the government is -- I -- look. I'll make this simple. I don't -- I don't -- I think you have enough to give us the remedy at this point. I mean, we have more than Simmermacher had.

But to the extent that the government wants to contest that there were ever EITs, to use their parlance, on these tapes, then we have witnesses who can be called and who will say I videotaped EITs. We've got a number of them ----

MJ [COL ACOSTA]: Can I ask this question. If I -- if I believe that the very worst EITs were on the two tapes, the absolute -- you know, everything that's in the SSCI, everything that you allege

occurred in your -- I'll refer to your -- 454, you know, the -- 459. God. 459. The -- that motion. If I -- if I take everything there and say that's all true ----

DDC [CAPT MIZER]: Yes, Judge.

MJ [COL ACOSTA]: All right. That's all on there. That's all on the tapes. And they got -- you know, they were taped over, whatever. They're gone now. And I -- if I'm able to determine that there is an adequate substitute, isn't that the appropriate remedy, short of abating the case permanently, if I say there's ----

DDC [CAPT MIZER]: Yeah.

MJ [COL ACOSTA]: ---- if there's an adequate substitute?

DDC [CAPT MIZER]: Yes, Judge. And I guess I would quarrel with one matter of fact. I think the government is right in saying what they called EITs ended in November/December of -- of 2003. But other ----

MJ [COL ACOSTA]: January of 2003.

DDC [CAPT MIZER]: January of 2003. The incident with the power drill, the incident with the handgun, the threats of death against Mr. Al-Nashiri's family which, again, is torture under the definition of MRE304. I mean, it's black letter. It's right there. That happened later, Judge. It happened at [redacted]

MJ [COL ACOSTA]: But there was no discussion of videotapes of that.

DDC [CAPT MIZER]: No, Judge, but I do want to be clear that, you know, the abuse of Mr. Al-Nashiri didn't end at Location 3.

MJ [COL ACOSTA]: Well -- I'm not suggesting that it did.

DDC [CAPT MIZER]: Okay.

MJ [COL ACOSTA]: I'm just suggesting what's recorded -- the EITs, as we've defined them for this case and for the commissions, ended for him in January of 2003, is what the -- the government purports.

DDC [CAPT MIZER]: Yes, Judge, and I -- I don't have any basis to challenge that. I mean, yes.

MJ [COL ACOSTA]: So -- but if I'm able to determine that and adequate substitute -- again, assuming for the sake of argument that the worst EITs -- you know, the waterboarding, the -- you know, the -- the box, the -- whatever -- the worst things are are in that -- are on that videotape, are on those two videotapes, they're extra-long videotapes and they've got it all on there ----

DDC [CAPT MIZER]: Yep.

MJ [COL ACOSTA]: ---- if I determine that there's an adequate substitute, or the government is able to prove that they have an adequate substitute through the testimony of other people, then I -- then the remedy is to permit that, correct?

DDC [CAPT MIZER]: Yes, Judge. I'm asking you to apply Simmermacher.

MJ [COL ACOSTA]: Right.

DDC [CAPT MIZER]: That's the second ----

MJ [COL ACOSTA]: No, I understand.

DDC [CAPT MIZER]: That's the second factor. Sorry, I didn't mean to talk over you.

MJ [COL ACOSTA]: I understand. You're saying that -- but I mean in Simmermacher there was no substitute, right? There was no way to test her or to -- or to -- to test that in -- in a -- in Simmermacher, right, because the -- the sample is destroyed.

Here we have other people that can say, no, it did -- you know, this is exactly what happened. Here's the things that -- that did occur.

DDC [CAPT MIZER]: I -- yes, Judge, and I -- I think probably some of the primary value there would be impeachment. I don't know that you can come up with an adequate substance -- substitute, Judge, under these circumstances. I think the adequate substitute, to the extent that there would be one, given that this primarily drives at mitigation is, again, the capital referral.

I think that it does go to merits because if you are, for instance, going to allow in the letterhead memorandum, we would be entitled to play those tapes to the members and say this is lasting harm and it -- it impacted and is derivative evidence of the torture. I mean, similar to the argument that you've heard in another context

here.

But that's why we're asking for these witnesses, Judge. There are -- there are other witnesses, [redacted]

MJ [COL ACOSTA]: [redacted]

DDC [CAPT MIZER]: Judge, I apologize for not having that at hand.

MJ [COL ACOSTA]: [redacted]

DDC [CAPT MIZER]: Judge, we got this discovery March 4th, so I can tell you that we haven't. We did go to Porter Goss' farm some years ago. But without this discovery we would not have had that option. And not surprisingly, Mr. Goss didn't want to talk with my investigators. But we -- we will do that, Judge, but ----

MJ [COL ACOSTA]: Well, right. I mean, that's got to be the proffer. If he says I went and looked at the tape and there was nothing on it.

DDC [CAPT MIZER]: It ----

MJ [COL ACOSTA]: You've got to find out what's on it.

DDC [CAPT MIZER]: We're moving as fast as we can. Like I said, this is the problem with litigating the tapes issue without having these documents until the 4th of March 2022, [redacted] Then you told us to supplement it last November. And then we get discovery that's relevant identifying witnesses.

And, Judge, I get the security review process, but it does make it difficult to stand here and answer have you done your homework when this stuff is late arriving.

MJ [COL ACOSTA]: Understood. I ----

DDC [CAPT MIZER]: And so we're moving, Judge, is the answer to that.

MJ [COL ACOSTA]: Yeah, I understand. I wasn't -- I could not recall the date that the -- that the discovery regarding -- and I don't know if that even -- it was something that -- there are certain things, again, that pass through me, there are certain things that don't. So I don't know when you get the discovery that doesn't come through me, obviously. But it seems a pertinent question that I would want to -- you know, if you want a witness, you've got to proffer what they're going to say.

[redacted]

[redacted]

DDC [CAPT MIZER]: Right. And I ----

MJ [COL ACOSTA]: [redacted]

DDC [CAPT MIZER]: I think that Mr. Miller is absolutely right that we could have a cascading series of witnesses here. Certainly the first two witnesses that actually put in the tapes and said I was there during the EIT. I hit record. There should have been something on those tapes. I can't explain why those tapes would be erased.

And we know that we have a lot of people there who have an incentive for those tapes to be blank. Those should be the first witnesses. [redacted]

[redacted]

MJ [COL ACOSTA]: Okay.

DDC [CAPT MIZER]: [redacted]

MJ [COL ACOSTA]: Oh, pardon me.

DDC [CAPT MIZER]: [redacted]

MJ [COL ACOSTA]: Okay.

DDC [CAPT MIZER]: And so I think that those should be the first three witnesses to say there should have been something on those tapes.

MJ [COL ACOSTA]: Well, again, that's how I get to the -- get to the issue of if we're going to litigate what's on the tapes, if I'm able to -- this may be cart before the horsing, but if I'm able to determine that there is an adequate substitute, do I care what's on the tape? Assuming, again, for the sake of argument, that it's the worst.

DDC [CAPT MIZER]: Yes, Judge. And I -- I -- as I stand here today, I don't know how you could reach that adequate substitute.

MJ [COL ACOSTA]: Well, I know that's your argument and I completely respect it.

DDC [CAPT MIZER]: Yes, Judge.

MJ [COL ACOSTA]: But that's part of what the determination would be, to have some of the witnesses who saw it to say is this adequate? Right? I have to see what the substitute is to know if

it's adequate.

DDC [CAPT MIZER]: Right, Judge. And we would -- we would -- once we get to the merits, I agree with Mr. Miller. Look, we've got to set some of the legal table to determine whether we get to the witnesses. And then once we do that, I think that then we start talking about the merits, whether there's an adequate substitute.

MJ [COL ACOSTA]: I understand. That was the original -- that was my purpose for clarifying with the government, because their original pleading said we -- we could essential -- I don't know if they fully did it, but they at least implied that they conceded that there was -- that there was the -- that the tapes contained the EITs.

And then that's why the last time we came here, and that position changed, whether it was based on new information or -- or new information or not or [redacted] That's why I needed the clarification.

And now I'm trying to figure out the most efficient way of doing this without conducting live discovery over weeks of all of our time down here if I can -- if I can answer one -- I'm trying to figure out if I can answer one question instead of two to three.

DDC [CAPT MIZER]: Yes, Judge. I ----

MJ [COL ACOSTA]: It may require -- and it -- frankly, it may

require a few witnesses too, but it may shorten my list of answers that I have to provide.

DDC [CAPT MIZER]: But -- and, Judge, the last ----

MJ [COL ACOSTA]: And some that are factually impossible for me to answer.

DDC [CAPT MIZER]: Yes, Judge. And I think that was one of the reasons, and this is the last thing that I'll say this late in the day, is, I mean, that's why I read [redacted]

MJ [COL ACOSTA]: [redacted]

And I'm not saying it is. I'm not ----

DDC [CAPT MIZER]: Right.

MJ [COL ACOSTA]: ---- making that determination now. Again, I'm not willing to do that right now. I'm telling you that it's just a piece of it, right?

DDC [CAPT MIZER]: Understand, Judge.

MJ [COL ACOSTA]: Because the other people there might be able to, right? And were it to come up, should it come up, there's other means of getting that information out.

DDC [CAPT MIZER]: Yes, Judge.

MJ [COL ACOSTA]: Okay. Thank you, Captain Mizer.

DDC [CAPT MIZER]: Aye, sir.

MJ [COL ACOSTA]: All right. What I'll tell you, you'll probably hear from me over the weekend on the issue of the witnesses on 354. I know that we'll continue -- we're continuing with -- obviously with Dr. Mitchell on Monday because he's -- he's certainly, everybody agrees, relevant to the motion to suppress the accused's statements and things as that goes.

But let's -- let's talk briefly about the 459. And this is where the -- the defense has provided a long, long motion. It's mostly motion and not attachments, with the narrative of the events of the case, and asks for removal of the death penalty from the case, and asks now for witnesses.

Government, you oppose the witnesses, correct?

TC [MR. MILLER]: Yes, Your Honor.

MJ [COL ACOSTA]: Now, Defense, my question to you -- and who's got 459? Is that Captain Mizer as well or is that ----

DDC [CAPT MIZER]: Yes, Judge.

MJ [COL ACOSTA]: I apologize. If I'd have known, I would have just had you leave. I don't think you need the large binder. I think that binder alone is probably your motion.

DDC [CAPT MIZER]: That's it, judge.

MJ [COL ACOSTA]: The government in its response says the

following: We accept everything that they say, even the stuff that we -- even the stuff that's -- that they say contains, I want to say misleading or -- or inaccurate things. They say they accept all of it.

Do I need to have witnesses for something -- hearings -- evidentiary hearings are to get evidence that I don't have before me. The government has said we -- we concede all of those facts, but you don't have the remedy; that remedy doesn't exist because of certain things.

Can I hear the arguments on the law on that, or do I have to have these witnesses testify about something that the government concedes?

DDC [CAPT MIZER]: I -- I think that you can, Judge. And I can be even very brief on this, which is why I suggested -- and we didn't file a 505 notice with this. I mean, as I understand the posture ----

MJ [COL ACOSTA]: No, but I added it in because I wanted to talk about it.

DDC [CAPT MIZER]: Yes, Judge.

MJ [COL ACOSTA]: I think I did.

DDC [CAPT MIZER]: And we're here to help. So ----

MJ [COL ACOSTA]: Thank you.

DDC [CAPT MIZER]: But the question is here, in essence, whether

you're going to follow D.C. Circuit precedent, which is our position, or Seventh and Sixth Circuit precedent, which is the government's position. And the D.C. Circuit case law is pretty clear that this defense exists, but only if there's evidence of coercion, violence, or brutality to the person.

MJ [COL ACOSTA]: Oh, understood. So you're saying that you can argue it on the law and we don't need to have an evidentiary hearing on 454 -- on 459?

DDC [CAPT MIZER]: If the government is tight that there's no dispute of facts, Judge. Because this is one of the things that happens with these issues, is they say there's no dispute of facts, we can decide things on the law, and then we come in and discuss whether there's something on videotapes.

MJ [COL ACOSTA]: I have it on the pleading. I'm going to ask -- I'm looking right now at Mr. Miller. And I'm going to ask him, is that pleading accurate and that you don't -- that for the purposes of the motion, you don't dispute the facts contained in 459?

TC [MR. MILLER]: Correct. We think you can make this as a matter of law. Yes.

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

DDC [CAPT MIZER]: Under that -- those circumstances, Judge, absolutely.

MJ [COL ACOSTA]: Okay. And we can take that up -- can that be

taken up in open session, the 459 argument?

DDC [CAPT MIZER]: I think so, Judge, and I think it would be very brief.

MJ [COL ACOSTA]: Okay.

TC [MR. MILLER]: Actually, Judge, I don't know if Captain Mizer agrees with me. I don't know how helpful argument would be.

MJ [COL ACOSTA]: Okay.

TC [MR. MILLER]: I think positions are fairly straightforward in the pleadings.

MJ [COL ACOSTA]: Are you good on your brief? Because I know you're citing the different -- again ----

DDC [CAPT MIZER]: I -- I ----

MJ [COL ACOSTA]: ---- the government cites to all the cases where it's only applied to pre -- you know, to pre-offense outrageous conduct, and your statement is, no, it -- it doesn't. It applies -- if it's -- it can be post if it's physical harm.

DDC [CAPT MIZER]: Yes, Judge. And if I could just make one point ----

MJ [COL ACOSTA]: I'll let you.

DDC [CAPT MIZER]: ---- and I think that would be it, it's the Gaviria case which is cited in our pleadings.

MJ [COL ACOSTA]: Yep.

DDC [CAPT MIZER]: 116 F.3d. It's at 1534, it's D.C. Circuit

1997. It acknowledges both the Seventh and Sixth Circuit precedent relied upon by the government, but then declares that it still is a viable defense of the D.C. Circuit and the -- the outrageous government misconduct defense has been cited in the D.C. Circuit as recently as 2016.

MJ [COL ACOSTA]: Okay.

DDC [CAPT MIZER]: But that's the entire argument that I would make, Judge.

MJ [COL ACOSTA]: Got it. Any response or ----

TC [MR. MILLER]: Hampton, Russell, Padilla, and Ghailani.

MJ [COL ACOSTA]: Got it. Okay, that handles 459. I will rule -- I will take that up. I will consider the motion, the attachments thereto, but there's not many on that, and I will take that under consideration.

DDC [CAPT MIZER]: Thanks, Your Honor.

MJ [COL ACOSTA]: Okay. Thank you.

TC [MR. MILLER]: Thank you, Your Honor.

MJ [COL ACOSTA]: All right. The only thing we have left is argument on our two -- the -- the joint hearing we had today. Do we need to -- are you prepared to present argument or do you want to do another closed session so you can do -- there's a closed portion and an open portion. We're in the closed portion now. Are you prepared to make arguments on -- I think it's the 398 is the closed portion.

Are you prepared to present argument on that now?

DDC [MS. MORGAN]: Yeah, I can go ahead, Judge.

MJ [COL ACOSTA]: Government, are you prepared to respond?

TC [MR. MILLER]: Yes, Your Honor.

MJ [COL ACOSTA]: Go ahead. And, again, my concern always is I just don't want to have more closed sessions than what I've told the public that I'm going to have, okay, so that's why I want to do it all at once if I can. Go ahead.

DDC [MS. MORGAN]: Yeah, Judge, and I'm going to keep it tight to 398, with the exception of I'm just going to comment briefly on Colonel Gabavics -- sorry. It's late on a Friday -- Colonel Rogers' 359 just to keep -- just to make sure I do not touch anything ----

MJ [COL ACOSTA]: Understood.

DDC [MS. MORGAN]: ---- other than the 359 argument.

With respect to 398 and the ability for Mr. Al-Nashiri to meet somewhere other than at Echo II, this is simple. Honestly, I thought this was resolved back in 2019. Thought we had a -- I'll call it a gentlewoman's agreement with the government that we could meet in the ELC based on the fact that it had come to our attention that Echo II was a black site, so we had sort of the debacle [redacted] move over there ----

MJ [COL ACOSTA]: Right.

DDC [MS. MORGAN]: ---- Echo II.

MJ [COL ACOSTA]: Which room are you meeting with him in Echo II? Are you meeting with him ----

DDC [MS. MORGAN]: We are not meeting in Echo II.

MJ [COL ACOSTA]: When you did. Pardon me. I know that you did, though, right? [redacted]

DDC [MS. MORGAN]: Well, so Echo II was built for us [redacted] We didn't ----

MJ [COL ACOSTA]: [redacted]

DDC [MS. MORGAN]: [redacted]

MJ [COL ACOSTA]: Was put there just for you.

DDC [MS. MORGAN]: Just for us, and we didn't know it was put on his exercise pen.

MJ [COL ACOSTA]: Right. It's not the same building, right? [redacted] He wasn't living there. There was a whole other thing that was there, right, and it got demoed.

DDC [MS. MORGAN]: Oh, it was an exercise pen.

MJ [COL ACOSTA]: Right, no, but, I mean, there was other things around there, right? Those buildings aren't the original, right.

DDC [MS. MORGAN]: Your Honor, honestly, this predates me.

MJ [COL ACOSTA]: Okay.

DDC [MS. MORGAN]: So I came on in 2019. So some of this -- I apologize for ----

MJ [COL ACOSTA]: Nope, it's okay.

DDC [MS. MORGAN]: ---- to some extent for lack of institutional knowledge. It was -- this goes into the fear of intrusions, because when Mr. Al-Nashiri disclosed to counsel that he was meeting in a black site, the next day-ish, please give me some grace with that disclosure, disclosure rolled in from the government as to where we were meeting.

MJ [COL ACOSTA]: Right.

DDC [MS. MORGAN]: Don't want to get into that. That's not my point.

But we then were accommodated in the ELC as of December 2019. That's where we thought we were going to be meeting. Thought we worked that out with the government.

[redacted]

MJ [COL ACOSTA]: Okay.

DDC [MS. MORGAN]: And -- and I'll -- honestly, COVID happened. Sort of had a break in meetings. That's no one's fault. And we have almost consistently been meeting [redacted] and it's been working out pretty well.

MJ [COL ACOSTA]: Even though it requires him to travel over here?

DDC [MS. MORGAN]: That's going to be sort of a secondary issue

with trying to limit his movement. We've really only been meeting around commissions times, and that's partially because we're having trouble getting meetings because of the frequency of the 9/11 hearings and because of the 9/11 order that's in place. I'm not sure if Your Honor is familiar.

MJ [COL ACOSTA]: Things have slowed down a little bit, haven't they? The 9/11 hearings?

DDC [MS. MORGAN]: Not really.

MJ [COL ACOSTA]: 9/11 meetings might be going on, but the hearings are not.

DDC [MS. MORGAN]: Technically they're still holding the courtroom in order to have their negotiations.

MJ [COL ACOSTA]: Right.

DDC [MS. MORGAN]: So that is the -- the ----

MJ [COL ACOSTA]: Is AV-34 unacceptable for some reason?

DDC [MS. MORGAN]: It is. And so if you remember when Dr. Crosby testified in December, there had been -- and it is the only time that Dr. Crosby in her ten years of coming here has had a negative interaction with the guard force.

MJ [COL ACOSTA]: Well, that's Dr. Crosby.

DDC [MS. MORGAN]: No, and so, Your Honor, she met the client to do an examination. Client came. For whatever reason had been roughed up by the guard force that meeting. Client ----

MJ [COL ACOSTA]: What year was that with what guard force? There's nothing, like, historically bad there, right? There's not ----

DDC [MS. MORGAN]: No, there's no black site. Nothing. I believe her testimony is it was early 2019 that she had met him there. Client experienced going to AV-34. He ended up saying he thought he was being -- he thought he was going to be rendered. He had a reaction when he met Dr. Crosby and said just take me back -- back to the black site.

So whatever series of events that Dr. Crosby testified to, there were a number of attempts to try and meet the client back in AV-34. He refused every meeting and can't -- we can't get him to meet us there.

So right now we are in a situation where we have the ability to meet him [redacted]

So what we are trying to do, as frankly it appears the only commission that's, you know, moving with any amount of steam, is figure out a way to meet our client with regularity.

MJ [COL ACOSTA]: We're the only commission that's moving with any amount of steam?

DDC [MS. MORGAN]: It seems like it.

MJ [COL ACOSTA]: Yeah.

DDC [MS. MORGAN]: You know, 9/11 right now is again in negotiations. The Malaysia cases are dealing with interpreter issues.

MJ [COL ACOSTA]: I'm aware.

DDC [MS. MORGAN]: You know, so we are trying to -- to find a way. And ----

MJ [COL ACOSTA]: So the only place you want to -- here's the -- here's the issue, right? The only place that you say you want to meet [redacted]

[redacted]

DDC [MS. MORGAN]: Right. And want, Your Honor, is we need to have a productive relationship with our client. We need to be able to see him. We need to be able to prepare for this. A couple of places have been taken off the table. And Your Honor, I just want to give you a little more ----

MJ [COL ACOSTA]: But how many places are going to be taken? I mean eventually we're like I -- all right. [redacted] and I know that they didn't know that it was the black site at the time.

DDC [MS. MORGAN]: Your Honor, the government was well aware of

where they were putting that. And to give you a little background on that, [redacted] Captain Mizer met with the client in that building in 2018.

In order to use the restroom, [redacted]

MJ [COL ACOSTA]: That's what those other buildings are ----

DDC [MS. MORGAN]: Yeah.

MJ [COL ACOSTA]: ---- places where people were kept. Okay.

DDC [MS. MORGAN]: And -- and so we [redacted] because of the [redacted] issue. That wasn't the fault of the defense. They then put him where they knew was a black site. That wasn't the fault of the defense.

I don't have the institutional knowledge about AV-34, what happened. But right now we have a situation that does work [redacted] and it does seem like that's going to be, in commission time, short term, [redacted]

So in terms of we have an active military commission going on, right now this gives us a space to meet. And what has been productive in other commissions is issuing an order. And so what has been very effective in this commission is having you issue an order.

The let's meet an hour before and let's meet an hour after has gotten us to be able to see our client regularly.

MJ [COL ACOSTA]: Okay.

DDC [MS. MORGAN]: It -- it shouldn't be this hard. I think we've all learned that things are more challenging down here. But that's what we are coming down here and asking in 398.

The other thing that we have, because we do have this sort of historical issue with the integrity of the attorney-client meeting space, is we've asked in 398 to be able to do an inspection.

MJ [COL ACOSTA]: Of what?

DDC [MS. MORGAN]: That is briefed in our pleadings.

MJ [COL ACOSTA]: An inspection of -- of ----

DDC [MS. MORGAN]: Just the attorney-client meeting space. What I did hear from Colonel Rogers is that [redacted] is privileged, [redacted] That's what he testified to today.

MJ [COL ACOSTA]: And you've been meeting with him there regularly now, right?

DDC [MS. MORGAN]: We have. We do keep our conversations -- we are careful not to veer into privileged communications at this point because we have asked to do an inspection. So we are careful what we talk about in that space.

MJ [COL ACOSTA]: Okay.

DDC [MS. MORGAN]: Judge, we -- we have -- we've done this for a couple years. We have asked for an inspection. The government was amenable to allowing us to inspect our -- our prior meeting locations based on the concerns that had come up. They did appear to be amenable to an inspection based on some of their prior pleadings in the 398 series.

We think that, given the history in our meeting locations, and I think a sincere desire on all -- for all parties to sort of keep this commission moving in the right direction, it's a pretty modest accommodation. And so ----

MJ [COL ACOSTA]: All right.

DDC [MS. MORGAN]: ---- really that's what we're looking for here.

LDC [MR. NATALE]: Excuse me, Your Honor.

MJ [COL ACOSTA]: [redacted] and inspection of it, that's what you want? That's -- that's the relief you want?

DDC [MS. MORGAN]: Yes.

MJ [COL ACOSTA]: That until the -- the -- your request for relief is essentially only meeting [redacted] be able to inspect it [redacted]

DDC [MS. MORGAN]: [redacted]

MJ [COL ACOSTA]: All right. That's what you're asking for.

DDC [MS. MORGAN]: Yes.

MJ [COL ACOSTA]: Mr. Natale, I'll let you chime in.

LDC [MR. NATALE]: Your Honor, I guess in some ways I've become sort of a fact witness because I've been the only person since last December to be able to go with the interpreter in to see our client, right? I cannot have the meetings that I need to have with him in order to discuss information that is attorney-client privileged.

MJ [COL ACOSTA]: And why is that? What do you mean by that?

LDC [MR. NATALE]: Because we don't -- we haven't been allowed to have the inspection that we need. That's all we want. And, Judge, when we go down there, that we've been refused to -- or prevented from seeing him more than I've been able to see him.

All we're asking is, let's have a place where I can establish a real attorney-client relationship and not just have to talk about I hope you're doing well. Did you get the photographs of the -- the tomatoes that someone sent you and things like that.

This is easy to solve. This is real easy to solve.

MJ [COL ACOSTA]: Okay.

LDC [MR. NATALE]: We would have never been here ----

MJ [COL ACOSTA]: I got the -- I got the argument from her.

LDC [MR. NATALE]: Okay.

MJ [COL ACOSTA]: But I wanted -- I can't let everybody stand up

and argue the same motion.

LDC [MR. NATALE]: I'm not arguing, Judge. I'm the fact witness who's been down here and having to experience it.

MJ [COL ACOSTA]: I've got it. Thank you.

DDC [MS. MORGAN]: Judge, if I could just touch on the facts from the colonel about 359.

MJ [COL ACOSTA]: Okay.

DDC [MS. MORGAN]: Sorry. I do not mean to go back and forth with you. I just don't want to enter -- I just don't want to comment on an open session.

MJ [COL ACOSTA]: Uh-huh.

DDC [MS. MORGAN]: I will save the bulk of my argument, but I did want to -- the colonel had talked about the manning of the guard force. And so what I would just like to point out is typically, you know, we have the situation where we're being asked to do more with less. And so while I am certainly sympathetic to standing up and -- and sort of supervising this operation, I -- I imagine, is difficult on a number of levels.

However, I would point out that the guard force manning, in very real terms, is -- is better than it was when Colonel Gabavics was in command in 2016. [redacted]

MJ [COL ACOSTA]: I picked up on that. [redacted]

[redacted]

DDC [MS. MORGAN]: The HVDs is the same, correct. But when you're actually talking about -- so -- so if anything, at worst it stayed the same then, when you're looking at HVDs ----

MJ [COL ACOSTA]: Understood. I was just trying to -- everybody wants to make the argument that things are easier, things are not easier. I'm just trying to ----

DDC [MS. MORGAN]: But ----

MJ [COL ACOSTA]: ---- evenly apply some ----

DDC [MS. MORGAN]: ---- from that ----

MJ [COL ACOSTA]: ---- logic upon numbers to that.

DDC [MS. MORGAN]: I'm sorry, sir. I did not mean to talk over.

[redacted]

MJ [COL ACOSTA]: Yeah, right, and that's because [redacted]

DDC [MS. MORGAN]: Right. So I would just keep that in mind. And then I don't know the classification level or what I'm allowed to say or not say about the DODI, but ----

MJ [COL ACOSTA]: I don't think there's any -- about recreation? Is that what you're talking about?

DDC [MS. MORGAN]: I -- Your Honor, it has not been provided.

MJ [COL ACOSTA]: I don't think that there's a department -- I don't think that that is a classified Department of Defense instruction.

DDC [MS. MORGAN]: The SOPs have not been provided to me or the DODI, so I don't want to comment on it.

MJ [COL ACOSTA]: I'm pretty sure that a quick search of Department of Defense publications will reveal -- I don't think that that's going to be one that -- it could be, perhaps, because of how they administer a detention facility or -- or as we call them in my service, disciplinary barracks, that they might -- that there might be some FOUO something. You know, the CID reg is always the one that comes up in every case. It's super secret and I issue a protective order every time a -- a -- somebody wants to look at it. But I'm betting you'll find that one.

DDC [MS. MORGAN]: Okay. Then I think everything else ----

MJ [COL ACOSTA]: I'm betting I'll find that one when I'm researching it before I -- since nobody else brought it up except for the witness today, so.

DDC [MS. MORGAN]: Then I will -- I believe everything else I can talk about in open session.

MJ [COL ACOSTA]: Okay. Thank you.

Government?

MATC [MR. WELLS]: Your Honor.

MJ [COL ACOSTA]: Good evening.

MATC [MR. WELLS]: Good evening. From the prosecution standpoint on behalf of the government, we would argue that no court order is needed. We've been proceeding without a court order and it seems to be working well. But Mr. Natale indicates that the defense will not meet in this location, [redacted] and divulge confidential communications with the client.

There is a standard for defense counsel, and it's reasonable assurances and reasonable confidentiality. Not total absolute. So it seems that, from the government's standpoint, on behalf of the JTF and also DoD policy that handles detention operations, every attorney-client meeting place always has some type of defect or wrong. And I could go through the litany starting with Echo II, which was the former black site.

[redacted] That was the location of the attorney-client meeting area when the commission charges were instituted from 2009 until 2013, when it was disclosed to the defense and the prosecution that this was -- [redacted] was the facility in 2003/2004 in which Mr. Nashiri was detained here by the CIA.

But as information was developed, we know that, as it was

argued today, and information that Mr. Nashiri decompensated while he was here in 2003/2004, EITs had ended in January of 2003 and nothing was applied to him here.

So nevertheless, the decision was made in 2013 to allow the defense to move to the [redacted] And in the midst of that, in addition to being a black site, Echo II was also being investigated by the various defense teams, 9/11 and this commission, for the presence of listening devices and various auto -- audio monitoring. Also, this very courtroom. And that was the 149 series and the AE 133 series.

We move to the [redacted] And for whatever reason there the -- the defense got limited opportunity to view and inspect. It was not the type of inspection that was allowed, I believe, in 2017 by taking off plates and things like that. But the evidence that we -- 60 witnesses in September here of 2021, no audio monitoring occurred there by the guard force or anybody else, [redacted] Nevertheless, that was objectionable to the defense and they would not meet there. They would not exchange confidential information thereafter.

Then we also equipped the -- the command said, well, let's go back to Echo II and we will [redacted] If I can make a proffer

there. [redacted]

It is not configured like the detention cells in 2003/2004 that are in Echo II. It's a completely different environment there. [redacted] The defense objected to that too just because it exists in the footprint of Echo II, but never really articulated that there was a trigger event of his PTSD. And, in fact, I don't think there's really been any evidence that his meetings with the defense in the original huts in which he was detained in 2003/2004 actually triggers PTSD and interferes with their attorney-client meetings.

Nevertheless, the government made the decision to move them and allow them to do that. Frankly, we probably should have litigated it back then and made a definitive determination.

AV-34 ----

MJ [COL ACOSTA]: You should have litigated it then to get an order but now you don't need an order?

MATC [MR. WELLS]: We should have litigated it to see if there was a PTSD trigger, because that seems to be the impetus here. [redacted] It's pretty stern and stark up there. But it has a -- a toilet and a

nice meeting area. [redacted]

[redacted]

Nevertheless, that was found objectionable.

The command did conduct an inquiry, which we have not produced to the defense or provided to the commission here, about the alleged bad experience. And it was claimed that there was guard misconduct. That is not what the inquiry determined. It's something about Ms. -- Dr. Crosby wanting to take him [redacted] that were not on the authorized list, so she couldn't conduct her examination or establish the rapport.

You've heard testimony that the accused was agitated in that room and got upset and take the proffer of the defense counsel, that he thought he was being rendered and he ought to just go back to a black site.

Well, that location is now objectionable. What seems to work for the defense, which we thought they were holding confidential communications, [redacted] which was outfitted for Hadi al-Iraqi to accommodate his medical condition.

[redacted]

MJ [COL ACOSTA]: [redacted]

MATC [MR. WELLS]: [redacted] He can lay down. I don't

know ----

MJ [COL ACOSTA]: Wasn't it built -- let's just -- let me just ask that question. [redacted]

MATC [MR. WELLS]: I think it was to accommodate him if he needed to lie down [redacted] And I do believe ----

MJ [COL ACOSTA]: [redacted] Right. Okay.

MATC [MR. WELLS]: [redacted] I'm not sure that it specifically built for that purpose.

MJ [COL ACOSTA]: I don't know that he ever did. I'm not on that commission, obviously.

MATC [MR. WELLS]: Yes, sir.

MJ [COL ACOSTA]: But I don't think that he ever did.

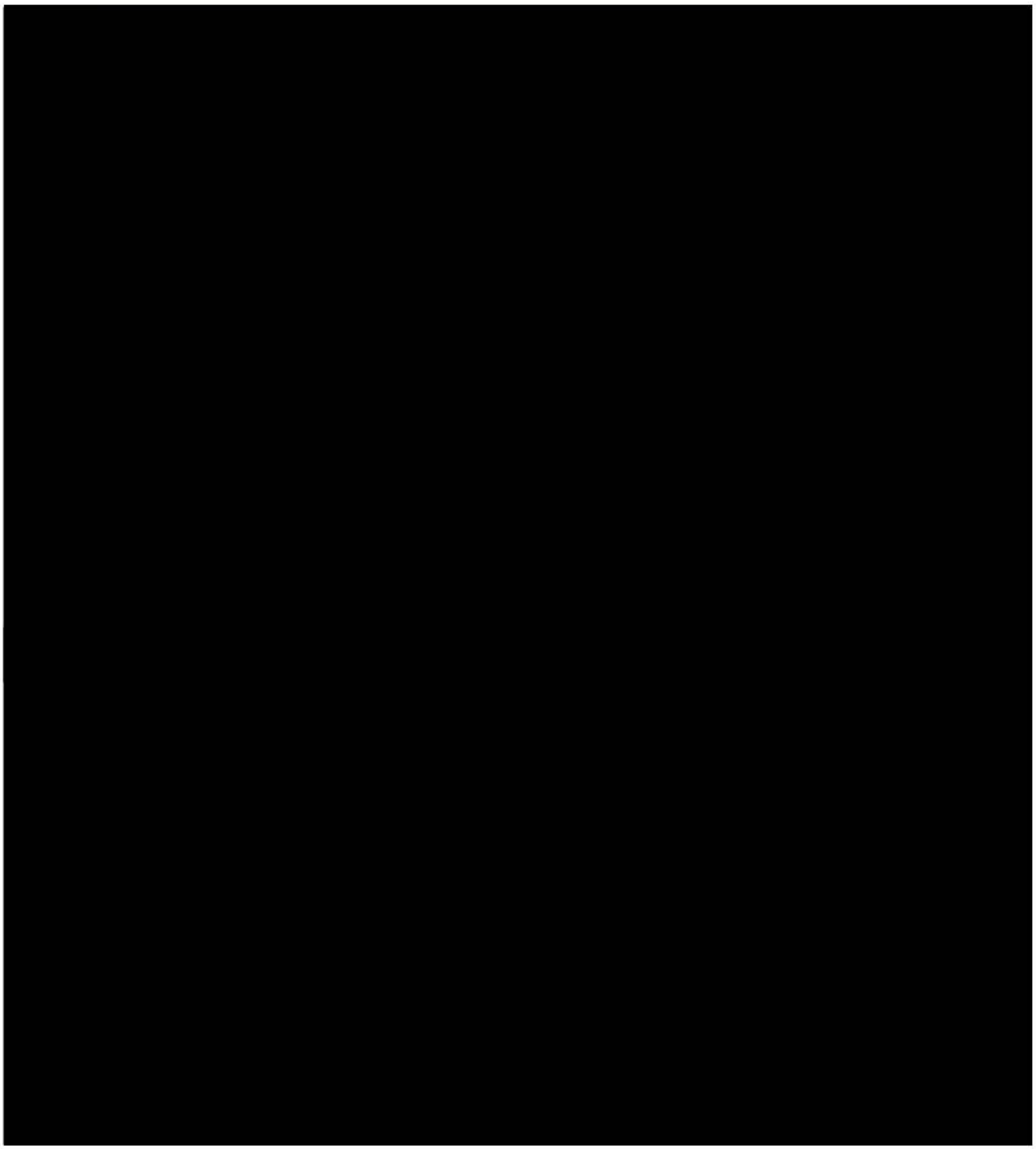
MATC [MR. WELLS]: [redacted]

But it isn't lost, at least on me, as a member of the prosecution, [redacted] there doesn't seem to be a real discussion if we really are harming the accused by having him transport out here to

have health and comfort meetings, it's also given him nausea and -- and tension.

So the testimony that we have today, though, is he has gone to Echo II [redacted] I believe.

[redacted]



MJ [COL ACOSTA]: Do we have something that says that?

MATC [MR. WELLS]: We have, yes, sir. And I ----

MJ [COL ACOSTA]: Have you provided it to the defense?

MATC [MR. WELLS]: We filed it with the commission on every attorney-client meeting space that I've just talked about, and I forget the exact AE number. It's not where we would think in 398 or 359 or someplace in there. I will get it to you.

MJ [COL ACOSTA]: Which isn't helpful for me, right?

MATC [MR. WELLS]: [redacted] However, there's good news. [redacted]

MJ [COL ACOSTA]: Starting with this.

MATC [MR. WELLS]: [redacted] And I don't know what the commission can do to satisfy the defense and give them reasonable assurances that their attorney-client meetings are not being monitored in any way for any confidential information. There has never been any violation or actual intrusion into their ----

MJ [COL ACOSTA]: Okay.

MATC [MR. WELLS]: ---- confidences.

MJ [COL ACOSTA]: All right. So what do you want the commission to do? You say not issue the order.

MATC [MR. WELLS]: No ruling. It's not ----

MJ [COL ACOSTA]: No ruling?

MATC [MR. WELLS]: ---- not needed.

MJ [COL ACOSTA]: Okay. Thank you.

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

DDC [MS. MORGAN]: I'm just a little confused. [redacted] So I guess that's sort of my first thing that doesn't make sense, which is why we want the inspection, [redacted] I don't want to be notified of something like that down the road. The defense just doesn't want any more smoke detectors [redacted] Like, we ----

MJ [COL ACOSTA]: I understand. I'm well aware.

DDC [MS. MORGAN]: Yep.

MJ [COL ACOSTA]: I'm well aware of your concerns.

DDC [MS. MORGAN]: So.

MJ [COL ACOSTA]: We've litigated your concerns. I have examined your concerns [redacted] a lot. I understand what your concern is, that you don't want to be heard having a discussion. You understand that video monitoring can occur for security, as is every single detention facility in the United States probably.

DDC [MS. MORGAN]: Right. And so that -- that's

really -- that -- I'm not going to -- I'm not going to belabor that point, Judge.

As far as the -- as far as the ELC -- or as far as the Echo II, Judge, I ----

MJ [COL ACOSTA]: He does meet there, right? He goes there [redacted] and we haven't had any issue. Has he reported any issues to you from that?

DDC [MS. MORGAN]: Judge, it is -- I am not aware of when the last time that has occurred and it is -- I know that in the course of his time at Guantanamo, he has. It is ----

MJ [COL ACOSTA]: Well, the witness reported it was 22 times in the last two years.

DDC [MS. MORGAN]: I don't think that that is -- to be completely candid with you, Judge, I don't think that's accurate.

MJ [COL ACOSTA]: Okay.

DDC [MS. MORGAN]: [redacted]

MJ [COL ACOSTA]: [redacted]

DDC [MS. MORGAN]: [redacted]

MJ [COL ACOSTA]: I understand.

DDC [MS. MORGAN]: Yeah. But, Judge ----

MJ [COL ACOSTA]: [redacted]

DDC [MS. MORGAN]: I believe the witness may have been mistaken ----

MJ [COL ACOSTA]: Okay.

DDC [MS. MORGAN]: ---- is the most charitable thing. I -- I am unaware of my client availing himself of the ICRC opportunities, certainly to that extent ----

MJ [COL ACOSTA]: Okay.

DDC [MS. MORGAN]: ---- if he has at all. And I'm not saying he hasn't at all but I -- I don't believe the witness was correct about that.

But even if he was, and so I'll make -- make an allowance for the witness being correct, is very different than talking about his case with his attorneys. It's just a different situation. It's one thing to call your -- call your family member and talk about the weather. It's another thing to try and meet with your attorneys and have a productive conversation about developing a legal strategy.

And so we're trying to form a rapport necessary to move forward in what is very much the most stressful situation of his life.

MJ [COL ACOSTA]: Understood.

DDC [MS. MORGAN]: So ----

MJ [COL ACOSTA]: And again, so you're asking -- what you're asking for is only meet [redacted]

DDC [MS. MORGAN]: Yeah.

MJ [COL ACOSTA]: [redacted]

DDC [MS. MORGAN]: Right. And, Judge, I would just point out the necessity for the order, and I think we've seen this. We needed an order for them to -- for -- for us to be able to meet with Mr. Al-Nashiri an hour before court, right? Like we saw that about and year and a half -- time is fake right now. Until you issued the we can meet for an hour before court and an hour after court, we ran into road blocks.

It -- things move much smoother around here when you issue orders and your orders are complied with. And so we are simply just asking for that so that we can get things done.

MJ [COL ACOSTA]: Understood.

DDC [MS. MORGAN]: And I have nothing further.

MJ [COL ACOSTA]: Thank you.

MATC [MR. WELLS]: Your Honor?

MJ [COL ACOSTA]: Yes.

MATC [MR. WELLS]: I'm sorry. If you issue an order [redacted]

what I'm hearing from the defense is they've been meeting back there but not conducting confidential communications with ----

MJ [COL ACOSTA]: Right, because they -- because they want the inspection. That's what they're saying. I'm not saying I'm issuing an order. I was asking her what the relief she requested is. It's a big deal that I generally start of all my stuff with tell me exactly what you want so that I know, A, because sometimes people ask me for things that I can't do, right? Citing what? It was a great lesson I learned a long time ago when I would ask for something from the judge he would be like, citing what?

MATC [MR. WELLS]: Your Honor ----

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

MATC [MR. WELLS]: ---- why did we have an order from the bench an hour before our meetings that you -- they wanted to have a meeting with the client [redacted] or in here if they aren't exchanging confidential information? Why did they request from you also an order after the session to have an hour to tarry over with the accused either here or in there to have a meeting if it wasn't for the purpose of confidential communications? They are choosing not to have confidential communications despite your order.

This is the problem with every meeting location that we go to. The defense is frustrating both the JTF and this commission and the commission's orders.

That's all I have, sir.

MJ [COL ACOSTA]: I understand your argument.

MATC [MR. WELLS]: Thank you.

MJ [COL ACOSTA]: Thank you. All right. Anything else from the government today?

TC [MR. MILLER]: Nothing else. Thank you very much, Your Honor.

MJ [COL ACOSTA]: Anything else from the defense? I think I've wrapped up all the closed sessions that I need to have for this week and potentially for ----

LDC [MR. NATALE]: Nothing further from the defense.

MJ [COL ACOSTA]: Okay. I will take -- we'll finish up with the open session -- we'll start with open session argument, and you can remind me if I tell you to call your first witness on Monday instead of doing this. But what I'd like is remind me that we're going to do the first session -- we're going to -- we're going to finish up open session argument on 359 0900 Monday. I'll write a note in a minute. And then we'll go from there, we'll -- we'll proceed in what we've got scheduled for the week next week. We stayed generally on track here and I appreciate everybody's diligence staying and working through this. All right.

If there's nothing else, this closed session is in recess. We will reconvene at 0090 open session on Monday.

[The R.M.C. 806 session recessed at 1729, 29 April 2022.]

[END OF PAGE]